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THE
FIRST PART
OF THE
INSTITUTES
OF THE
LAWS OF ENGLAND.

OR, A
COMMENTARY upon LITTLETON.

Not the NAME of the AUTHOR only, but of the LAW itself.

Quid te vana juvant miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure meum est.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus.

MART.
CICERO.

Hæc ego grandævus posui tibi, candide lector,
Authore EDUARDO COKE, MILITE.

THE THIRTEENTH EDITION,
REVISED AND CORRECTED.

WITH THE ADDITION OF
NOTES and REFERENCES,

FROM THE BEGINNING TO FOLIO 195 INCLUSIVE,

By FRANCIS HARGRAVE, Esq. of Lincoln's-Inn.

AND FROM FOLIO 196 TO THE END,

With the PREFACE and INDEX to the NOTES,

By CHARLES BUTLER, Esq. of Lincoln's-Inn.

AND

An ANALYSIS of LITTLETON,

Written by an Unknown Hand in 1658-9, but never before published.

L O N D O N:

PRINTED BY T. WRIGHT,

For E. BROOKE, (Successor to Messrs. Worrall and Tovey), BELL-YARD, near TEMPLE-BAR.

M,DCC,LXXXVIII.



TO THE RIGHT HONOURABLE
EDWARD, LORD THURLOW,
BARON THURLOW OF ASHFIELD,
IN THE COUNTY OF SUFFOLK,
LORD HIGH CHANCELLOR
OF
GREAT - BRITAIN,
THIS WORK
IS,
WITH HIS LORDSHIP'S PERMISSION,
RESPECTFULLY DEDICATED.



THE EDITOR'S ADDRESS to the PUBLIC.

THE very high and advanced price at which the *twelfth* edition of *Sir Edward Coke's First Institute, or Commentary upon Littleton*, has been sold for a long time past, is a proof, that a *new* edition is now wanted in order to supply the public demand. This of itself may be thought a sufficient reason for offering a *new* edition; but another, and more cogent motive concurs in inducing to such a proposal; for notwithstanding the advantages which may have been given to the *tenth*, *eleventh*, and *twelfth* editions, there still remains an ample field for further improvements. It is not intended, by this observation, in the least to derogate from the merit of those three editions; of which the *tenth* and *eleventh* are particularly thought by some to deserve commendation, as well on account of the care and industry exerted in correcting the errors of former impressions, as on account of the knowledge and judgement shewn in the additional notes and references. But a work like *Sir Edward Coke's Commentary*, so crowded with references to other books and authorities, will ever leave room for corrections; and being written on a subject so dependant, as the law necessarily is, on the opinions of the time *present*, and so frequently undergoing changes by acts of the legislature, will continually call for additions. These considerations may suffice to evince the propriety of attempting a *new* edition; but something further is requisite to recommend *that* now offered to the public; and therefore the editor will explain the plan, on which he proposes to conduct it.

Littleton's Tenures and *Sir Edward Coke's Commentary* will be printed from the *second* edition, that being generally esteemed the most correct one of the *Commentary*; but it will be occasionally compared with the *first* and *other* editions; all of which have been procured for that purpose. Also the text of *Littleton* will be collated with the *Roban* edition, which was that preferred by *Sir Edward Coke*, and a still *earlier* one by *Letton* and *Mechlinia*, which was printed in the life-time of *Littleton*, or within a year after his death, and has *never yet* been made use of in any edition of the *Commentary*. For the use of these two most curious and scarce editions of *Littleton*, the editor is indebted to the kindness of one, whose name he should think it an honour to be at liberty to mention. The editor is also provided with the curious editions of *Littleton* by *Pynson* and *Redman*, which are the next in date to the *Roban* edition. He is possessed too of an edition in 1534 by *Rastell*, and of most of the *other* editions of *Littleton*, which are very numerous; but these latter, not being of so great authority, will seldom be consulted. It is proper to add, that the editor proposes to give the various readings of *four* or *five* of the earliest editions of *Littleton*, which has never been attempted before. But no various readings will be given, except where they appear to the editor *substantially* to affect the sense of the author*; and therefore the reader will not find *any* in the *first* section; the difference of the several editions, so far as regards that section, being apparently quite *immaterial*. As to *references*, those in the *first*, *second*, and *other* editions of *Sir Edward Coke's Commentary* before the *tenth*, having been made by *Sir Edward Coke* himself, will be *wholly* retained, with such corrections only of apparent mistakes as shall occur to the editor. Many of the additional references in the *tenth*, *eleventh*, and *twelfth* editions will also be retained; it being intended only to omit such as the editor shall discover to be plainly foreign to the purpose. The editor is aware, that even some of *Sir Edward Coke's* own references have been complained of as not pertinent; which, when the prodigious number of them, and the great variety of public and private affairs which commanded his attention through life, are considered, may be accounted for, without any great reflection on his care and accuracy. But the editor would deem it a presumption in him to *omit any part* of the *original work*; though, in respect to the references, such a liberty is in very numerous instances taken in the *twelfth* edition†; and besides, he would by no means be understood to engage for an examination of *every* reference with the book cited, which is a task far greater than his other avocations will allow him to engage in‡. Further, it is proposed by the editor, to give some additional references, particularly to the Reports published since the *twelfth* edition; and some notes; but he avoids promising a *great* number of either, lest he should undertake more than he may hereafter be able to accomplish. However, in order to make amends for the smallness of the number of new notes and references||, great care shall be taken in the choice of them; and they

* This may seem not quite consistent with *sometimes* giving the word *Nota* as a various reading; but the reason of it is, that *Littleton* is thought by *Sir Edward Coke* to use the word *Nota* in a sense peculiarly significant. See Co. Litt. 22. a.—The various readings of *Littleton*, taken from the edition by *Letton* and *Mechlinia*, will be distinguished by *L.* and *M.* those from the *Roban* edition by *Rob.* those from *Pynson's* edition by *P.* and those from *Redman's* edition by *Red.* and if a reading should be taken from any *other* edition, it will be particularly mentioned. In *Redman's* edition there are references to cases in some of the more ancient Year Books, which it was once intended to have given as part of the various readings from *Redman*; but on re-consideration, they do not appear of sufficient consequence to be taken notice of.

† The editor has not yet found such a liberty taken in any edition, except the *twelfth*; but in *that* the omission of lord *Coke's* references is very frequent indeed, and he doubts whether many pages can be found without instances of it. In several pages he finds *twenty* or *thirty* references omitted, and in some *forty* or *fifty*. The truth of this will appear by examining fol. 4. b. and 5. a. of the *twelfth* edition with the same folios in any preceding one. The editor would not be so *early* in making this observation, if it was not with a view to shew, how unaccountable it is, that notwithstanding this suppression of a great part of the authorities, on which Lord *Coke* founds his opinions, the *twelfth* edition should sell for *six pounds*, whilst the price of some of the more early editions, though they contain the *whole* of the original work, and therefore are infinitely more valuable, is scarce as many *shillings*.

‡ It is necessary to mention this, lest the continuation of those mistaken references by lord *Coke*, which are to be found in all the former editions, should be imputed to the inattention of the editor of the present edition, and as a negligence not consistent with his engagements to the public. The editor may add, that many of the mistakes are of such a kind, that to correct them, and to refer to the books or authorities intended, would exceed his utmost diligence and power.

|| At first the editor doubted, whether it would be in his power to give the time necessary for writing *many* notes and references; but this first number of the work, he hopes, will convince his readers, how anxious he is to furnish a great number; and he will exert himself to the utmost in order to continue the work on the same enlarged plan. Having engaged in the undertaking, he is resolved at all events to make great sacrifices, rather than suffer it to languish in his hands.

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shall be so expressed, as clearly to shew whether they tend to confirm, to question, to contradict, or to illustrate the doctrine advanced in the text; a distinction very requisite for the convenience and information of the reader, though in new editions of law-books too frequently neglected. In the *eleventh* and *twelfth* editions, the *new* references are not distinguished from Sir Edward Coke's; but in this present edition it is thought proper to acquaint the reader, which belong to him, and which to his respective editors; and for that purpose, the additional references taken from the *tenth*, *eleventh*, and *twelfth*, editions will be inclosed between *parentheses*; and those, with the notes by the editor of this edition, with the various readings of Littleton, will be referred to by figures, and placed at the bottom of the page. Such a discrimination is a justice due to those from whom the references proceed, particularly to Sir Edward Coke; and, at the same time, must be a satisfaction to the reader.—The *eleventh* and *twelfth* editions contain some notes and additions, shewing the alterations in the laws since the time of Sir Edward Coke, which were printed separately at the end of the work. This has been found inconvenient; and therefore, in the present edition, they will be placed in the margin of the book where they respectively apply; except such of them as the editor shall find improper to be retained, or such as shall consist of extracts from acts of parliament, which, being too long for marginal insertion, will be omitted; and it is hoped, that the omission of those extracts will not be disapproved of, as a short reference to the statutes themselves, with an intimation that they have altered the law, will be substituted, which will equally answer the purpose of apprizing the reader*.—In all the former editions, the French text of Littleton's Tenures, and the whole of Sir Edward Coke's Commentary, were printed in the *black* letter; but in this edition only *Roman* and *Italic* letters will be used, which, it is presumed, will be both an agreeable and useful alteration in the printing; the *black* letter being generally deemed less pleasing, and more fatiguing to the sight, than either of the others.—In respect to the *Index* to the First Institute, it is at present intended, that it shall be the same as in the *eleventh* and *twelfth* editions; the editor thinking that having already undertaken so much, it would be imprudent to pledge himself still further, by entering into any engagement for making additions to the *Index*.

To the *ninth* and *subsequent* editions were added Sir Edward Coke's *Readings* on the *Statute of Fines*, and on *Bail* and *Mainprize*; to the *tenth*, *eleventh*, and *twelfth* was added his *Copyholder*; and to the two latter the *Treatise* of the *Old Tenures* was also added. All these tracts will be given in the present edition; but with this difference, that the *Reading* on the *Statute of Fines*, will be in *English*, and the *Treatise* of *Old Tenures*, instead of being in French only, will be accompanied with the *Old English* translation, as printed at the end of the *first* edition of the *Terms of the Law*. The *original French* of the *Old Tenures* is continued on account of the great antiquity of the book; but in the printing, the *black* letter will not be used.

Besides Sir Edward Coke's *Tracts* and the *Old Tenures*, the present edition will have an *Analysis* of Littleton, from a manuscript, dated 1658-9, which has never yet been printed. This *Analysis* is a methodical summary of Littleton, containing, not only a *general* view of the *whole* work, but also a *particular* one of *each* chapter. It accidentally fell into the hands of the editor. He is not informed who was the author; but it appears to him to be judiciously and ingeniously executed, and worthy of publication; and he hopes that it will not be deemed an improper addition, more especially as it will neither occasion the suppression of any other matter, or increase the price of the work to the purchasers.

To the whole will be prefixed a new *Preface*, by the editor of the present edition. In this *Preface*, he proposes, in the *first* place, to consider the merit of Littleton's Tenures and Sir Edward Coke's Commentary, and to point out the excellencies of each; in the *next* place, to give a *particular* account of the several editions of both; and *lastly*, to explain how this will differ from the former editions.

Such is the edition of Sir Edward Coke's First Institute, now submitted as a candidate for the public favour and encouragement; nor shall any exertion within the power of the editor be wanting to deserve them. He foresees that *great pains* and *labour* will be necessary to the effecting a due performance of his engagements, and that *little fame* can be expected from the most successful execution of an undertaking so humble as scarce to exceed that of a *mere* editor. But still he looks forward with pleasure. His veneration for the names of Littleton and Coke; his admiration of their writings; his persuasion that an attentive contemplation of them, by the improvement it must produce, will be its own reward; and his zeal to be instrumental in exhibiting them to the public eye, pure, genuine, and undisguised, and with as many advantages as a faithful and industrious editor can bestow: these were the considerations which chiefly prompted him to commence the undertaking; and these, he trusts, will continue to animate him till it is completed. If by perseverance and an unremitting ardor, the editor should succeed in his endeavours, he will then have the pleasing satisfaction of reflecting, that his labours have been useful, instructive, and agreeable to himself, and, at the same time, not wholly unprofitable or unacceptable to the community †.

FRA. HARGRAVE.

* The notes added in the 11th and 12th editions, exclusive of extracts from acts of parliament, are so few, that all put together scarce amount to so much as the additional matter given by the editor of the present edition in his first number; and he is now doubtful, whether he shall retain any of them in their original form. However, if he should, they shall be distinguished in the manner above mentioned.

† From some late circumstances there is reason to apprehend, that the editor's situation in respect to the work he has undertaken is greatly misunderstood. The entire conduct of the edition is intrusted to him; but he is not the proprietor of it; nor is he personally interested in the *loss* or *profits* which may attend the publication. His engagements to the proprietors of the edition are of a very limited kind. Those he has entered into with the public are very extensive. For the former engagements, a benefit, which was offered without any application on his part, is secured to him, independently of the event of the publication; but he can truly say, that it was the *least* of the considerations which induced him to undertake the work, and that he would still cheerfully renounce it, if by so doing he could render the work more valuable to the public. For his latter engagements he desires no other reward, than the approbation of those, for whose benefit his labours are intended.—The editor finds, that several respectable persons have expressed surprize at publishing the work by Numbers. This mode of publication, though in itself not liable to any great exception, has, by the abuse of it, become rather disreputable in the appearance; and therefore when it was first proposed to the Editor by the Proprietors of the Edition, he objected to it. But on considering the great and immediate expences incident to their undertaking, and the other reasons urged by them, they were found too cogent to be resisted; and the editor was the more easily induced to acquiesce, because he found the proprietors most ready to put themselves to every expence, which he recommended, for the purpose of rendering the work more acceptable to the public.

A D D R E S S

F R O M

MR. H A R G R A V E,

ANNOUNCING HIS RELINQUISHMENT OF THIS WORK, &c.

MR. HARGRAVE, the editor of so much of the NEW EDITION of COKE UPON LITTLETON as has been published, at length finds his relinquishment of the undertaking in an unfinished state quite unavoidable. Numerous and severe are the sacrifices, which he has heretofore made in order to accomplish the original proposals in their fullest extent. To this moment he feels the effect of those sacrifices; nor is he likely ever to conquer wholly the disadvantage already incurred from them. But it might be improper and disgusting to enter into particulars upon this head, which in its nature is too personal to the editor to be interesting to others. He will therefore be content with generally declaring, that his situation is become such, as to render him unequal to any longer sustaining the weight of those labors, which he has ever found incident to the work upon the extended plan of annotation adopted by him from the commencement of the edition, though certainly not belonging to it from the very limited professions and terms originally held out to the Public. It is from personal considerations, and in his own defence, that he thus adverts to having passed the bounds of the first undertaking in the actual execution: because, as he feels himself open to censure, from those indisposed to yield to indulgent construction, for having done LESS than he promised, he too plainly sees the necessity of striving to soften such censure by the recollection of his having also done MORE. In truth, had he not rashly exceeded the limits first prescribed, by wandering into the wide field of annotation, it is most probable, that the WHOLE of the edition would have been finished long ago, and consequently that the editor would not now have to mortify himself by apologizing for executing only ONE HALF of it*. This to be sure is the most favourable point of view for the editor; its tendency being to shew, that his excess of zeal to render the edition VALUABLE has been one cause of his finally leaving it IMPERFECT. If it shall be thought proper by others kindly to receive the editor's apology in this form, it will qualify his unhappiness at the painful and trying moment of separation from a very favorite work before its advancement into maturity. Should a less indulgent construction be applied to the editor, it will deeply wound feelings already enough exercised; but from a consciousness of being open to some degree of exception for what rigid observers may stile an indefeasible abandonment of a work so long promised to be completed, he must in that case kiss the rod, and submit himself to the severity of animadversion with a patient humility.

It is no small consolation to Mr. Hargrave to accompany this recital of his failure in the edition, with information of its having fallen into the hands of a professional gentleman † of such a description, as to warrant expecting from him a quick and able execution of the remainder of the undertaking. As Mr. Hargrave understands, his successor is prompted to engage in the work by an extreme partiality for it, and from having been in the habit of studying and annotating on the COKE UPON LITTLETON. He also possesses the important advantage of having long practised in the conveyancing line; to which, as Mr. Hargrave can speak from his own experience as a barrister in that branch of the law, a familiarity with the law of real property, and consequently with the writings of LITTLETON and COKE, is peculiarly essential. These and other considerations claim from Mr. Hargrave much beyond a hope, that the depending edition of COKE UPON LITTLETON will gain considerably by change of the editor; and that the new adventurer in this arduous undertaking will stamp the remainder of the edition with much greater value than could be reached by any efforts however vigorous from the original editor,

F R A. H A R G R A V E.

Boswell-Court, 18 Jan. 1785.

* The COKE upon LITTLETON, exclusive of the Preface and Index, consists of 393 folios or 786 pages. Mr. HARGRAVE has proceeded in the new edition and actually published to the end of folio 190 or page 380, which is exactly 13 folios short of one half of the work.

† CHARLES BUTLER, of Lincoln's-Inn, Esquire.

IN the original proposals for printing this work, it was mentioned to be then intended to include in it Lord COKE's Compleat Copyholder, and the other Tracts which had been printed with some of the latter editions of the COKE UPON LITTLETON: It has, however, on further consideration been thought adviseable to omit them, as having no immediate connection with this work; as also to avoid an unnecessary addition to the bulk and expence of the present volume. The insertion of them in this place, was apprehended to be the less necessary, a separate collection of them being already published in an octavo volume.

P R E F A C E

T O T H E

P R E S E N T E D I T I O N.

THE reputation of LITTLETON'S TREATISE on TENURES is too well established, to require any mention of the praises which the most respectable writers of our country have bestowed on it. No work on our laws has been more warmly or generally applauded by them. But some foreign writers have spoken of it in very different terms. At the head of these is Hottoman, who, in his Treatise "De Verbis feudalibus," thus expresses himself: "Stephanus Pasquierius excellenti vir ingenio, et inter Parisienses causidicos dicendi facultate præstans, libellum mihi Anglicanum Littletonium dedit, quo Feudorum Anglicorum Jura exponuntur, ita inconditè, absurdè, et inconcinne scriptum, ut facilè appareat, verissimum esse, quod Polydorus Virgilius, in Anglicâ Historiâ, de Jure Anglicano testatus est, stultitiam in eo libro, cum malitiâ, et calumniandi studio, certare." This passage from Hottoman is cited without any disapprobation in the 6th edition of Struvius's Bibliotheca Juris Selecta; but in the 8th edition of that work (Jenæ 1756) it is qualified by the words "singularia sed parum apta sunt, quæ Franciscus Hottomanus profert, &c." Gatzert, in his "Commentatio Juris exotici Historico-Literaria de Jure communi Angliæ," (Gottingen 1765) gives the following account of Littleton and his works: "Æqualis huic, tempore, æt doctrinâ, famâ et meritis longe superior fuit, immortalitatem nominis apud posteros, si quis unquam merito consecutus, Thomas Littleton; a quo juris studium inchoant hodie Angli, plane ut suum olim, ab edicto Prætoris et XII Tabulis, Romani. Hic igitur Ictus, ab solutis disciplinis academicis, jura patria mox cum plausu in Interiори Templo Londinensi, quæ paulo ante ibidem didicerat, aliquantum temporis professus, ab Henrico VI. ad officium primo judicandi in curia Palatii vocatus est. Advocati deinde ac procuratoris regii (king's serjeant) muneri a° 1455 admotus, judexque porro ambulatorius factus provincialis, (justice of assizes) et tandem inter judicantes communium placitorum curiæ a° 1466 ab Edoardo IV. relatus, dignus habitus est, qui multum ampliori, quam solebat, stipendio ordinisque adeo Balnei honoribus a° 1475 donaretur. Vivere desit a° 1533 *.—Unicum librum scripsit, sed qui plurimum loco est, si spectas eruditionem et argumentum. In eo excussit doctrinam juris patrii difficillimam, gravissimam, usuque quotidiano maxime commendabilem; qualia nempe, et quotuplicia sint feuda Angliæ, quænam eorum jura, obligationes, præstationes atque servitia. In usus quidem Richardi filii, et aliorum quorundam ad explicanda illis capita aliquot opusculi DE TENURIS ab incerto auctore Edoardi III. ævo conscripti. Gallice primo fuit compositus, mox Gallice deinde sapius et Anglice, mox vero Gallice et Latine, typis excusus. Viginti quinque servitiorum feudalium genera statuit, quæ tribus libris, in quos omne opus dispergitur, persecutus est. Titulum hunc esse voluit OF TENURES. In anno editionis originariæ a Cokio qui a° 1533 ponit dissentiunt, eamque circa a° 1477 non diu post inventam typographiæ artem prodiisse, valde vero similiter statuunt Biographi Brit. vol. V. qui cum Nicolsono, p. 233. late etiam de argumento imprimis, et divisione libri agunt. Editio duodecima 1738 lucem vidit. Cokius in præfatione sui ad Littletonum Commentarii, de quo mox disseram, inter plura quæ auctorem concernunt ejusque opus, XV. Ictos nominis magni alios appellat, qui eodem tempore floruerunt. Exhibet præterea imaginem Littletonianam. Cæterum liber ob methodi brevitatem, argumentandi subtilitatem, atque dictorum ordinem, laudem omnino meretur; sed nec minus fatendum est, adeo sæpissime obscuritati bonum hominem studuisse, ut ænigmata legum maluisse, quam præcepta, tradere videatur. Multa jam immutata esse, plura inveterata atque obsoleta, non urgeo. Interim communis Ictorum Anglorum hæc vox est perfectissimum et absolutissimum hoc opus esse ex omnibus quæ unquam in ulla scientia humana scripta sint quæ unquam proferre potuerit hominis ingenium; non intelligere qui culpent. Ita parum abest, quin credant, falli eum fuisse nescium!"

General observations
on Littleton's
Tenures.

The English reader will probably be surprised at these accounts of Littleton. Hottoman has the reputation of great learning, and elegant writing; but he has been blamed very generally for the contemptuous language with which he speaks, even of the writers of his own civil law.

* This is a strange mistake, as Littleton died in 1482.

PREFACE TO THE PRESENT EDITION.

Gravina, while he mentions his endowments, both natural and acquired, with admiration; censures his abuse of other judicial writers with great severity. Speaking of him, he says, "Non modo in Accursianis et Bartolinis interpretibus reprehendendis, sed in ipso Triboniano perpetuo exagitando, collectam totâ vitâ opinionem verecundiæ atque modellæ, prorsus amisit." Grav. lib. 1. § 179.

Cujas also was supposed to allude to him in a passage of his works, where having occasion to mention the writers who find fault with the disposition and arrangement of the civil law, he says, "Quam illi sunt imperitissimi! nam neque quid ars sit sciunt; neque artem digestorum aut principia certa juris ulla perceperunt unquam; suaves tamen ad rideandi materiam."

But Hottoman's general disposition to abuse, is not the only circumstance by which his virulent censure of Littleton may be accounted for. Full of the doctrines of the feudal laws of his own country, he might expect to find doctrines of a similar nature in Littleton, without adverting that the greatest part of Littleton's work treats of the subordinate and practical part of the laws of England, which, like that of every other country, is in a great degree peculiar to itself, and bears but a remote analogy to those of other countries. It is allowed, that the feudal polity of the different countries of Europe, is derived from the same origin; that there is a marked similitude in their principal institutions; and a singular uniformity in the history of their rise, perfection, decline, and fall. But the more we go from a general view of their constitutions and governments, to their particular laws and customs, the less this similitude and uniformity are discoverable.

Thus the history of every country, where the feudal laws have prevailed, while it presents us, on the one hand, with an account of the many restraints imposed by them upon alienation, and of the many methods which have been taken to make property unalienable, presents us, on the other, with an account of the different arts which have been used to elude these restraints, and to make property free. This is as observable in the law of England, as it is in the law of any other country.

But the mode by which it has been effected in England, is peculiar to England. In other countries, where a liberty of alienation has been introduced, it has rested on a kind of compromise with the lord, by paying him a certain fine; and a kind of compromise with the relations of the feudatory, by allowing them a right of redemption, commonly called the "jus retractus." But the steps by which a free alienation of property has obtained ground in England are very different. In England an unlimited freedom of aliening socage and military land was soon allowed; the practice of sub-infeudation was soon abolished; the alienation of lands was restrained by the introduction of conditional fees, and afterwards by the introduction of estates tail; entails from their first establishment were greatly discountenanced by the courts of justice, and they were eluded by the doctrines of discontinuance and warranty. In the course of time, a fine was made a bar to the claims of the issue in tail, and a common recovery to the claims both of the issue and of those in remainder and reversion. Most of these circumstances are peculiar to the History of England: hence an English reader, who opens the writings of the foreign feudists, with an expectation of finding there something applicable to the practical parts of the law of his own country, respecting the alienation of landed property, will be greatly disappointed. He will find the most positive prohibition of aliening the fee without the consent of the lord: he will find very nice and subtle disquisitions of what amounts to an alienation: he will find that, in some countries, the lord's consent still continues a favour, that in others it is a right, which the tenant may claim on rendering a certain fine. In short, he will find the works of foreign feudists filled with accounts of the "jus retractus," or "droit de rachat," the "retraite lignager," and the "droit des lods et des ventes;" but he will hardly find the words, or any thing equivalent to the words, conditional fee, estate tail, discontinuance, warranty, fine, or recovery, in the sense in which we use them.

The same may be observed on the doctrine of conditions. According to the strict principles of the feudal law, no conditions could be annexed to a fief, except the implied conditions to which every fief was subject, from the obligation of service on the part of the tenant, and the obligation of protection on the part of the lord. Every fief to which any express or conventional condition was annexed, was, from that very circumstance, ranked among improper fiefs. But fiefs in England were at all times susceptible of every kind of condition.

It would be easy to pursue these observations through the subsequent chapters of Littleton's Treatise. Even if we consider the subject on a more extensive scale, we shall find some circumstances peculiar to the English law, which must necessarily occasion a very essential and marked difference between the constitution and forms of the government of England and the constitution and forms of the government of other countries. Such are the universal conversion of allodial lands into fiefs; the total abolition of sub-infeudation; the freedom of alienation of estates in fee-simple; and the limited and dependant situation of our nobility when contrasted with the situation of the high nobility of foreign countries: all these are peculiar in a great measure to our laws. It follows, that our writers must be silent on many of the topics which fill the immense volumes of foreign feudists: and they, from the same circumstance, must be equally silent on many of the subjects which are discussed by our writers. That this is so, will appear to every person conversant with the ancient writers on our laws, who will give a cursory look at the writers on the feudal laws of other countries. Nothing in this respect can be more

* The title of this work is, "Oceanus Juris, five Tractatus Tractatum Juris universi, duce et auspice Gregorio 13. in unum congesti, a Fr. Ziletti." There are two editions of this work, both printed at Venice; the first in 1548, the second in 1584. The first edition is in 16 tomes, generally bound in 12 volumes; the second is in 15 tomes, generally bound in 29 volumes. The arrangement of this work is greatly admired; but it is not a work in great request, even in those countries which are governed by the civil law.

PREFACE TO THE PRESENT EDITION.

different than those parts of the writings of Bracton, Britton, Fleta, Littleton, sir Edward Coke, and sir William Blackstone, which treat of landed property, and the books of the fiefs, Cujas's Commentary upon them, the various treatises on feudal matters collected in the 10th and 11th volumes of the "*Tractatus Tractatum* *," Du Moulin's *Commentarii in priores tres Titulos Consuetudinis Parisiensis* †, or the more modern treatises of Monsieur Germain Antoine Guyot ‡, and Monsieur Hervé §.

These observations are offered with a view to account for the contemptuous manner in which the two foreign writers, cited above, speak of Littleton. They may also account, in some measure, for a circumstance which has been a matter of some surprize, the total silence of sir Edward Coke on the general doctrine of fiefs. It is obvious, how extremely desirous his lordship is upon every occasion to give the reasons of the doctrines laid down by him; and what forced, and sometimes even puerile reasons, he assigns for them: yet though so much of our law is supposed to depend upon feudal principles, he never once mentions the feudal law.

"I do marvel many times, says sir Henry Spelman, that my lord Coke, adorning our law with so many flowers of antiquity and foreign learning, hath not (as I suppose) turned aside into this field, i. e. feudal learning, from whence so many roots of our law have, of old, been taken and transplanted. I wish some worthy would read them diligently, and shew the several heads from whence those of ours are taken. They beyond the seas are not only diligent, but very curious in this kind; but we are all for profit and '*luerando pane*,' taking what we find at market, without enquiring whence it came." But this complaint is open to observation.

There is no doubt but our laws respecting landed property are susceptible of great illustration from a recurrence to the general history and principles of the feudal law. This is evident from the writings of lord chief baron Gilbert, particularly his treatise of Tenures, in which he has very successfully explained, by feudal principles, several of the leading points of the doctrines laid down in the works of Littleton and sir Edward Coke, and shewn the real grounds of several of their distinctions, which otherwise appear to be merely arbitrary. By this he has reduced them to a degree of system, of which till then they did not appear susceptible. His treatise, therefore, cannot be too much recommended to every person who wishes to make himself a complete master of the extensive and various learning contained in the works of those writers. The same may be said of the writings of sir William Blackstone. Much useful information may be derived also from other writers on these subjects.

But the reader, whose aim is to qualify himself for the practice of his profession, cannot be advised to extend his researches upon those subjects very far. The points of feudal learning, which serve to explain or illustrate the jurisprudence of England, are few in number, and may be found in the authors we have mentioned.

It is not impossible but further enquiries might lead to other interesting discoveries. But the knowledge absolutely necessary for every person to possess who is to practise the law with credit to himself and advantage to his clients, is of so very abstruse a nature, and comprehends such a variety of different matters, that the utmost time, which the compass of a life allows for the study, is not more than sufficient for the acquisition of that branch of knowledge only; still less will it allow him to enter upon the immense field of foreign feudality. It were greatly to be wished that some gentleman, possessed of sufficient time, talents, and assiduity, would dedicate them to this study. Those who have read the late doctor GILBERT STEWART's "*View of Society in Europe, in its Progress from Rudeness to Refinement*," will lament that he did not pursue his enquiries on this subject. From such a writer, a work on this subject might be expected, at once entertaining, interesting, and instructive; but such a work is not to be expected from a practising lawyer. Whatever may be the energies of his mind, his industry, his application and activity, he will soon feel, that to gain an accurate and extensive knowledge of the law, as it is practised in our courts of justice, requires them all. Thus, on the one hand, the student will find an advantage in some degree of research into feudal learning; on the other, he will feel it necessary to bound his researches, and to leave, before he has made any great progress in them, the Book of Fiefs, and its commentators, for Littleton's Tenures and sir Edward Coke's Commentary.

If it were proper to enter into a further defence of Littleton, it might be done, by observing, that it must be a matter of great doubt, whether Hottoman ever saw, or Gatzert more than saw, the work they so severely censure. Hottoman, if he had read it, *might* think it inelegant and absurd; but he *could not* think it malicious, or indicative of a disposition to slander. Gatzert says Littleton specifies twenty-five kinds of feudal services. It is probable, that by services he meant tenures: if he did, it is obvious that he confounded those chapters of Littleton which

* This is usually the first treatise printed in the general collection of his works. An abridgement of it was published in 1773 by Mr. Henrion de Pansey, under the title of "*Traité des Fiefs de Du Moulin, Analyté et Conferé avec les autres Feudistes*."

† The title of his work is, "*Traité des Matieres Feodales, tant pour le Pays Coutumier que pour celuy du Droit écrit, avec des Observations*. Par Germain Antoine Guyot. Paris, 1738, and Ann. Suiv. 7 vol. in 4to."

§ "*Theorie des Matieres Feodales et Censuelles, ou l'on developpe la Chaine de ces Matieres, dans un Ordre et sous un Aspect, qui en facilitent l'intelligence, y repandent de nouvelles Lumieres, et menent a des Definitions neuves des Contrats de Fiefs, & de Cens*. Par Monsieur Hervé. 1785. Paris. 6 vol. in 8vo." The first volume of this work contains an historical account of the rise, progress, and present state of Fiefs in France. In 1756, Monsieur Bouquet published one volume of a work entitled, "*Le Droit Public de la France*." In his preface to it he promised to continue and complete it in two more volumes, but he is since dead, without having published any part of the continuation; a circumstance greatly to be regretted by the lovers of this kind of learning, as the first volume is executed in a most masterly manner. The English reader will perhaps find it the most interesting and instructive work that has yet appeared on the subject in the French language. If the reader wishes to pursue his researches on the subject, he will find some assistance from a small work printed at Francfort in 1779, entitled, "*Joannes Adamsi Nappii Historia Juris Scientiæ Romanæ Feodalis Privatæ ac Publicæ*, 1 vol. 8vo."

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treat of the nature of the feudal estate, with those chapters which treat of the nature of the feudal tenure: in every other sense the word *Services*, applied in this manner to Littleton's work, is without a meaning.—Besides, he mentions Latin editions of Littleton, when no edition in that language ever appeared.

In fact, were it not for the general observations to which they naturally give rise, neither the criticism of Hottoman nor that of Gatzert would have been noticed.

When doctor Cowell, in his *Law Dictionary*, cited the passage in question from Hottoman, it raised universal indignation, and he expunged it from the later editions of his book. It certainly was unjust to impute it as a crime to doctor Cowell, that he inserted this citation in his work; but the manner in which it was received is a striking proof of the high estimation in which Littleton's *Treatise* was held.

General observations
on Sir Edward Coke's
Commentary.

The reputation of SIR EDWARD COKE'S COMMENTARY is not inferior to that of the work which is the subject of it. It is objected to it, that it is defective in method. But it should be observed, that a want of method was, in some respects; inseparable from the nature of the undertaking. During a long life of intense and unremitting application to the study of the laws of England, Sir Edward Coke had treasured up an immensity of the most valuable common-law learning. This he wished to present to the public, and chose that mode of doing it, in which, without being obliged to dwell on those doctrines of the law which other authors might explain equally well, he might produce that profound and recondite learning which he felt himself to possess above all others. In adopting this plan, he appears to have judged rationally, and consequently ought not to be censured for a circumstance inseparable from it.

It must be allowed, that the style of Sir Edward Coke is strongly tinged with the quaintness of the times in which he wrote; but it is accurate, expressive, and clear. That it is sometimes difficult to comprehend his meaning, is owing, generally speaking, to the abstruseness of his subject, not to the obscurity of his language.—It has also been objected to him, that the authorities he cites do not in many places come up to the doctrines they are brought to support. There appears to be some ground for this observation. Yet it should not be forgot, that the uncommon depth of his learning, and acuteness of his mind, might enable him to discover connections and consequences which escape a common observer.

It is sometimes said, that the perusal of his Commentary is now become useless, as many of the doctrines of law which his writings explain are become obsolete; and that every thing useful in him may be found more systematically and agreeably arranged in modern writers. It must be acknowledged, that when he treats of those parts of the law which have been altered since his time, his Commentary partakes, in a certain degree, of the obsolescence of the subjects to which it is applied; but even where this is the case, it does not often happen that the doctrines laid down by him do not serve to illustrate other parts of the law which are still in force. Thus,—there is no doubt but the cases which now come before the courts of equity, and the principles upon which they are determined, are extremely different in their nature from those which are the subject of Sir Edward Coke's researches. Yet the great personages who have presided in those courts, have frequently resorted to the doctrines laid down by Sir Edward Coke, to form, explain, and illustrate their decrees. Hence, though portions charged upon real estates, for the benefit of younger children, were not known in Littleton's time, and not much known in the time of Sir Edward Coke; yet on the points which arise respecting the vesting and payment of portions, no writings in the law are more frequently or more successfully applied to than Sir Edward Coke's Commentary on Littleton's Chapter of Conditions. It may also be observed, that notwithstanding the general tenor of the present business of our courts, cases must frequently occur which depend upon the most abstruse and intricate parts of the ancient law. Thus the case of *Jacob v. Wheate* led to the discussion of escheats and uses as they stood before the statute of Henry VIII. and the case of *Taylor v. Horde* turned on the learning of disseins.

But the most advantageous and, perhaps, the most proper point of view in which the merit and ability of Sir Edward Coke's writings can be placed, is by considering him as the centre of modern and ancient law.—The modern system of law may be supposed to have taken its rise at the end of the reign of King Henry VII. and to have assumed something of a regular form about the latter end of the reign of King Charles II. The principal features of this alteration are, perhaps, the introduction of recoveries; conveyances to uses; the testamentary disposition by wills; the abolition of military tenures; the statute of frauds and perjuries; the establishment of a regular system of equitable jurisdiction; the discontinuance of real actions; and the mode of trying titles to landed property by ejectment. There is no doubt, but that, during the above period, a material alteration was effected in the jurisprudence of this country: but this alteration has been effected, not so much by superseding, as by giving a new direction to the principles of the old law, and applying them to new subjects. Hence a knowledge of ancient legal learning is absolutely necessary to a modern lawyer. Now Sir Edward Coke's Commentary upon Littleton is an immense repository of every thing that is most interesting or useful in the legal learning of ancient times. Were it not for his writings, we should still have to search for it in the voluminous and chaotic compilation of cases contained in the Year-books; or in the dry, though valuable Abridgements of Statham, Fitzherbert, Brooke, and Rolle. Every person, who has attempted, must be sensible how very difficult and disgusting it is, to pursue a regular investigation of any point of law through those works. The writings of Sir Edward Coke have considerably abridged, if not entirely taken away, the necessity of this labour.

But

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But his writings are not only a repository of ancient learning; they also contain the outlines of the principal doctrines of modern law and equity. On the one hand, he delineates and explains the ancient system of law, as it stood at the accession of the Tudor line; on the other, he points out the leading circumstances of the innovations which then began to take place. He shews the different restraints which our ancestors imposed on the alienation of landed property, the methods by which they were eluded, and the various modifications which property received after the free alienation of it was allowed. He shews, how the notorious and public transfer of property by livery of seisin was superseded, by the secret and refined mode of transferring it, introduced in consequence of the statute of uses. We may trace in his works the beginning of the disuse of real actions; the tendency in the nation to convert the military into socage tenures; and the outlines of almost every other point of modern jurisprudence. Thus his writings stand between, and connect the ancient and modern parts of the law, and by shewing their mutual relation and dependency, discover the many ways by which they resolve into, explain, and illustrate one another.

It has not yet been settled, and perhaps cannot now be settled, with any degree of precision, when the first EDITION of LITTLETON's work was printed. Sir Edward Coke's mistakes respecting the Rohan edition, are pointed out in the note taken from the 12th edition to that part of his Preface. Doctor Middleton, in his Account of Printing in England, conjectures the edition by J. Lettou and W. Machlinia, to have been printed in 1481, and that it is the first edition. This makes the printing of the book to have been within six or seven years after Caxton's introduction of the art into England, and within twenty-four years after the first invention of it. Dr. Middleton's conjecture is supported by the concurrent circumstance of the time when those printers appear to have been in partnership; and no other edition bears evidence of a prior title to antiquity. Another edition of nearly equal pretensions to precedence with the Lettou and Machlinia edition, has lately appeared from the library of the late William Bayntun, esq. It has remained hitherto undescribed, and was probably unknown to all who have undertaken to notice the several editions of this work. At the end it is said to be printed by Machlinia alone, then living near Fleet-bridge; from which, and other circumstances, it is clearly distinguishable from the former edition. The letter used in printing it is less rude, and more like the modern English black letter, than the letter used in the joint edition of Lettou and Machlinia, and the abbreviations are much less numerous. These circumstances afford some, though but a faint ground to suppose it posterior in date to the former. Mr. Hargrave has both these editions. In 1766, Mons. Houard, an Avocat in the Parliament of Normandy, and Conseiller Echevin of the town of Dieppe, published at Rouen in two volumes, the text of Littleton, with a French interpretation, notes, a glossary, and Pieces justificatives. Many editions of Littleton in French and in English only have been published in small octavo, twelves, sixteens, and twenty-fours. They are all of them very inaccurate. The French edition in 1585 is the first in which the sections are numbered. An edition in French and English, in double columns, with a table of the principal matters, was printed in duodecimo in 1671. Considering the universal estimation in which Littleton's work is held, and that it generally is the first work put into a student's hand, it is very singular, that since the editions by Lettou and Machlinia, and the Rohan edition, no correct edition of it without the Commentary has yet been published. The reader will hear with pleasure, that Mr. Hargrave has it in contemplation to favour the public with such an edition, and to print it in such a manner as will make it a typographical curiosity.

Account of the editions of Littleton without the Commentary.

The first EDITION of SIR EDWARD COKE's COMMENTARY upon Littleton was published in his life-time, in 1628: it is very incorrect. The second edition was printed in 1629, and is supposed to have been revised by the author. The subsequent editions, to the eighth inclusively, seem to have been printed from the second, without much variation. The ninth edition includes Sir Edward Coke's Reading on Fines, and his Treatise on Bail and Mainprize. To the tenth edition are added, the Complete Copyholder, with many references. In the eleventh edition the book intitled the Olde Tenures is inserted. At the end, both of the edition of Littleton by Lettou and Machlinia, and of that by Machlinia only, Littleton's work is called the "Tenores Novelli," to distinguish it (it is presumed) from the Treatise of Olde Tenures. The eleventh edition has also several notes and additions, tending principally to shew the alteration of the law since the time of Littleton and his commentator. The twelfth and last edition was published in 1738. Some observations upon it may be found in Mr. Hargrave's Address to the Public on his undertaking the present edition. An abridgement of Sir Edward Coke's Commentary was published in 1714, by Mr. Serjeant Hawkins; short but pointed observations are occasionally introduced in it, to explain the principles of the old law, and the alterations made in it by subsequent statutes.

Editions of Littleton with Sir Edw. Coke's Commentary.

Mr. Hargrave began the PRESENT EDITION, by publishing it in Numbers. Soon after his publication of the First Number, he was favored with Lord chief justice Hale's manuscript notes. By an advertisement prefixed to the Second Number, he informed the public that they were very numerous, as far as the Chapter of Knight Service; that there were few on the subsequent parts of the work; that for the communication of them, he was indebted to the liberal spirit of a noble lord*, who, he observed, had ever distinguished

Present edition.

* The present Earl of Hardwicke.

himself

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himself as a zealous encourager of undertakings having the least tendency to promote science and learning; that in the original, some of the notes were in Latin, but most of them in Law-French; and that it was thought most convenient to give the latter in a literal English translation. Upon the publication of the Second Number, Mr. Hargrave received from sir William Jones an account of some few various readings from two English manuscripts of Littleton's Tenures. By an advertisement prefixed to the Third Number he informed the public, that both of these manuscripts were in the public library at Cambridge, being marked D d 11. 60. and M m 52.; that the first was written on vellum, and was imperfect at the beginning, and in the Chapter of Warranty; and that the second, which seemed to be the most valuable, was written on paper, and had only one leaf torn, and that its antiquity appeared from the following note in the first page:

Iste liber emptus fuit in cæmeterio Sti. Pauli

London, 27th die Julii, anno regis E. 4ti. 20mo. 10s. 6d.

that this date shewed that the manuscript was of Littleton's time, July 20 E. 4. being in 1481, which was the year before Littleton's death; that in referring to the manuscripts, that in vellum would be distinguished by Vell. MS. and that in paper by Paper MS. With these assistances Mr. Hargrave completed that part of the edition which is executed by him. He then relinquished the work, and, by an Advertisement (which immediately precedes this Preface) he informed the public of it, and of the present editor's undertaking to continue the work.

Soon after the publication of this Advertisement, the present editor, through the obliging interference of John Holliday, esq. of Lincoln's-Inn, with the executors of the will of the late sir Thomas Parker, was favoured with a copy of the notes of lord chancellor Nottingham and lord Hale upon this work. The following account is given of them in a note in sir Thomas Parker's own hand-writing:

"The notes to this book, in my hand-writing (except one note in folio 26. b. and some modern cases), were transcribed from a copy of the lord chancellor Nottingham's manuscript notes, in the margin of his lord Coke's Commentary upon Littleton, which copy was made for the use of his son Heneage Finch, esq. solicitor-general, afterwards earl of Aylesford, and is now in the possession of the honourable Mr. Legge, to whose favour I am indebted for these notes.

"The notes in a different hand-writing were transcribed from a copy of lord chief-justice Hale's MSS. notes in the margin of Coke upon Littleton, presented by lord Hale to the father of Philip Gybbon, esq. which copy was made for the use of the honourable Charles Yorke, esq. his Majesty's solicitor-general. The book in which the notes are in the hand-writing of lord Hale, is now in the possession of Mr. Gybbon; and the book from which these notes were transcribed by the favour of Mr. Yorke, is now in his possession.

"T. PARKER, 1758."

Under these circumstances the THIRTEENTH EDITION has been completed in its form.

When it became generally known that Mr. Hargrave had relinquished the work, the present editor engaged in it; but he did not engage in it while there was the slightest probability of its being undertaken by any other person: and even then, he would not have engaged in it, if by doing so he incurred any obligation of completing Mr. Hargrave's undertaking in all its parts. He thought, an imperfect execution of the remaining part of the work would be more agreeable to the public than none; that to present them with the remaining part of the text of Littleton and his Commentator, with some references and some notes, would be an acceptable offering to them. No other person appeared with any, and the present editor's performance does not prevent the exertions of any future adventurer.

LINCOLN'S-INN, }
Nov. 4, 1787. }

CHARLES BUTLER.

DE O, PATRIÆ, TIBI,

Proœmium.

OUR author, a gentleman of an ancient and a fair-descended family de Littleton, took his name of a town so called, as that famous chief-justice sir John de Markham, and divers of our profession, and others, have done.

The name and degree of our author.

Thomas de Littleton, lord of Frankley, had issue Elizabeth his only child, and did bear the arms of his ancestors, viz. argent a chevron between three escalop-shells fable. The bearing hereof is very ancient and honourable; for the senators of Rome did wear bracelets of escalop-shells about their arms, and the knights of the honourable order of St. Michael in France do wear a collar of gold in the form of escalop-shells at this day. Hereof much more might be said, but it belongs unto others.

His arms.

Instituted by Lewis the Eleventh, king of France, 9. E. 4. 1469.

With this Elizabeth married Thomas Westcote, esquire, the king's servant in court, a gentleman anciently descended, who bare argent, a bend between two cotises fable, a bordure engrayled gules, bezanty.

Thomas Westcote.

But she being fair, and of a noble spirit, and having large possessions and inheritance from her ancestors de Littleton, and from her mother, the daughter and heir of Richard de Quatermains, and other her ancestors (ready means in time to work her own desire), resolved to continue the honour of her name (as did the daughter and heir of Charleton, with one of the sons of Knightly, and divers others), and therefore prudently, whilst it was in her own power, provided by Westcote's assent before marriage, that her issue inheritable should be called by the name of de Littleton. These two had issue four sons, Thomas, Nicholas, Edmund, and Guy, and four daughters.

Thomas the eldest was our author, who bare his father's christian-name Thomas, and his mother's surname de Littleton, and the arms de Littleton also; and so doth his posterity bear both name and arms to this day.

Our author bore his mother's surname.

Camden, in his Britannia, saith thus: Thomas Littleton, alias Westcote, the famous lawyer, to whose Treatise of Tenures the students of the common law are no less beholden, than the civilians to Justinian's Institutes.

Camden.
"The just shall flourish like the palm-tree, and spread abroad like the cedar in Libanus." Psal. xcii. 11.

The dignity of this fair-descended family de Littleton hath grown up together and spread itself abroad by matches, with many other ancient and honourable families, to many worthy and fruitful branches, whose posterity flourish at this day, and quartereth many fair coats, and [*] enjoyeth fruitful and opulent inheritances thereby.

[*] The best kind of quartering of arms.

He was of the Inner-Temple, and read learnedly upon the statute of W. 2. *De donis conditionalibus*, which we have. He was afterward called *ad statum*

T H E P R E F A C E.

King's serjeant, Rot.
Pat. 33. H. 6. part 1.
m. 16.
Mich. 34. H. 8. fol. 3. a.
Judge of the Com-
mon Pleas, Rot. Pat.
6. E. 4. part 1. m. 15.

Knight of the Bath,
15. E. 4.

When he wrote this
book.
14. E. 4. tit. Gar-
ranty 5.

Litt. Sect. 692. 729 &
740.

The deceases of his
contemporaries.
[a] He died 27. H. 6.
[b] He died 39. H. 6.
[c] Died 11. E. 4.
[d] Died 16. H. 7.
[e] Died 7. E. 4.
[f] Overlived our
author.
[g] Survived him also.
[h] Died 23. H. 6.
[i] Survived our au-
thor.
[k] Died 33. H. 6.
[l] Died 18. H. 6.
[m] Died 20. H. 6.
[n] Removed 1. E. 4.
[o] Removed 8. E. 4.
[p] Died 21. E. 4.

Queen Elizabeth.

Inner-Temple.
Clifford's-Inn.
Lion's-Inn.

et grad' servientis ad legem, and was steward of the court of the Marshalsey of the king's household, and for his worthiness was made by king *H. 6.* his serjeant, and rode justice of assise the Northern Circuit, which places he held under king *E. 4.* until he, in the sixth year of his reign, constituted him one of the judges of the court of common pleas, and then rode Northamptonshire Circuit. The same king, in the 15th year of his reign, with the prince, and other nobles and gentlemen of ancient blood, honoured him with the knight-hood of the Bath.

He compiled this book when he was judge, after the fourteenth year of the reign of king *E. 4.* but the certain time we cannot yet attain unto, but (as we conceive) it was not long before his death, because it wanted his last hand; "for that tenant by *elegit*, statute-merchant, and staple, were in the table of "the first printed book, and yet he never wrote of them *".

Our author, in composing this work, had great furtherance in that he flourished in the time of many famous and expert sages of the law. [a] Sir Richard Newton, [b] sir John Prisot, [c] sir Robert Danby, [d] sir Thomas Brian, [e] sir Pierce Arden, [f] sir Richard Choke, [g] Walter Moyle, [h] William Paston, [i] Robert Danvers, [k] William Ascough, and other justices of the court of common pleas: and of the king's-bench, [l] sir John June, [m] sir John Hody, [n] sir John Fortescue, [o] sir John Markham, [p] sir Thomas Billing, and other excellent men flourished in his time.

And of worldly blessings I account it not the least, that in the beginning of my study of the laws of this realm, the courts of justice, both of equity and of law, were furnished with men of excellent judgment, gravity, and wisdom. As in the chancery, sir Nicholas Bacon, and after him sir Thomas Bromley. In the exchequer-chamber, the lord Burghley, lord high treasurer of England, and sir Walter Mildmay, chancellor of the exchequer. In the king's bench, sir Christopher Wray, and after him sir John Popham. In the common pleas, sir James Dyer, and after him sir Edmund Anderson. In the court of exchequer, sir Edward Saunders, after him sir John Jeffery, and after him sir Roger Manwood, men famous (amongst many others) in their several places, and flourished, and were all honoured and preferred by that thrice noble and virtuous queen Elizabeth of ever blessed memory. Of these reverend judges, and others their associates, I must ingenuously confess, that in her reign I learned many things, which in these Institutes I have published: and of this queen I may say, that as the rose is the queen of flowers, and smelleth more sweetly when it is plucked from the branch, so I may say and justify, that she by just desert was the queen of queens, and of kings also, for religion, piety, magnanimity, and justice; who now by remembrance thereof, since Almighty God gathered her to himself, is of greater honour and renown than when she was living in this world. You cannot question what rose I mean; for take the red or the white, she was not only by royal descent and inherent birth-right, but by royal beauty also, heir to both.

And though we wish by our labours (which are but *cunabula legis*, the cradles of the law) delight and profit to all the students of the law, in their beginning of their study (to whom the First Part of the Institutes is intended), yet principally to my loving friends, the students of the honourable and worthy societies of the Inner-Temple, and Clifford's-Inn, and of Lion's-Inn also, where I was some time reader. And yet of them more particularly to

* That Littleton did intend to write of those tenancies, is plain from the 291st and 324th Sections; but it may be justly questioned whether the fact alledged by my lord Coke, to support his opinion, be true; because in the copy of the Rohan edition, now in Lincoln's-Inn Library, and in that at this time in the bookseller's custody, the Table mentions nothing concerning these tenancies; nor does it seem probable that there ever was any other Table, both the Copies appearing on the nicest examination to be complete. *Note to 11th edit.—See also Note on Sect. 241. of the present edit.*

T H E P R E F A C E.

such as have been of that famous university of Cambridge, *alma mea mater*. And to my much-honoured and beloved allies and friends of the county of Norfolk, my dear and native country; and to Suffolk, where I passed my middle age; and of Buckinghamshire, where in my old age I live. In which counties, we, out of former collections, compiled these Institutes. But now return we again to our author.

He married with Johan, one of the daughters and coheirs of William Burley, of Broomcroft-castle, in the county of Salop, a gentleman of ancient descent, and bare the arms of his family, argent, a fess checkie or and azure, upon a lion rampant sable, armed gules; and by her had three sons, fir William, Richard the lawyer, and Thomas.

His marriage.

His issue.

In his life-time, he, as a loving father and a wise man, provided matches for these three sons, in virtuous and ancient families, that is to say, for his son fir William, Ellen, daughter and coheir of Thomas Welsh esquire, who by her had issue Johan his only child, married to fir John Aston of Tixal, knight: and for the second wife of fir William, Mary the daughter of William Whittington esquire, whose posterity in Worcestershire flourish to this day. For Richard Littleton his second son, to whom he gave good possessions of inheritance, Alice, daughter and heir of William Winsbury of Pilleton-Hall in the county of Stafford esquire, whose posterity prosper in Staffordshire to this day. And for Thomas his third son, to whom he gave good possessions of inheritance, Anne, daughter and heir of John Botreaux esquire, whose posterity in Shropshire continue prosperously to this day. Thus advanced he his posterity, and his posterity, by imitation of his virtues, have honoured him.

The re-establishment of his posterity, by the matches of his three sons with virtue and good blood.

He gave possessions of inheritance to his younger sons for their better advancement.

He made his last will and testament the 22d day of August, in the twenty-first year of the reign of king Edward the fourth, whereof he made his three sons, a parson, a vicar, and a servant of his, executors; and constituted supervisor thereof, his true and faithful friend, John Alcock, doctor of law, of the famous university of Cambridge, then bishop of Worcester; a man of singular piety, devotion, chastity, temperance, and holiness of life; who amongst other of his pious and charitable works, founded Jesus College in Cambridge; a fit and a fast friend to our honourable and vertuous judge.

His last will.

His executors, his supervisor.

He left this life in his great and good age, on the 23d day of the month of August, in the said twenty-first year of the reign of king Edward the fourth: for it is observed for a special blessing of Almighty God, that few or none of that profession die *intestatus et improles*, without will, and without child; which last will was proved the 8th of November following, in the Prerogative Court of Canterbury, for that he had *bona notabilia* in divers diocesses. But yet our author liveth still *in ore omnium jurisprudentium*.

His age.
His departure.

Littleton is named in 1. H. 7. and 21. H. 7. Some do hold, that it is no error either in the reporter or printer; but that it was Richard the son of our author, who in those days professed the law, and had read upon the statute of W. 2. *quia multi per malitiam*, and * unto whom his father dedicated his book: and this Richard died at Pilleton-Hall in Staffordshire, in 9. H. 8.

1. H. 7. fol. 27.
21. H. 7. fol. 32. b.

W. 2. cap. 11.
[*] See Littleton, Sect. 749.

The body of our author is honourably interred in the cathedral church of Worcester, under a fair tomb of marble, with his statue or portraiture upon it, together with his own match, and the matches of some of his ancestors, and with a memorial of his principal titles; and out of the mouth of his statue proceedeth this prayer, *Fili Dei miserere mei*, which he himself caused to be made and finished in his life-time, and remaineth to this day. His wife Johan, lady Littleton, survived him, and left a great inheritance of her father, and Ellen her mother, daughter and heir of John Grendon esquire, and other her ancestors, to fir William Littleton her son.

His sepulchre.

This

T H E P R E F A C E.

When this work was published.

T. N. B. 212. C.

Note.

When this work was first imprinted.

His picture.

The figure of his mind.

This work was not published in print, either by our author himself, or Richard his son, or any other, until after the deceases both of our author and of Richard his son. For I find it not cited in any book or report, before sir Anthony Fitzherbert cited him in his *Natura Brevium*; who published that book of his *Natura Brevium* in 26. H. 8. Which work of our author, in respect of the excellency thereof, by all probability should have been cited in the reports of the reigns of E. 5. R. 3. H. 7. or H. 8. or by St. Jermyn in his book of the Doctor and Student†, which he published in the three and twentieth year of H. 8. if in those days our author's book had been printed. And yet you shall observe, that time doth ever give greater authority to works and writings that are of great and profound learning, than at the first they had. The first impression that I find of our author's book was at Roan in France, by William de Tailier (for that it was written in French) *ad instantiam Richardi Pynson*, at the instance of Richard Pynson, the printer of King H. 8. before the said book of *Natura Brevium* was published; and therefore upon these and other things that we have seen, we are of opinion, that it was first printed about the four and twentieth year of the reign of king H. 8. since which time he had been commonly cited, and (as he deserves) more and more highly esteemed *.

He that is desirous to see his picture, may in the churches of Frankley and Hales-Owen, see the grave and reverend countenance of our author, the outward man; but he hath left this book, as a figure of that higher and nobler part, that is, of the excellent and rare endowments of his mind, especially in the profound knowledge of the fundamental laws of this realm. He that diligently reads this his excellent work, shall behold the child and figure of his mind, which the more often he beholds in the visual line, and

* This opinion of my lord Coke's, concerning the time of the first impression of Littleton's Tenures, although it hath been followed by sir William Dugdale, in his *Origines Juridicæ*, and by bishop Nicholson, in his *Historical Library*, is certainly erroneous; for it appears by two copies now in the bookseller's custody, that they were printed twice at London in the year 1528, once by Richard Pynson, and again by Robert Redmayne; and that was the nineteenth year of the reign of H. 8. To determine certainly when the Rohan edition was published, is almost impossible; and before any conjectures can be offered on that subject, 'twill be necessary to consider how conclusive the arguments his lordship draws from our author's not being cited as authority in the books he mentions may be: it either proves what his lordship uses it for, or else that Littleton's authority was not then so well established as 'tis now (for which he gives us here a very good reason): and that this last is true, the aforesaid editions do sufficiently evince, for their titles and conclusions run thus: "Littleton's Tenures, newly and most truly corrected." And in the end, *Expliciunt tenores Littletoni cum alterationibus eorum et additionibus novis, necnon cum aliis non minus utilioribus*: Nay, these very additions are incorporated into the book itself, nor are they distinguished by any mark from the Original. The weakness of this argument will further appear, if it should be applied to the discovering the time my lord Coke's Commentary on Littleton was first published, for this was not cited as authority for some time after its publication. The old editions abovementioned. Pynson's and Le Talleur's name, and the manner Littleton is printed in at Rohan, seem to be the only means of discovering what we seek. From those editions we may collect, not only that the Rohan impression is older than the year 1528, but also by what occurs in the beginning and end of them, that there had been other impressions of our author. From Pynson's name at the end of the Rohan edition, it may be concluded that he would not have engaged his friend William Le Talleur to have printed Littleton at Rohan, had he ever before printed any books in French; and that he printed an Abridgment of the Statutes, part of which is in French, in the year 1499, appears by one of those books now in the same person's custody. Statham's Abridgment has his name to it, but there is no date, yet it being printed with the same types, and in the same manner, Littleton was at Rohan, and as it is a larger book, it is highly probable 'twas printed some time after the publication of Littleton's Tenures, and that Pynson's success in the lesser undertaking induced him to venture on the greater; which in those days was the work of two or three years. William Le Talleur printed a Chronicle of the Duchy of Normandy, as appears by his name and cypher at the end thereof, and the date in the beginning in the year 1487. The book itself is printed without any title-page, initial letter of the chapters, number of the leaves or year, and in a character much resembling writing, and with such abbreviations as are used in manuscripts: all which 'tis well known to those who have seen many old books, are undoubted proofs of a book's being printed when that art was in its infancy. Upon the whole it may certainly be concluded, that the book was printed some years before 1487; because the abovementioned Chronicle, which hath not such marks of antiquity, was printed in that year; and from what has been observed concerning the manner 'tis printed in, it will be thought by those who are versed in ancient books, to have been published ten years before that time. *Note to the 11th Edition.*

† This book appears to have been first published by J. Russell, 1623. Ames.

T H E P R E F A C E.

well observes him, the more shall he justly admire the judgment of our author, and increase his own. This only is desired, that he had written of other parts of law, and especially of the rules of good pleading, (the heart-string of the common law) wherein he excelled: for of him might the saying of our English poet be verified:

Thereto he could indite and maken a thing;

Chauter.

There was no wight could pinch at his writing:

So far from exception, as none could pinch at it. This skill of good pleading, he highly in this work commended to his son, and under his name to all other students sons of his law. He was learned also in that art, which is so necessary to a compleat lawyer; I mean of logick, as you shall perceive by reading of these Institutes, wherein are observed his syllogisms, inductions, and other arguments; and his definitions, descriptions, divisions, etymologies, derivations, significations, and the like. Certain it is, that when a great learned man (who is long in making) dieth, much learning dieth with him.

Good pleading.

Logick.

Seneca.

That which we have formerly written, that this book is the ornament of the common law, and the most perfect and absolute work that ever was written in any humane science; and in another place, that which I affirmed and took upon me to maintain against all opposites whatsoever, that it is a work of as absolute perfection in its kind, and as free from error, as any book that I have known to be written of any humane learning, shall to the diligent and observing reader of these Institutes be made manifest, and we by them (which is but a Commentary upon him) be deemed to have fully satisfied that, which we in former times have so confidently affirmed and assumed. His greatest commendation, because it is of greatest profit to us, is, that by this excellent work, which he had studiously learned of others, he faithfully taught all the professors of the law in succeeding ages. The victory is not great to overthrow his opposites, for there never was any learned man in the law, that understood our author, but concurred with me in his commendation: *Habet enim justam venerationem quicquid excellit*; for whatsoever excelleth hath just honour due to it. Such as in words have endeavoured to offer him disgrace, never understood him, and therefore we leave them in their ignorance, and wish that by these our labours they may know the truth and be converted. But herein we will proceed no further, for, *Stultum est absurdas opiniones accuratius refellere*. It is meer folly to confute absurd opinions with too much curiosity.

The commendation
of his work.

Cicero.

Aristotle.

And albeit our author in his Three Books cites not many authorities, yet he holdeth no opinion in any of them, but is proved and approved by these two faithful witnesses in matter of law, authority and reason. Certain it is, when he raiseth any question, and sheweth the reason on both sides, the latter opinion is his own, and is consonant to law. We have known many of his cases drawn in question, but never could find any judgment given against any of them, which we cannot affirm of any other book or edition of our law. In the reign of our late sovereign lord king James of famous and ever blessed memory, it came in question upon a demurrer in law, Whether the release to one trespasser should be available or no to his companion? Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his companions, gave judgment according to the opinion of our author, and openly said, that they owed so great reverence to Littleton, as they would not have his case disputed or questioned: and the like you may find in this Part of the Institutes. Thus much (though not so much as his due) have we spoken of him; both to set out his life, because he is our author, and for the imitation of him by others of our profession.

Note.

Mich. 3. Jac. in com-
muni banc. inter
Cock & Ilmour.

T H E P R E F A C E

What is endeavoured
by these Institutes.

We have in these Institutes endeavoured to open the true sense of every of his particular cases, and the extent of every of the same, either in express words, or by implication; and where any of them are altered by any latter act of parliament to observe the same, and wherein the alteration consisteth. Certain it is, that there is never a period, nor (for the most part) a word, nor an *&c.* but affordeth excellent matter of learning. But the module of a preface cannot express the observations that are made in this work, of the deep judgment and notable invention of our author. We have by comparison of the late and modern impressions with the original print, vindicated our author from two injuries: First, from divers corruptions in the late and modern prints, and restored our author to his own: Secondly, from all additions and encroachments upon him, that nothing might appear in his work but his own *.

The benefit of these
Institutes.

Our hope is, that the young student, who heretofore meeting at the first, and wrestling with as difficult terms and matter, as in many years after, was at the first discouraged as many have been, may, by reading these Institutes, have the difficulty and darkness both of the matter, and of the terms and words of art in the beginning of his study, facilitated and explained unto him, to the end he may proceed in his study chearfully and with delight; and therefore I have termed them Institutes, because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the national laws of England.

Wherefore called In-
stitutes.

Wherefore published
in English.

This Part we have (and not without precedent) published in English, for that they are an introduction to the knowledge of the national law of the realm; a work necessary, and yet heretofore not undertaken by any, albeit in all other professions there are the like. We have left our author to speak his own language, and have translated him into English, to the end that any of the nobility or gentry of this realm, or of any other estate or profession whatsoever, that will be pleased to read him and these Institutes, may understand the language wherein they are written.

Regula.

36. E. 3. cap. 5.

I cannot conjecture that the general communicating of these laws in the English tongue can work any inconvenience, but introduce great profit, seeing that *Ignorantia juris non excusat*, Ignorance of the law excuseth not. And herein I am justified by the wisdom of a parliament; the words whereof be, " That the laws and customs of this realm the rather should be reasonably perceived and known, and better understood by the tongue used in this realm, and by so much every man might the better govern himself without offending of the law, and the better keep, save and defend his heritage and possessions. And in divers regions and countries, where the king, the nobles, and other of the said realm have been, good governance and full right is done to every man, because that the laws and customs be learned and used in the tongue of the country : " as more at large by the said act, and the purview thereof may appear : *Et neminem oportet esse sapientorem legibus*, No man ought to be wiser than the law.

Regula.

Our author's kind of
French.

And true it is that our books of reports and statutes in ancient times were written in such French as in those times was commonly spoken and written by the French themselves. But this kind of French that our author hath used, is most commonly written and read, and very rarely spoken, and therefore cannot be either pure, or well pronounced. Yet the change thereof (having been so long customary) should be without any profit, but not without great danger and difficulty: for so many ancient terms and words drawn from that legal French, are grown to be *vocabula artis*, vocables of art, so apt and significant to express the true sense of the laws, and are so woven in the laws themselves, as it is in a manner impossible to change them, neither ought legal terms to be changed.

* See the additions to this new edition, No. 74 and 81. *Note to the 11th edit.*

T H E P R E F A C E.

In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in other liberal sciences, you shall meet with a whole army of words, which cannot defend themselves *in bello grammaticali*, in the grammatical war, and yet are more significant, compendious, and effectual to express the true sense of the matter, than if they were expressed in pure Latin. 36. E. 3. ub. supr.

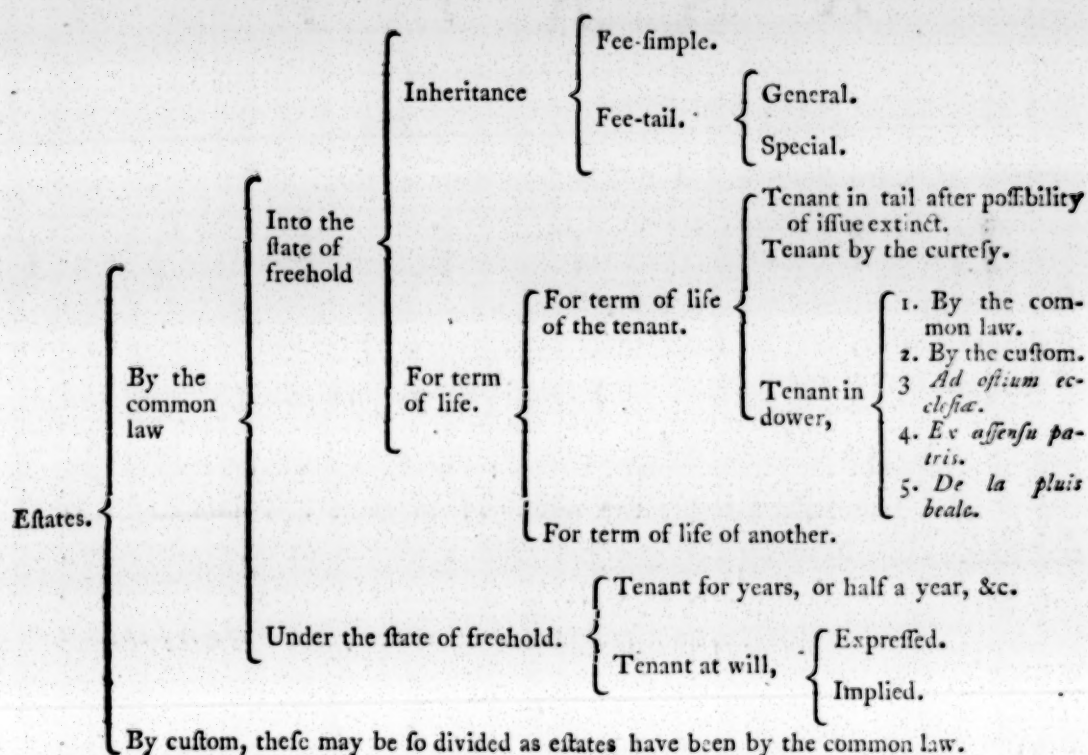
This work we have called "The First Part of the Institutes," for two causes : First, for that our author is the first book that our student taketh in hand : Secondly, for that there are some other Parts of Institutes not yet published, (viz.) The Second Part, being a Commentary upon the statute of *Magna Charta*, Westm. 1. and other old statutes. The Third Part treateth of criminal causes and pleas of the crown : which Three Parts we have, by the goodness of Almighty God, already finished. The Fourth Part we have purposed to be of the jurisdiction of courts : but hereof we have only collected some materials towards the raising of so great and honourable a building. We have by the goodness and assistance of Almighty God, brought this twelfth work to an end : in the eleven books of our Reports we have related the opinions and judgments of others ; but herein we have set down our own. Wherefore called the First Part.

Before I entered into any of these Parts of our Institutes, I acknowledging mine own weakness and want of judgment to undertake so great works, directed my humble suit and prayer to the Author of all goodness and wisdom, out of the Book of Wisdom ; *Pater & Deus misericordiae, da mihi sedium tuarum assitricem sapientiam, mitte eam de Caelis sanctis tuis & a sede magnitudinis tuae, ut tecum sit & tecum laboret, ut sciam quid acceptum sit apud te !* " Oh Father " and God of mercy, give me Wisdom, the assistant of thy seats ! Oh send " her out of the holy heavens, and from the seat of thy greatness, that she " may be present with me, and labour with me, that I may know what is pleasing unto thee." *Amen.* Lib. Sap. cap. ix. vers. 4. 10.

Our author hath divided his whole work into Three Books. In his First he hath divided estates in lands and tenements, in this manner : for *res per divisionem melius aperiuntur.* Bracton,

T H E P R E F A C E .

A Figure of the Division of Possessions.



[*] See the first remark to the Preface.

*Regula.
Inevitable est parte una
perspecta, tota re non
cognita, de ea judi-
care.*

Our author dealt only with the estates and terms above said: somewhat we shall speak of estates by force of certain statutes, as of statute-merchant, statute-staple, and *elegit*, (whereof our author intended to have written) [*] and likewise to executors to whom lands are devised for payment of debts, and the like.

I shall desire, that the learned reader will not conceive any opinion against any part of this painful and large volume, until he shall have advisedly read over the whole, and diligently searched out, and well considered of the several authorities, proofs and reasons which we have cited and set down for warrant and confirmation of our opinions throughout this whole work.

Mine advice to the student is, that before he read any part of our Commentaries upon any Section, that first he read again and again our author himself in that Section, and do his best endeavours, first of himself, and then by conference with others, (which is the life of study) to understand it, and then to read our Commentary thereupon, and no more at any one time than he is able with a delight to bear away, and after to meditate thereon, which is the life of reading. But of this argument we have for the better direction of our student in his study, spoken in our Epistle to our First Book of Reports.

And albeit the reader shall not at any one day (do what he can) reach to the meaning of our author, or of our Commentaries, yet let him no way discourage himself, but proceed; for on some other day, in some other place, that doubt will be cleared. Our labours herein are drawn out to this great volume, for that our author is twice repeated, once in French, and again in English.

ANALYSIS

OF

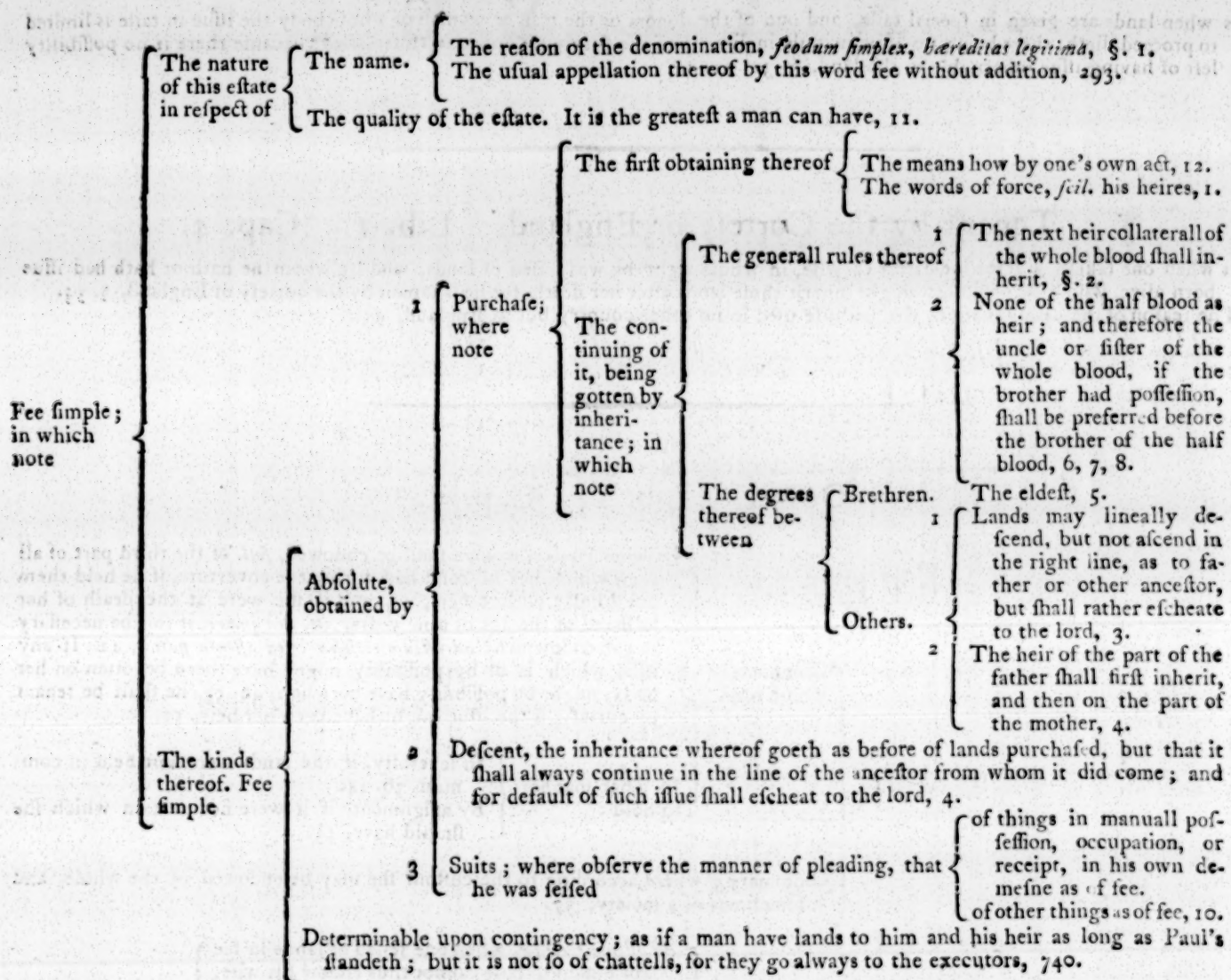
LITTLETON.

FEBRUARY 21, 1658-9.

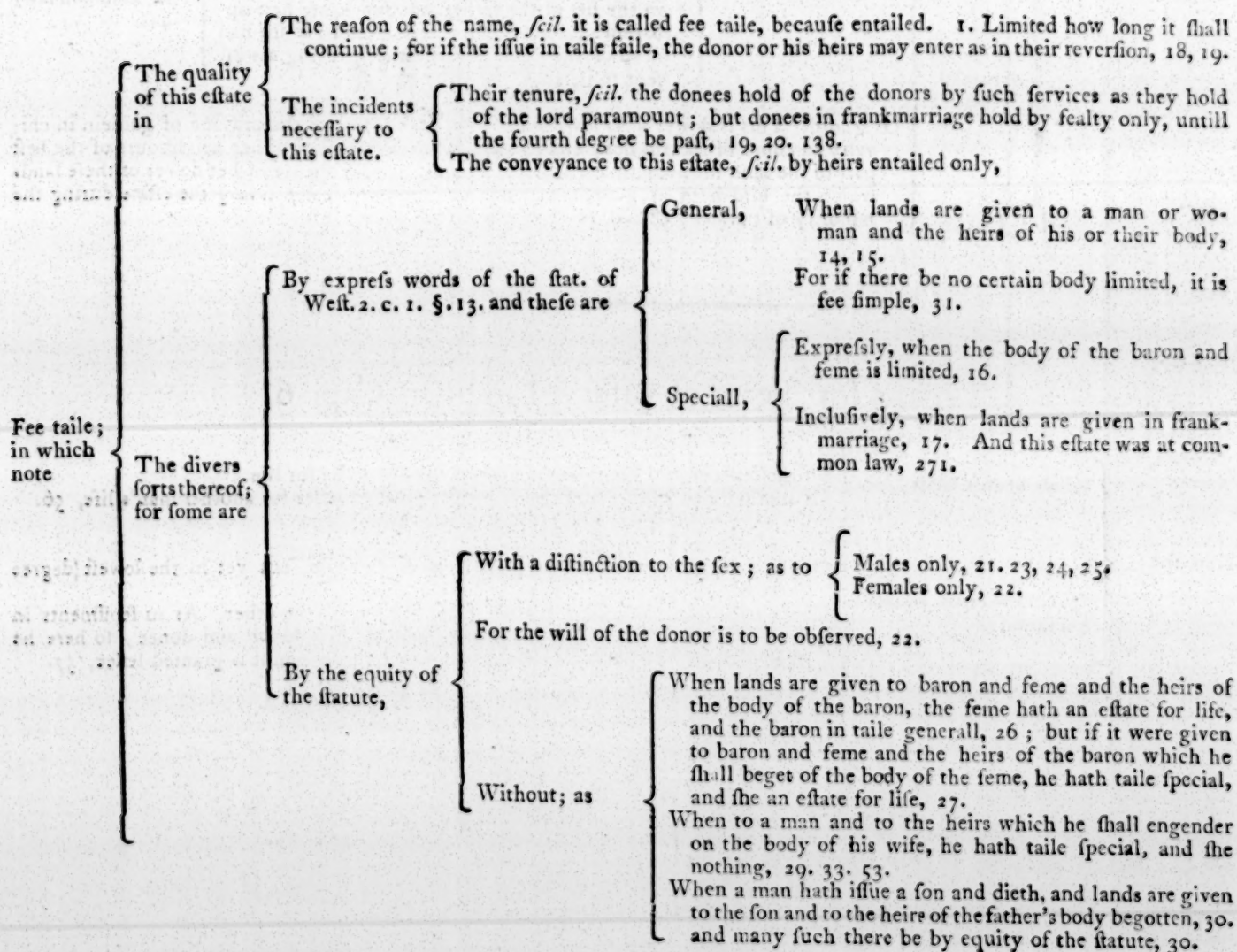
Synopsis totius Littleton Analyticè.

Littleton's TENURES may be di- vided into two parts, scilicet,	Titles of	Land of freehold	Estates of	Inheritance	By the common law, as Fee Simple Book I. Chap. 1.							
					By statute, as	Fee Taile	-	2.				
						Fee Taile after possibility of issue extinct	-	3.				
					Freehold by	The act of law : tenant	By the Curtesy	-	4.			
							In Dower	-	5.			
						Agreement between party and party ; as Tenant for Life		-	6.			
					Certain qualifica- tions of estates by	other acci- dents tend- ing to	Reason of mixture with other possessions, scil. by	1	Descent, Parcenary, Book III. Ch. 1, 2.			
								2	Purchase, Jointenancy	-	3.	
								3	Both, Tenancy in Common	-	4.	
Ratifying of estates by the act of	Parties	Intituled by right, by	strengthens the estate already established, as	Remitter			12.					
				Warranty			13.					
The de- struction of estates by	Discontinuances of a right	Continuance of a wrong ; the	adding a surer and better title thereunto, as	Release			8.					
				Interested in the possession, as Attornment			10.					
The de- struction of estates by	Discontinuances of a right	Continuance of a wrong ; the	adding a surer and better title thereunto, as	Confirmation			9.					
				Interested in the possession, as Attornment			10.					
The de- struction of estates by	Discontinuances of a right	Continuance of a wrong ; the	adding a surer and better title thereunto, as	Attornment			10.					
				Interested in the possession, as Attornment	10.							
The de- struction of estates by	Discontinuances of a right	Continuance of a wrong ; the	adding a surer and better title thereunto, as	Attornment	10.							
				Interested in the possession, as Attornment	10.							
Chattell,	Tenures, scil. the ser- vices which are as it were the bond be- twixt the lord and te- nant whereby lands are held to	Reall. Personall.	Certain, Tenant for years	-	-	-	-	I.	7.			
				Uncertain, Tenant at will	-	-	-	-	-	8, 9, 10.		
				The King only, as	Grand Serjeanty	-	-	-	-	-	II.	9.
						Petit Serjeanty	-	-	-	-	-	9.
				Spiritual, Frankalmoigne	-	-	-	-	-	-	6.	
				Other lords also of these tenements, which are	Temporal, to be performed by their	Bodies	Homage	not continued in the line	-	-	1.	
									continued in the line of the lord and tenant, called Homage Auncestrell	7.		
				Fealty	-	-	-	2.				
Goods	generally throughout the realm	Socage	-		5.							
		Rents	-	12.								
Both these tenants bring	Fees	Esuage	-	3.								
			Knights Service	-	4.							
Bond Villenage	-	-	-	11.								

Fee Simple. Lib. 1. Cap. 1.



Fee Taile. Lib. 1. Cap. 2.



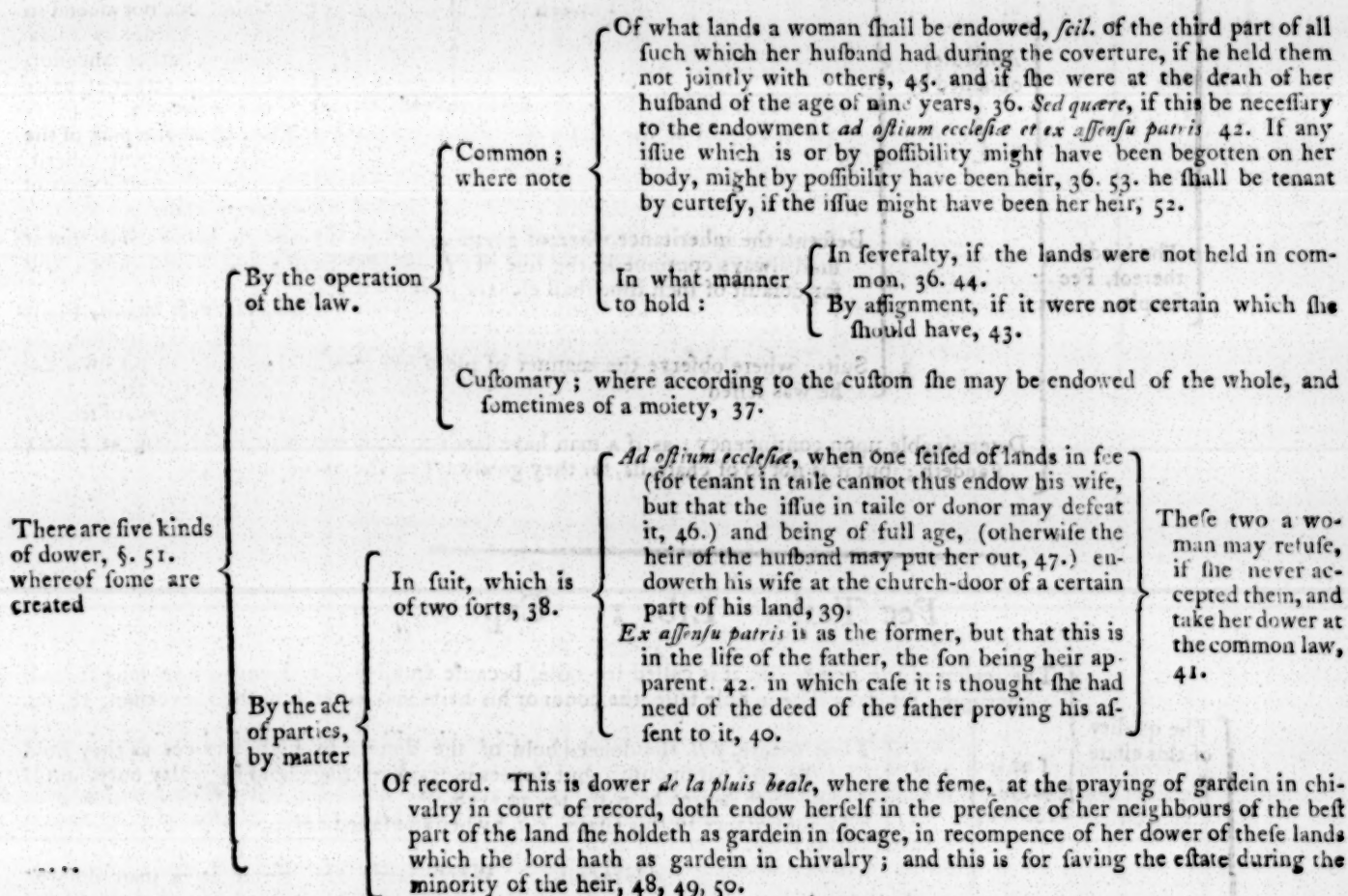
Tenant in Taile after Possibility of Issue extinct. Lib. 1. Cap. 3.

Is when lands are given in special taile, and one of the donors or the man or woman of whose body the issue in taile is limited to proceed dieth, there being no issue in taile in life, then the surviving donee is thus called, because there is no possibility left of having issue inheritable to the land, §. 32, 33, 34.

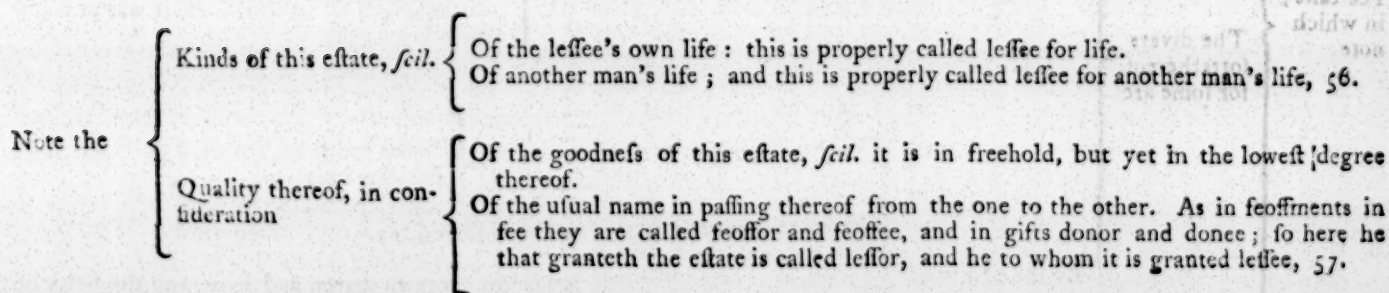
Tenant by the Curtesy of England. Lib. 1. Cap. 4.

Is when one taketh a feme inheritrix to wife, in whose right he was seised of lands, and by whom he hath or hath had issue born alive, which by possibility might inherit those lands after her death, for he is tenant by the curtesy of England, §. 35. The reason of the denomination, *scil.* because used in no other country but in England, §. 55.

Dower. Lib. 1. Cap. 5.



Tenant for Term of Life. Lib. 1. Cap. 6.



Tenant for Years. Lib. 1. Cap. 7.

Note the	Name of this estate, viz.	When one leaseth lands to another for a term of years, the lessee is thus called, 58. So if the lease be but for half a year, or a quarter, for there is no other terms to term him, 67.
	How it passeth from the lessor to the lessee.	1 The lessee may enter when he will by force of his lease, by or without deed; and livery is not necessary, unless where freehold passeth in possession or remainder [then it is], 59, 60. Unless it be in exchanges, where if the lands be in one county it is good by parol, 62, 63. Note in exchanges, { That the estate of the exchanges must be equal [not the value] 64, 65. That in both their deeds mention must be made of the exchange, 65.
	Nature of it,	2 How many liveries there needs [when necessary], <i>scil.</i> but one in every county, if it be made in the name of all in the same county, 61. At what time it taketh effect, <i>scil.</i> at the time prefixed, although the lessor die before the day; and yet the death of the feoffor is a countermand of a letter of attorney to deliver seisin, 66.
	What inconveniencies this estate is tied unto.	1 To pay the rent reserved, else may the lessor distrain or bring an action of debt; but if the lessor were not seised at the time of the lease, the lessor may plead in barre, if it be not by indenture, 58. 2 He must amove his household stuff, and come before his lease expire, or else after the lessor may take them, 68. 3 The lessee for years is bound to repair the house, 71. 4 Liable to a writ of waste if he commit any, 67.

Tenant at Will. Lib. 1. Cap. 8.

Note the	Divers sorts of this estate; for it is created either	Expressly; as when one letteth lands to hold at his will; and it is called so, because there is no certainty of the estate but only at will, 68. If therefore it be granted to the lessee and his heirs at will, this word (heirs) is void, 82. Yet if the lessor determine his will, the lessee shall have convenient time to carry away his corn and household stuff, as well as executors for the goods of their testator, 68, 69. By implication; as when one having a deed of feoffment made unto him, and entereth before livery, 70.
	Necessary appendances to this estate. For	The services reserved, { They shall not do fealty, 84. They must pay the rent reserved, else may the lessor distrain or bring an action of debt, 72. The things he is not bound to, reparations, yet is punishable for voluntary waste, as well as a bailee for goods lent him, 71.

Tenant at Will according to Custom. Lib. 1. Cap. 9, 10.

Note the	Diversity of this estate; for it is by	Copy of court roll, 73. and so called, because the tenants have no other evidence but of their lord's court roll, 75. And it is when one holdeth land at the will of the lord; and although they have inheritance, yet if the lord oust them they have no remedy, but by petition, 77. according to the custom of the manor, 73.
		The verge; which differeth from the former only in the use of the white rod in their surrenders, 78.
	Condition of it; in regard of	The quality of it is a base tenure, for they have no freehold by course of common law, 81; although by custom they may have estates of inheritance, 81, 82.
		The circumstance
		In passing it from a man, which is by surrender; for if he alien by deed, it is a forfeiture, 74. And this
		Surrender is
		Into the hands of the lord, to the use of him who should have it by some custom, 78.
		Into the hands of the bailiff or issue, or of two honest men of the same lordship, and they to present it at the next court, 79. And generally all such customs not repugnant to reason are allowable, 80.
		In continuing of it being paid by
		Sink, which must be by plaint in their lord's court, 76.
		Sustentation of their houses by reparation, 83.
		Service, <i>scil.</i> such a tenant must do fealty, 84. 132.

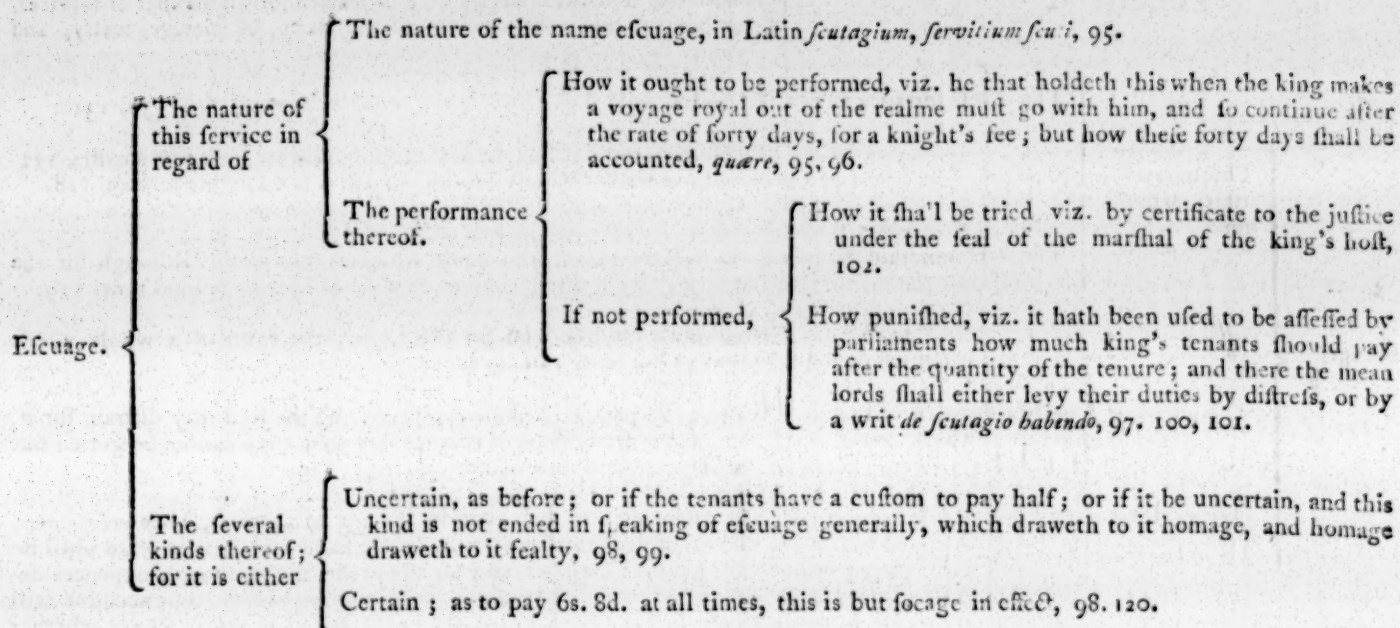
Homage. Lib. 2. Cap. 1.

Homage.	The nature of this service ; <i>scil.</i> it is the most honourable a tenant can do to his lord, 85.		
	The persons which should	Make it. They must have a greater estate than for life ; for no tenant for life can take or do homage ; therefore one entitled to be tenant <i>per</i> curtesy during the life of his wife shall do homage ; after her death not, 90.	
		Take it ; none but the lord himself, 92.	
	The perform- ance of it ; where note	The manner how it must be done. viz. the tenant be bare-headed, kneel on both knees, and hold both his hands between the hands of his lord, and shall say, if he hold	Of him only, " I become your man," &c. unless he be a man of religion, or some sole, and they shall leave out these words, 85, 86, 87.
Of more lords, he shall say in the end, " saving my faith which I owe unto my sovereign lord the king and other lords," &c. 89.			
	The service itself.	The times how often it shall be done, viz.	One tender, if the lord refuse, excuseth the tenant of being distrained for it, until his lord demand it again, and it be denied, 150, 151.
			Once doing of it excuseth him for his life against any that comes in by descent ; but not against him that recovers by any title, 148, 149.

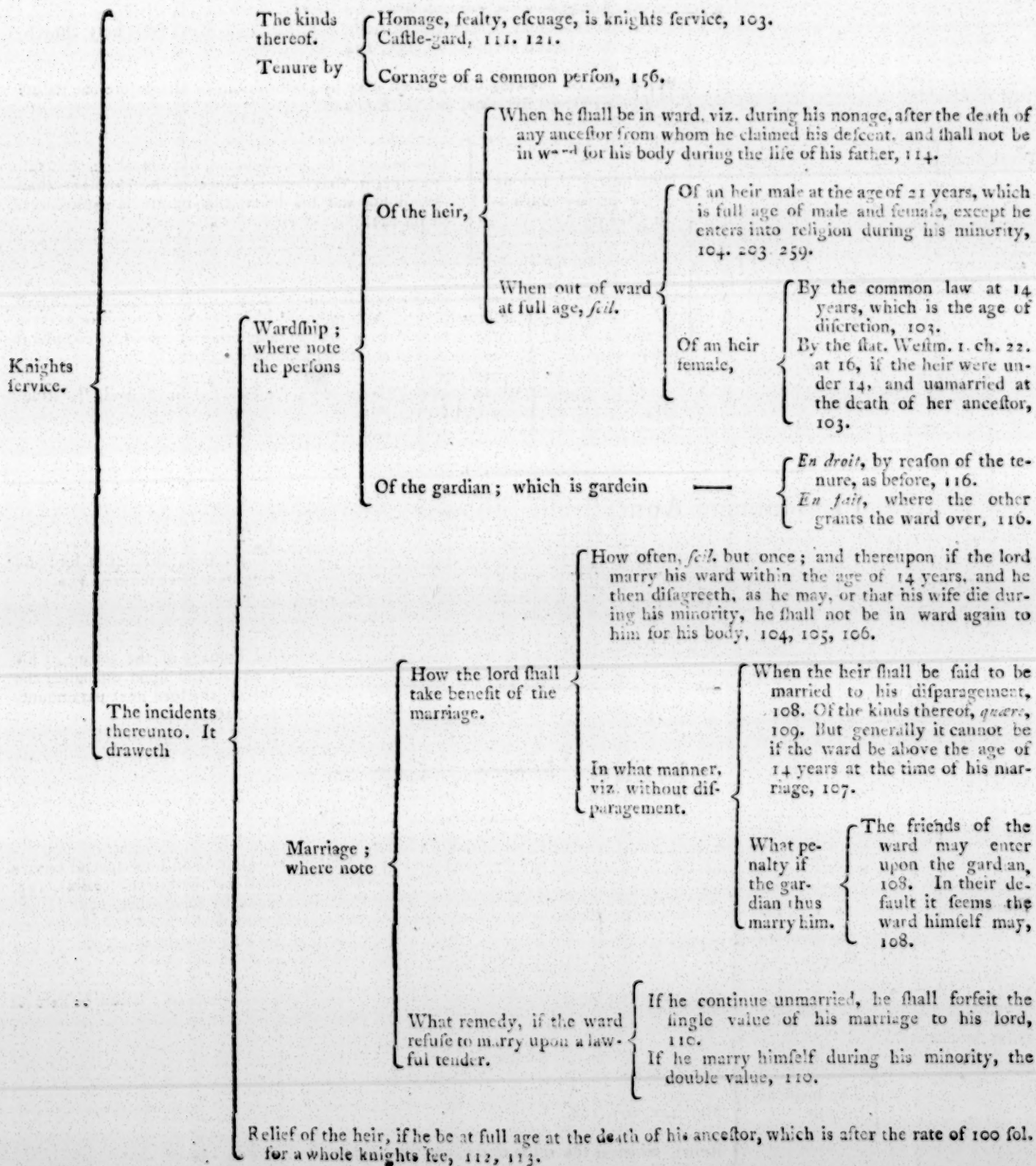
Fealty. Lib. 2. Cap. 2.

Fealty.	{	What manner of service this is.	{	Fealty, in English, is as much as <i>fidelitas</i> in Latin, 91.	
		It is incident to all tenures but frankalmoigne, 131.			
	{	How long it is to be performed ; where note	{	The persons which should	Make it ; <i>scil.</i> for life or years, but not tenant at will, 93. 132.
					Take it ; the steward or bailiff of the lord's court, 92.
The forms of it, 88. 91. 94.					

Efcuage. Lib. 2. Cap. 3.



Knights Service. Lib. 2. Cap. 4.



Socage. Lib. 2. Cap. 5.

Socage.	The tenure itself; where note	The divers sorts thereof.	Where one holdeth lands by certain service for all manner of services, as homage and rent, or homage and fealty, or homage, fealty, and rent, 117. By fealty only, if the lord refuse no other service, 118. 130. 131. By escuage certain, 120. to pay a sum certain for guarding a castle, 121. and generally, by any service which is not knights service, 118.
		The denomination <i>socagium</i> , or <i>servitia socæ</i> ; the name whereof remaineth, although for the most part the manner of the service by mutual consent be altered into an annual rent, 119.	
	The incidents appertaining	To the lord of whom the lands are holden, relief after the death of such a tenant: where note	How much must be paid for relief, <i>scil.</i> the value of a whole year's rent to the lord, 126. 128. When to be paid, <i>scil.</i> immediately, or else the lord may distrain for it, unless the services be of that quality that they cannot be gotten but at some certain time of the year, 127. 129.
		To the gardian in socage.	Ward: for if such tenant die, his heirs within the age of 14 years, his <i>prochein amy</i> , to whom the inheritance cannot come shall always have such heir in ward until he be 14 years of age; but he must account for the profit, the reasonable expences deducted, and so must any other that taketh upon him as gardian; but account will not lie against executors but for the profits after the age of 14 years. <i>Quære</i> , whether it shall be brought against him for profits after 14 as gardian or bailiff, 123. 124. 125. Marriage doth not of right belong to the gardian; but if he do marry his ward, he must account for it, 123.

Frankalmoigne. Lib. 2. Cap. 6.

Frankalmoigne.	The commencement of this tenure.	To whom lands may be so given to be holden, <i>scil.</i> to a man of the holy church, or to be a special corporation, 133. 134. By whom. By the king only, unless it be by prescription, or else before the statute of <i>quia emptores terrarum</i> , an. 18. Ed. 140.	
		How long, <i>scil.</i> so long as the privy continueth; for if	The tenancy to be alienated by tenant in frankalmoigne, or that the reversion cometh to another than the donor and his heirs, this tenure is determined, 139. 141.
	The continuance thereof.	In what manner; where note	What service the tenant must do, <i>scil.</i> no terrene service, or other service certain, for then he is called tenant by divine service, 137; but in conscience he ought to make prayers for, &c. but is not compellable otherwise than by complaint to the ordinary visitor, 135. 136. 138. What advantage this tenure hath, <i>scil.</i> it draweth to it acquittal, 142.

Homage Auncestell. Lib. 2. Cap. 7.

Homage Auncestell.	When it shall be called homage auncestell, <i>scil.</i> when it hath continued in the lineal descent of lord and tenant without alienation, 143. 147. and it may be either in socage or knights service tenure, 152.	
	How it differeth from other services, <i>scil.</i> in	Acquittal, 144. Warranty, if the lord then being hath received homage of the tenant or his ancestors, else may the lord disclaim, 143. 145. And upon disclaimer the feignory is extinct, and the tenant shall hold of the lord next paramount, therefore an abbot or prior may not disclaime, 146.

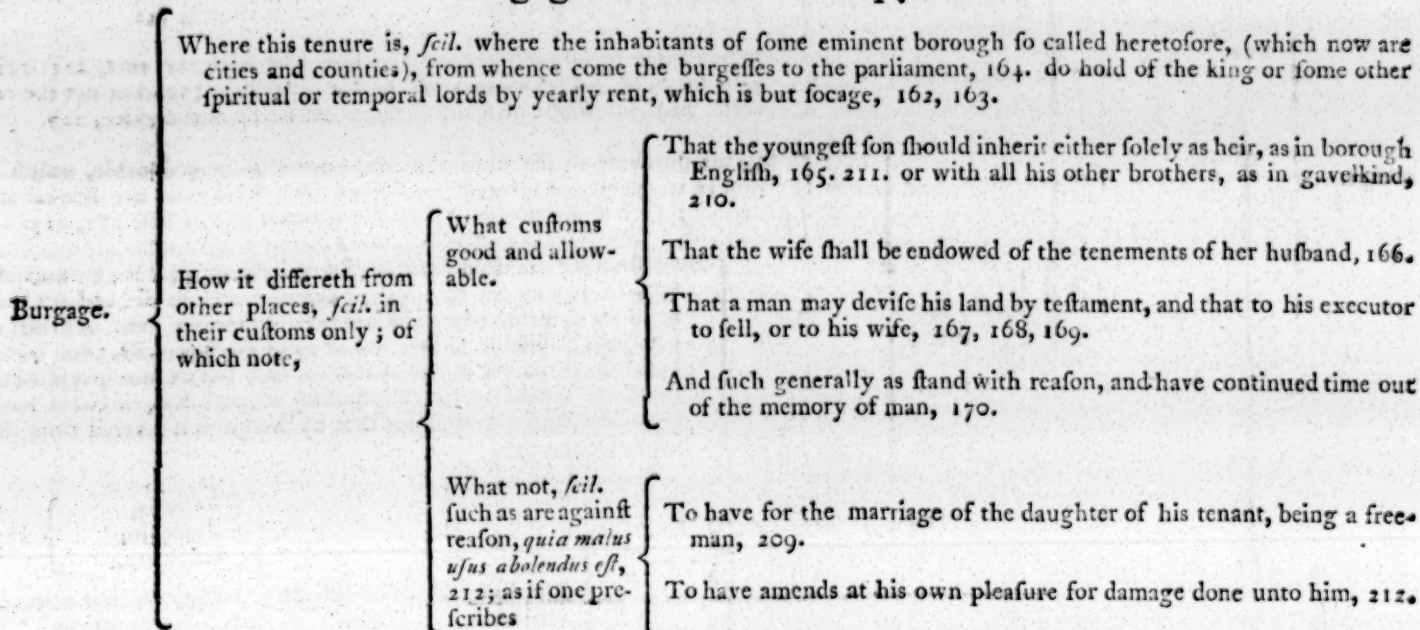
Grand Serjeantie. Lib. 2. Cap. 8.

Grand Serjeantie.	The service wherein.	The several kinds thereof.	When one holdeth of the king to do some special service to the king (for the most part within the realm), 155. in proper person, 153. or by some other, 157. When one holdeth of the king by cornage, 156.
		The nature of it.	Called grand serjeanty, <i>quasi magnum servitium</i> : it can be held of none but the king, 154. 156.
	The incidents thereto.	Ward, 158.	
		Marriage, 107, 108. Relief, which is the value of the land for a year, <i>ultra reprises</i> , 154.	

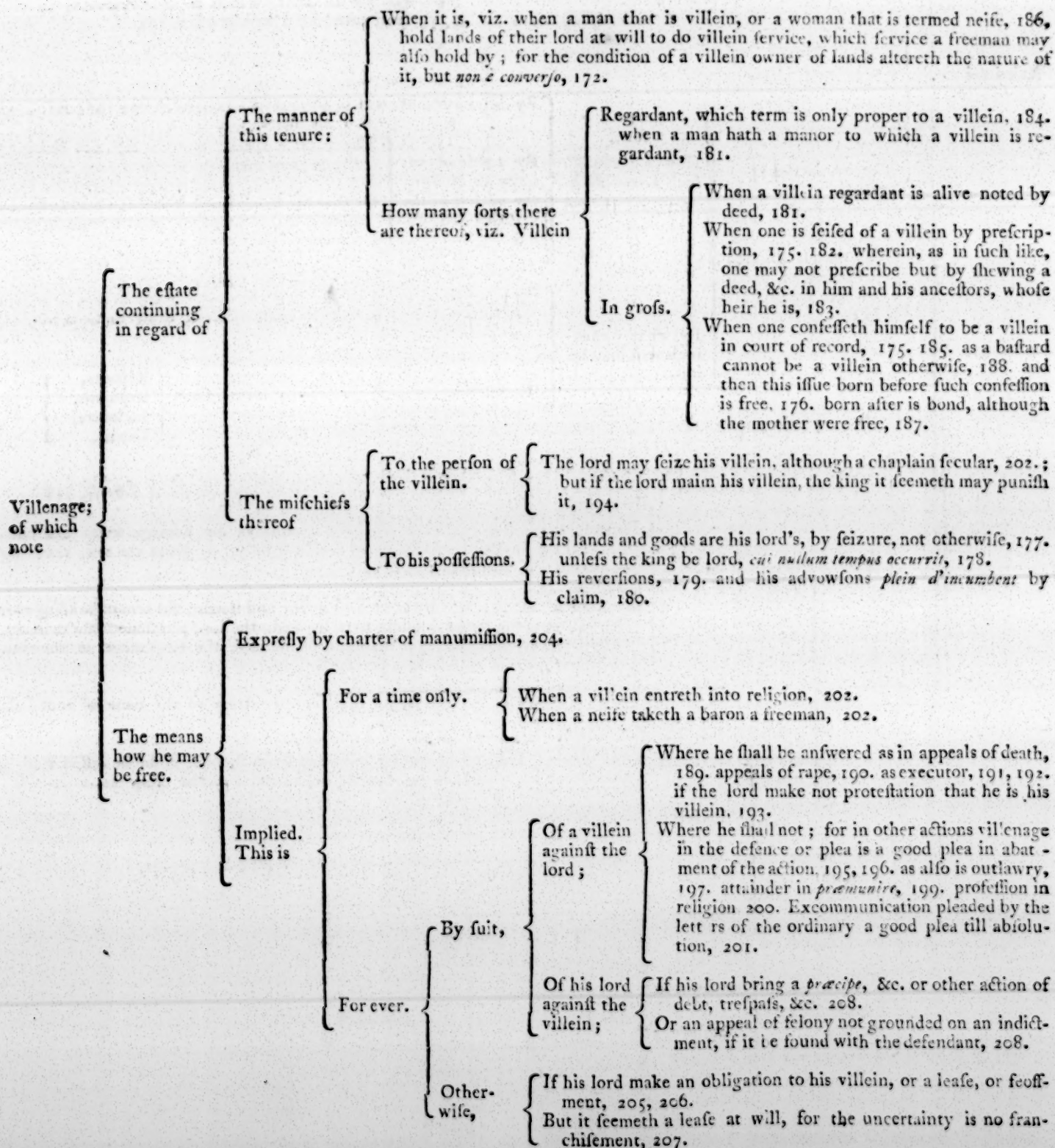
Petit Serjeantie. Lib. 2. Cap. 9.

This is to render some small thing touching the war, as bow, arrow, &c. 159. which although it be focage in effect, 160, yet it can be held of none but of the king, 161.

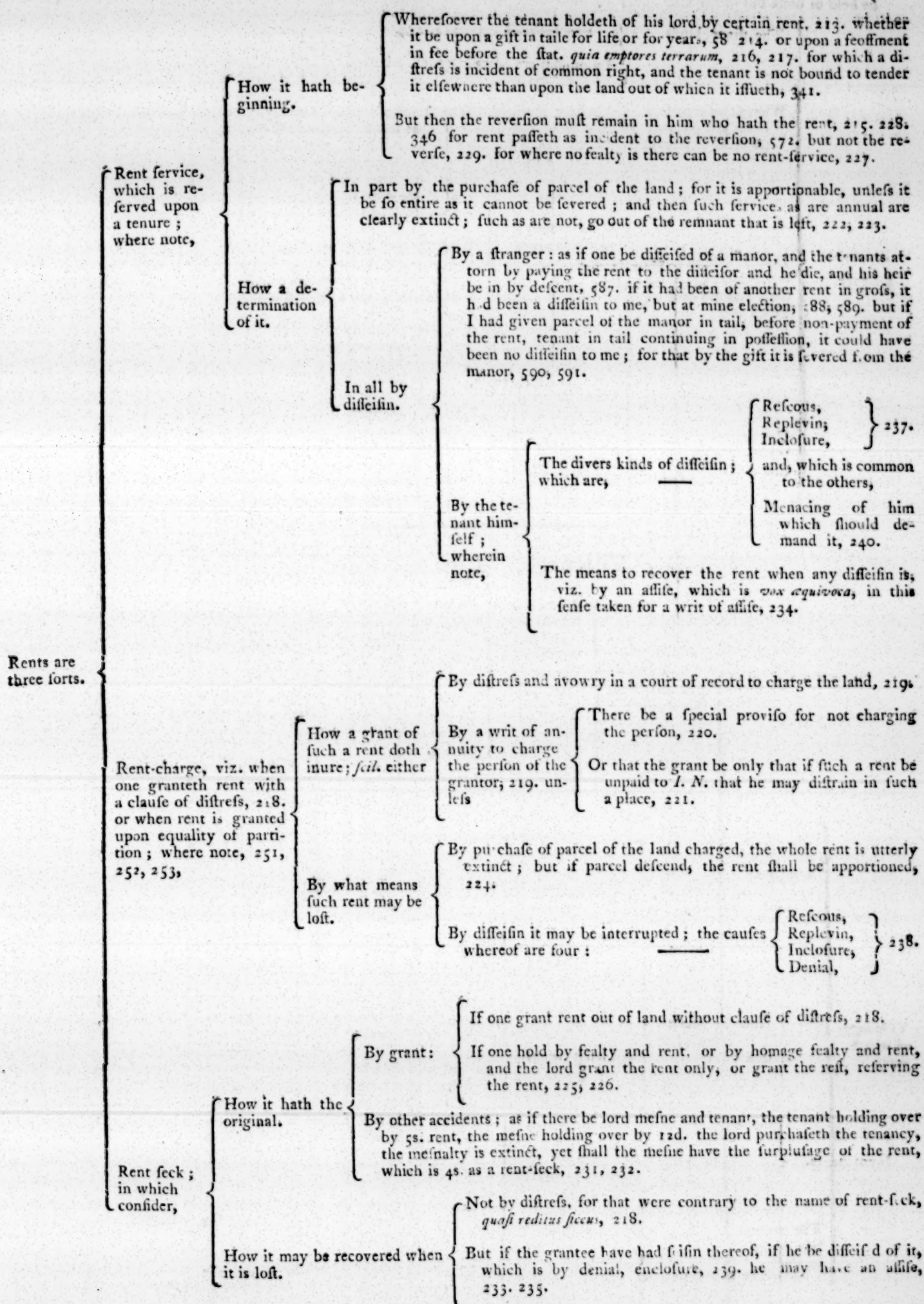
Burgage. Lib. 2. Cap. 10.



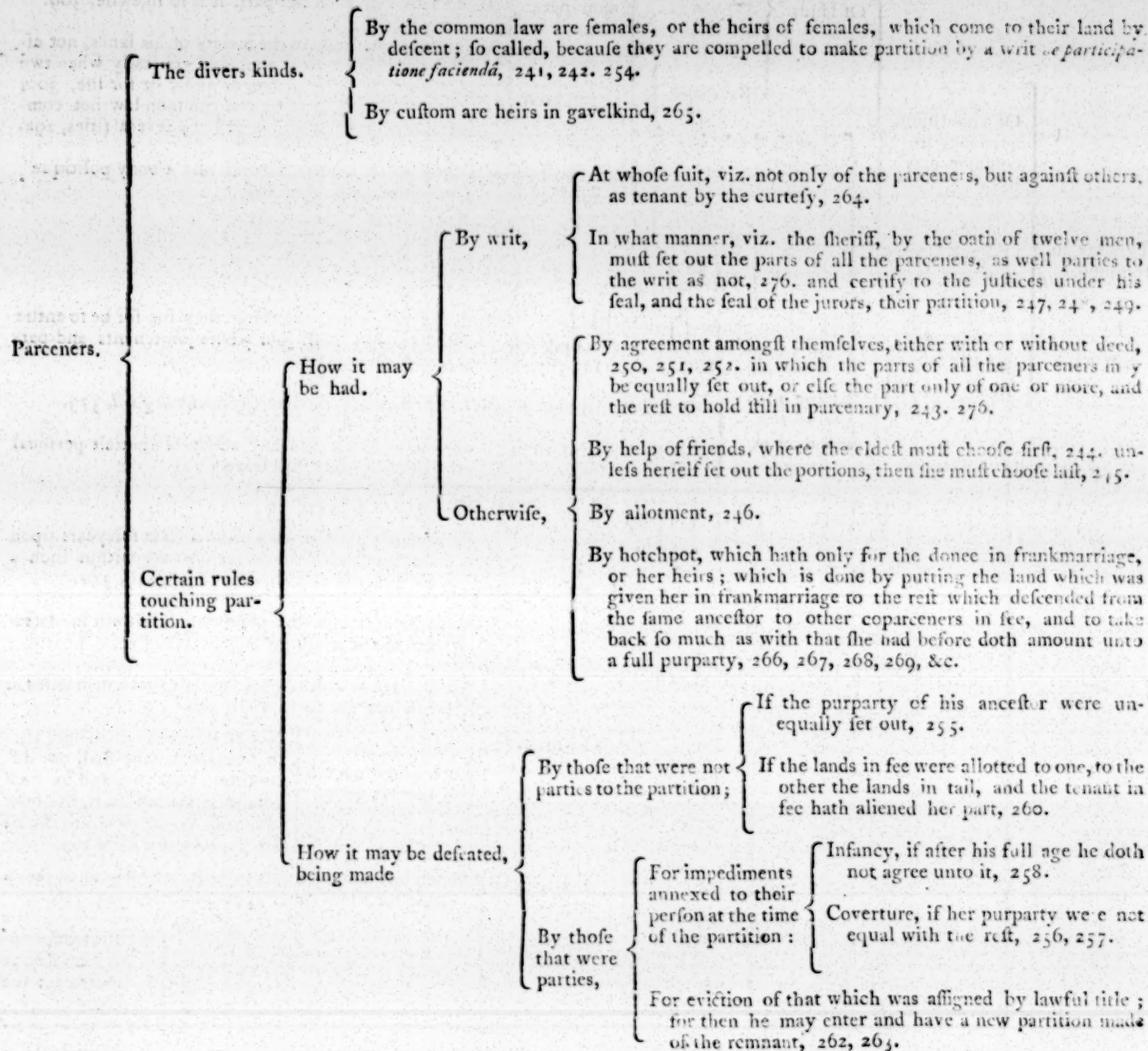
Villinage. Lib. 2. Cap. 11.



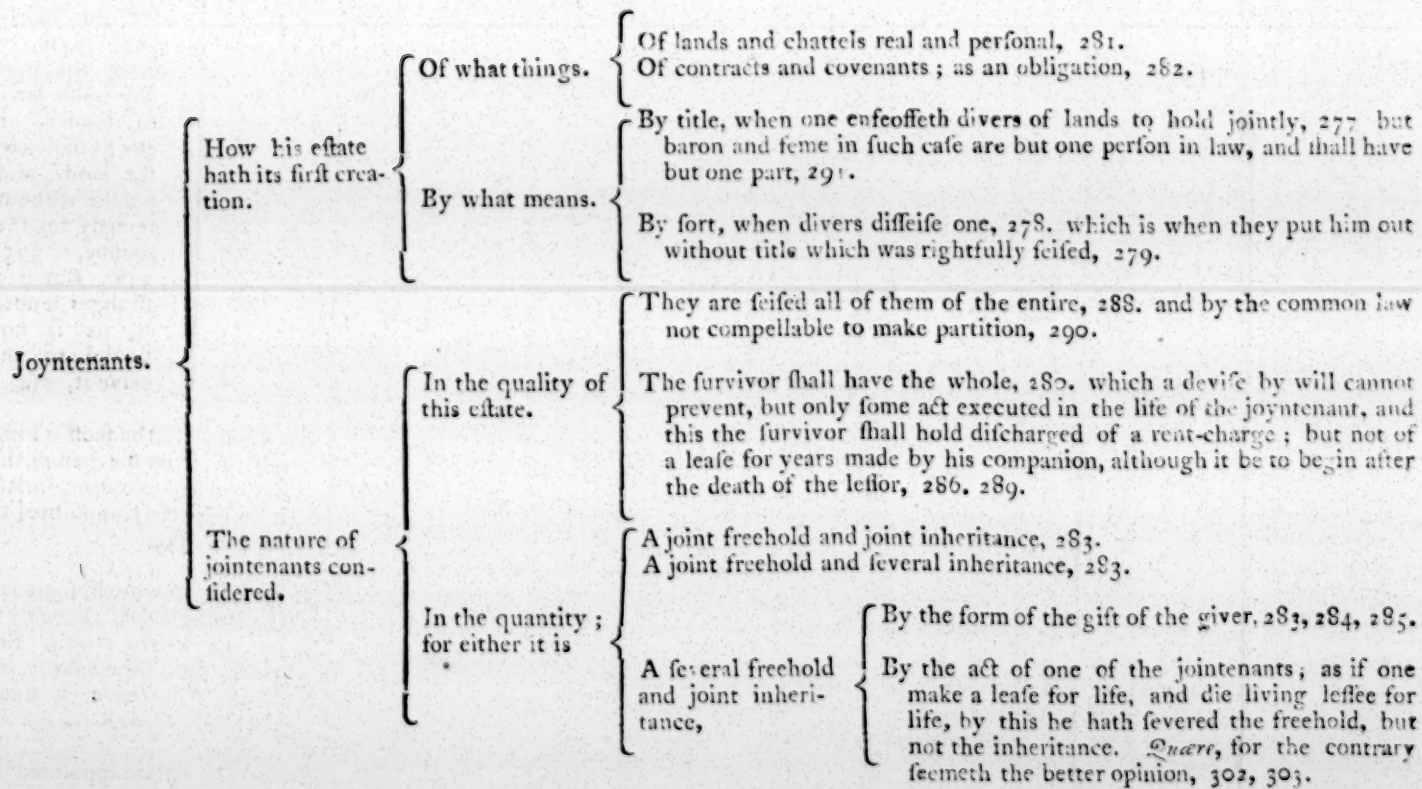
Rents. Lib. 2. Cap. 12.



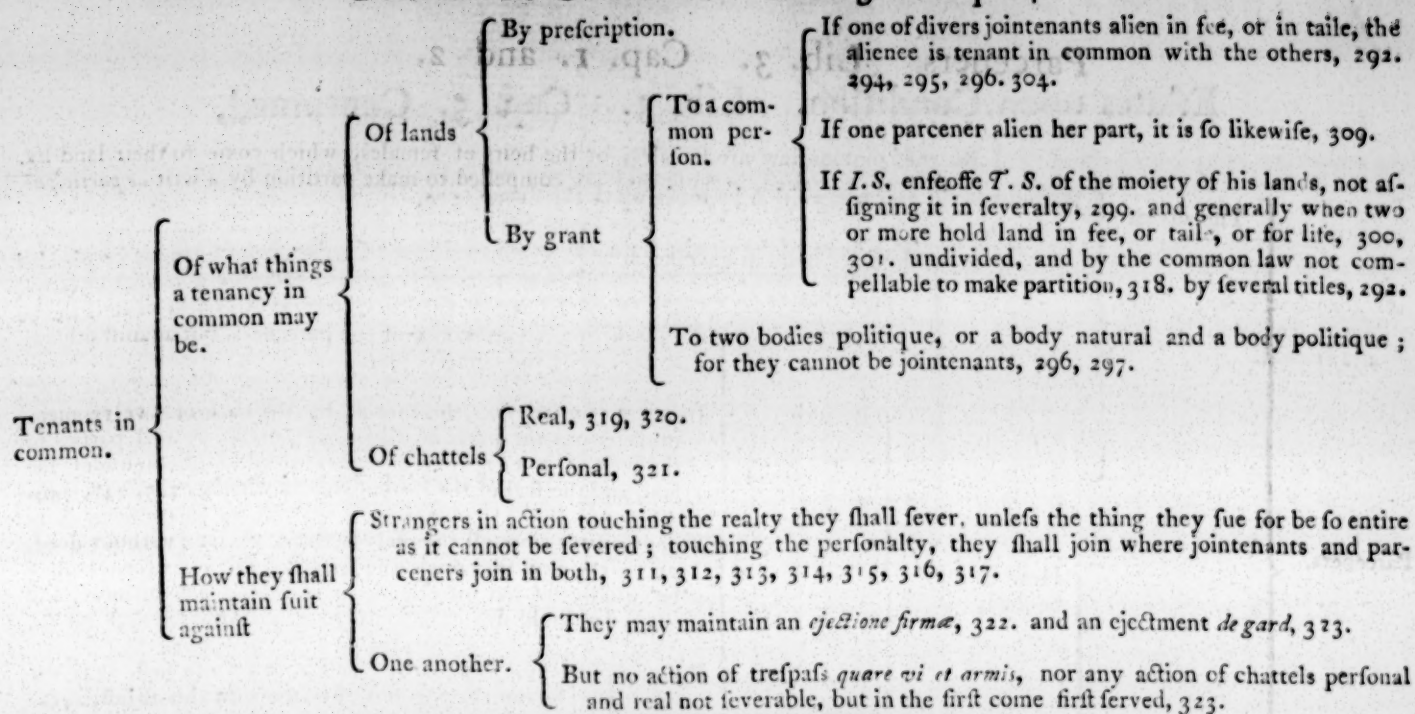
Parceners. Lib. 3. Cap. 1. and 2.



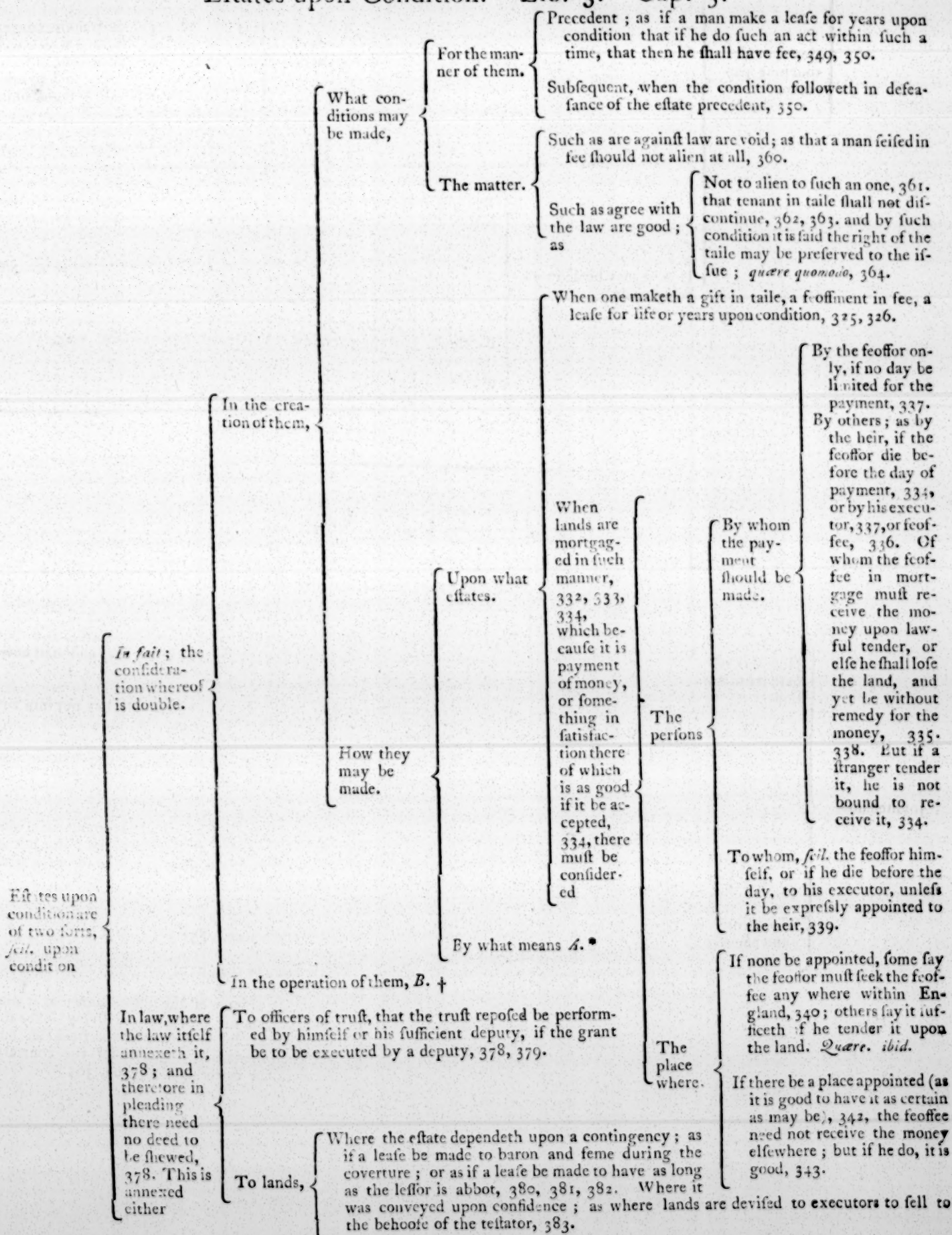
Joyntenants. Lib. 3. Cap. 3.



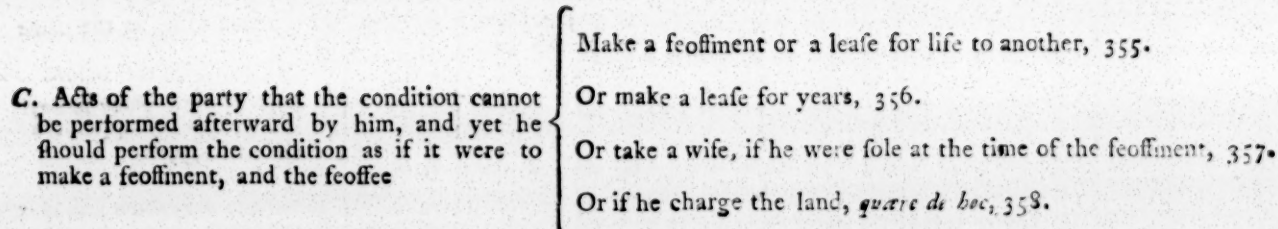
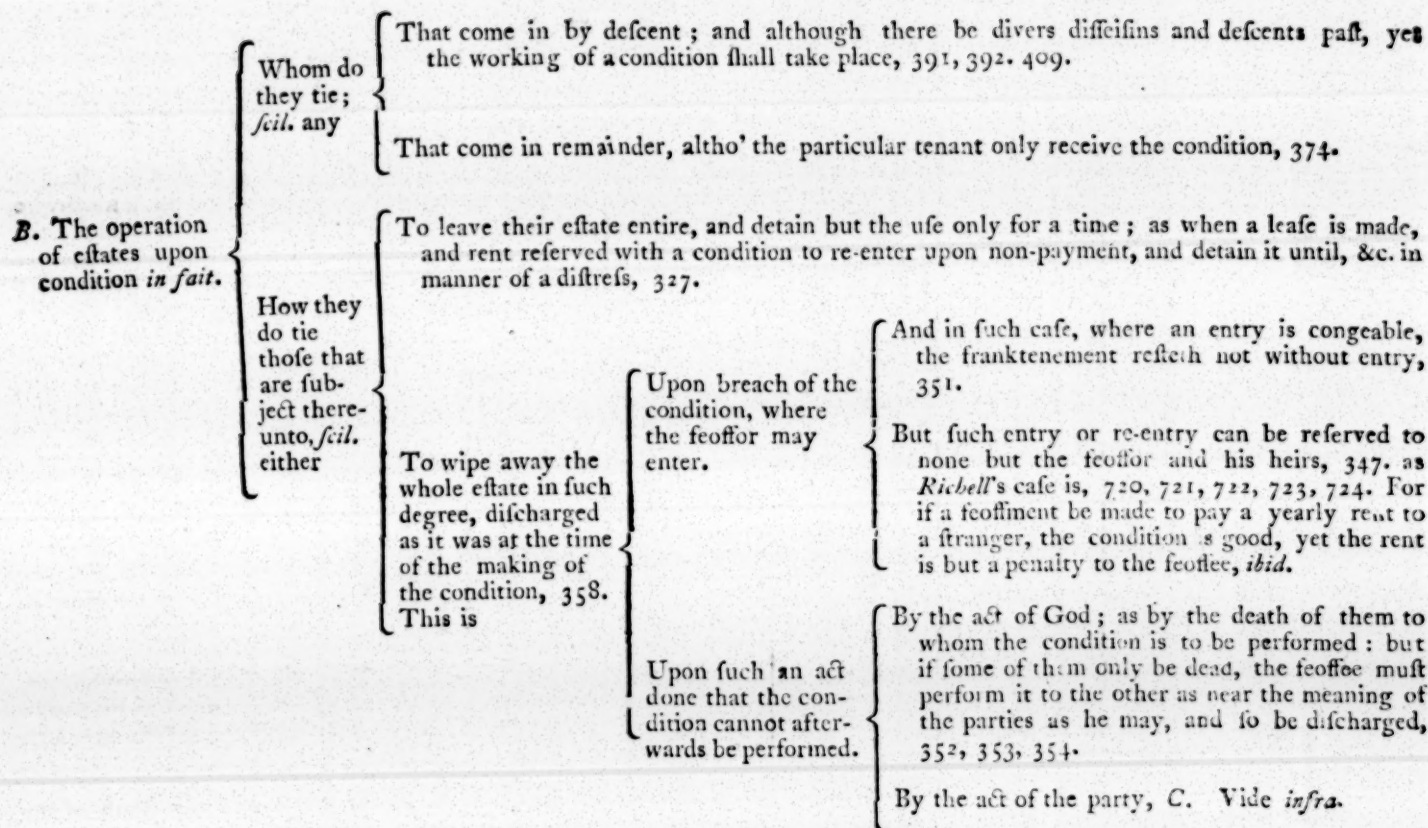
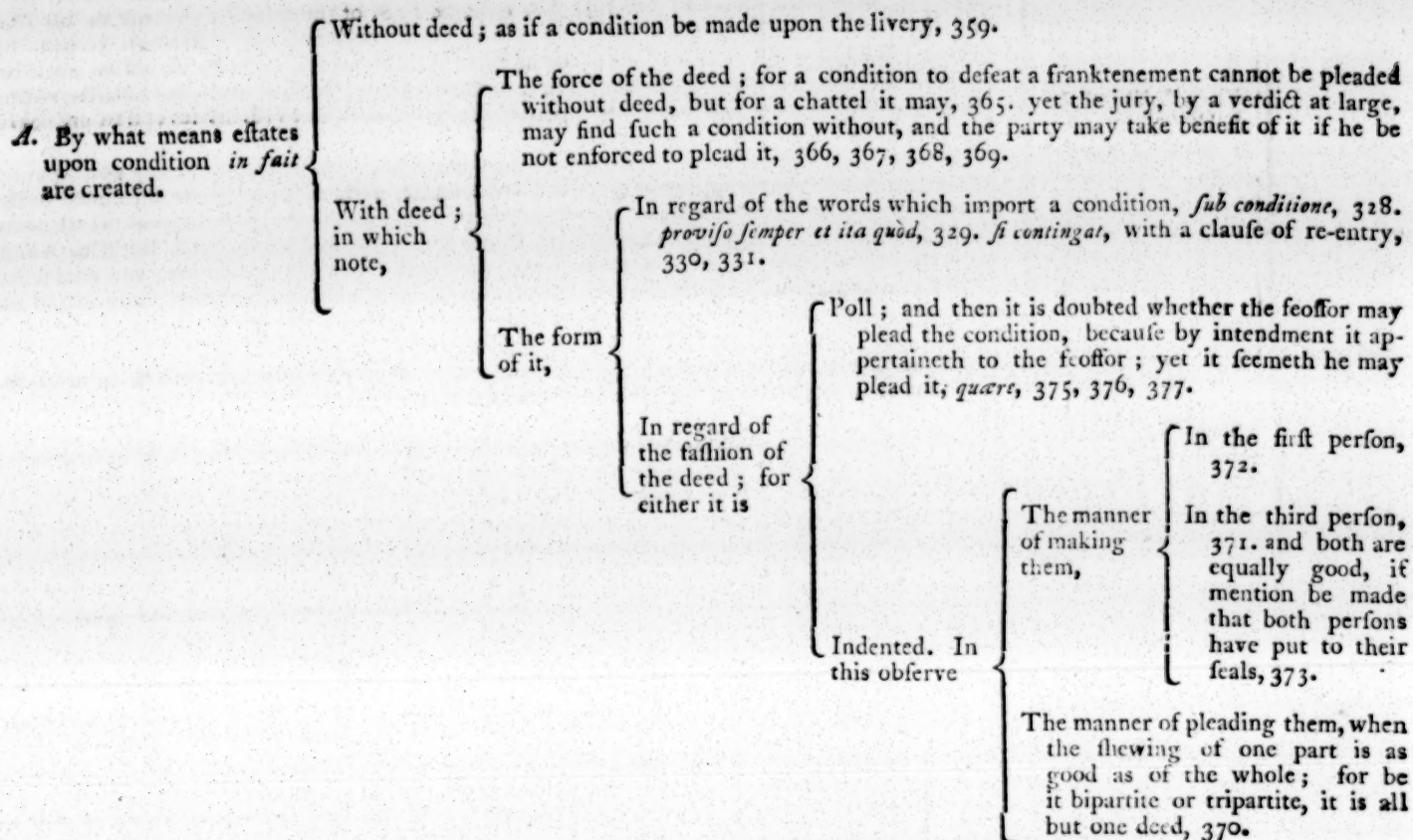
Tenants in Common. Lib. 3. Cap. 4.



Estates upon Condition. Lib. 3. Cap. 5.

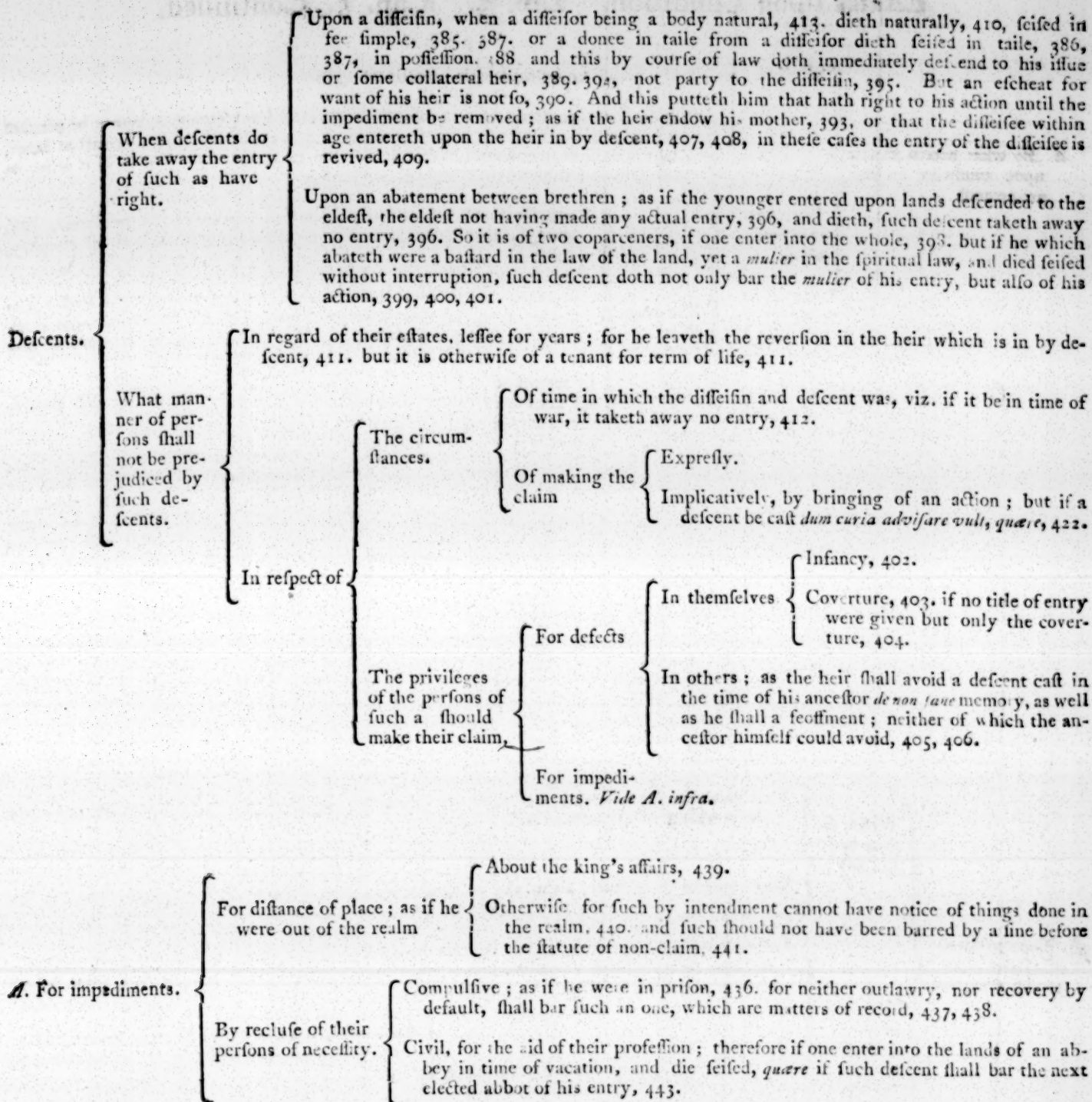


Estates upon Condition. Lib. 3. Cap. 5. Continued.

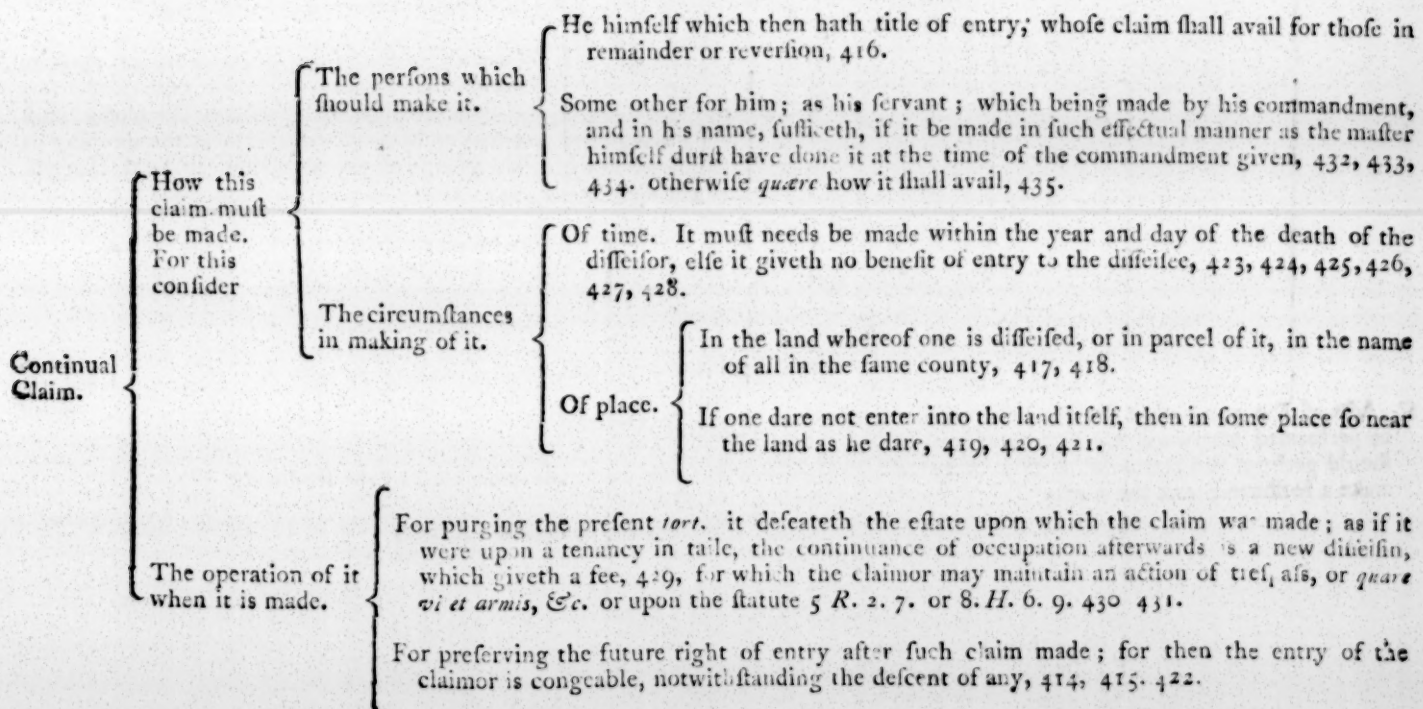


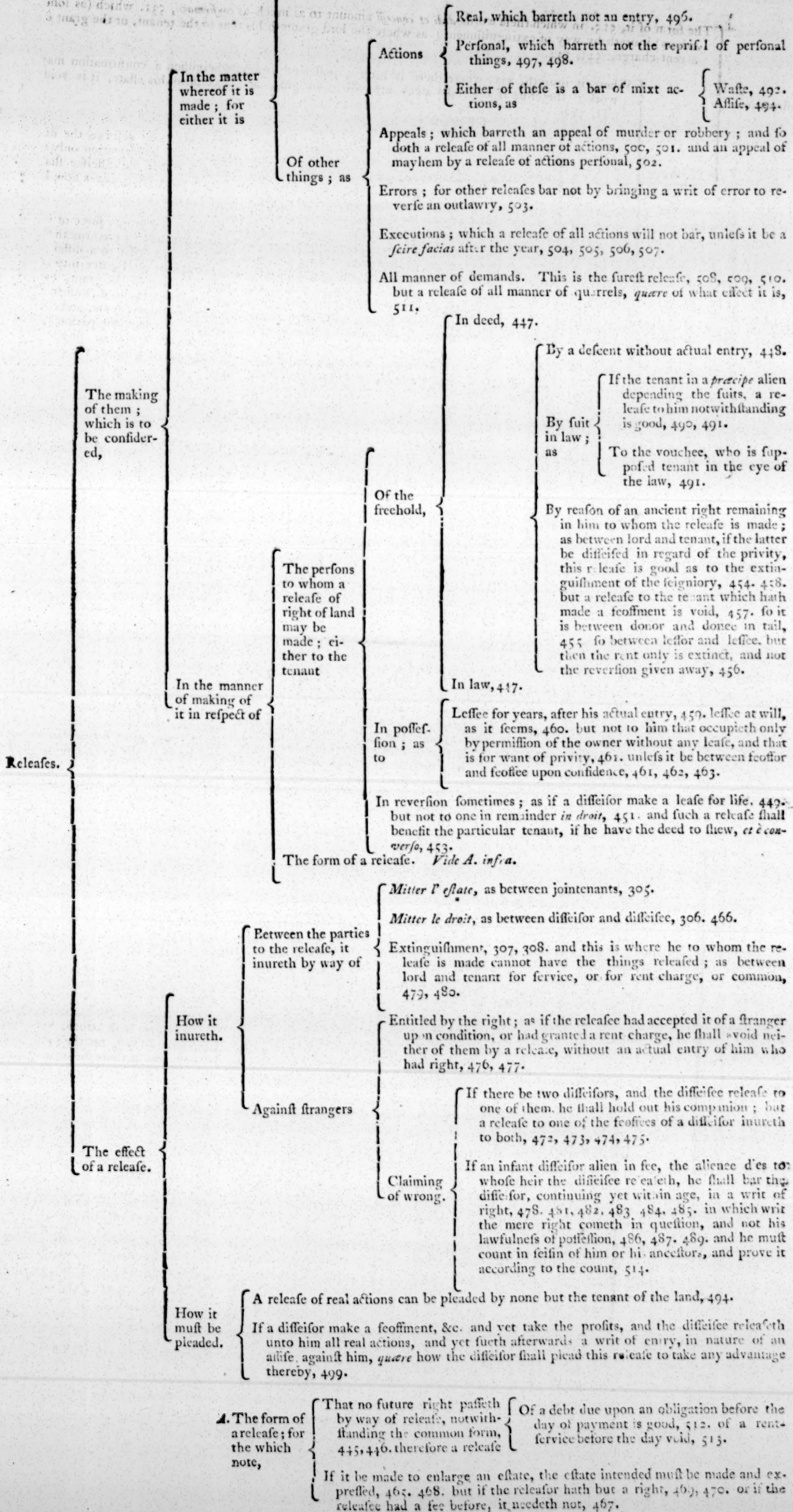
Estates upon Condition. Lib. 3. Cap. 6. and 7. Continued.

Descents. Cap. 6.

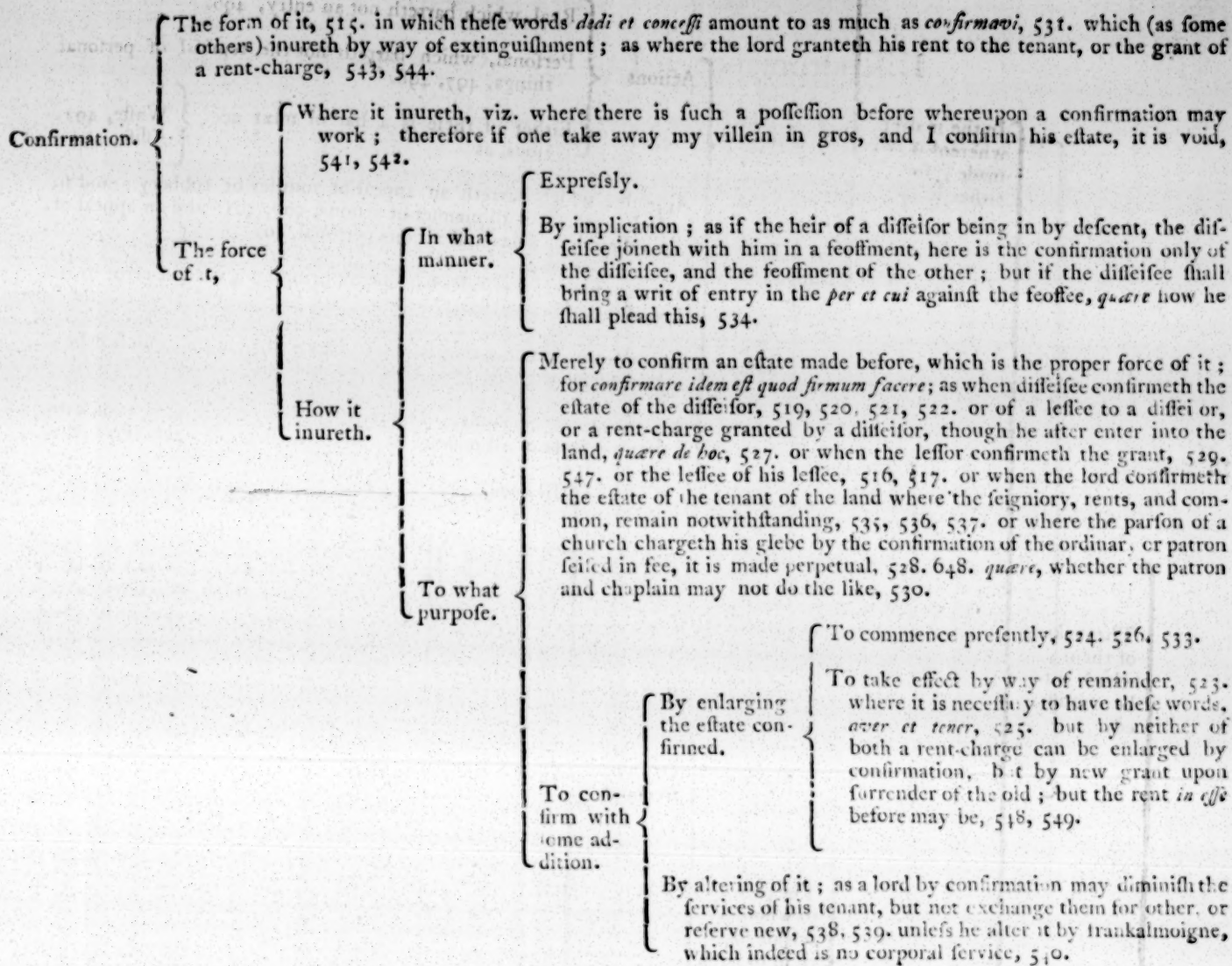


Continual Claim. Cap. 7.

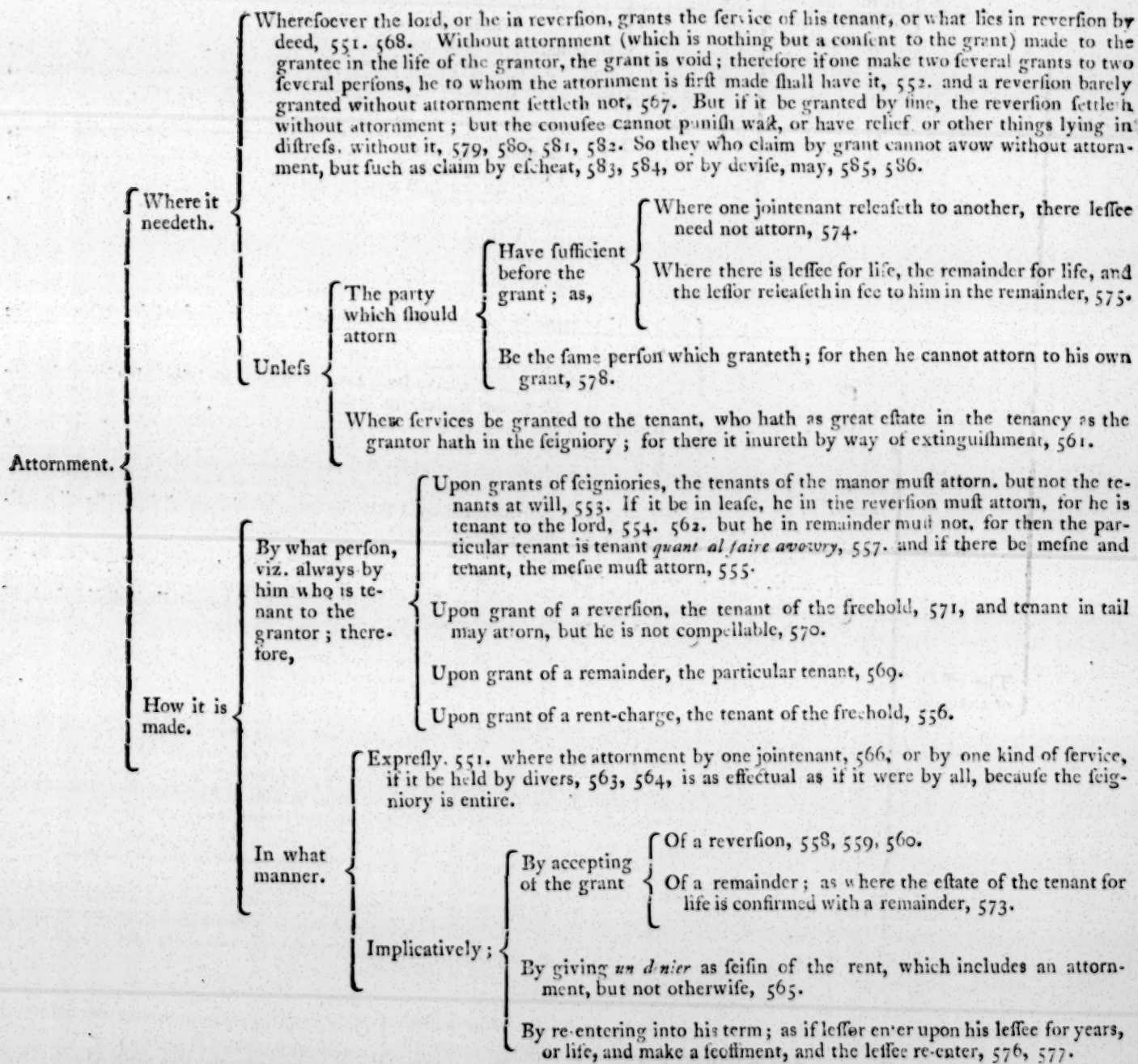




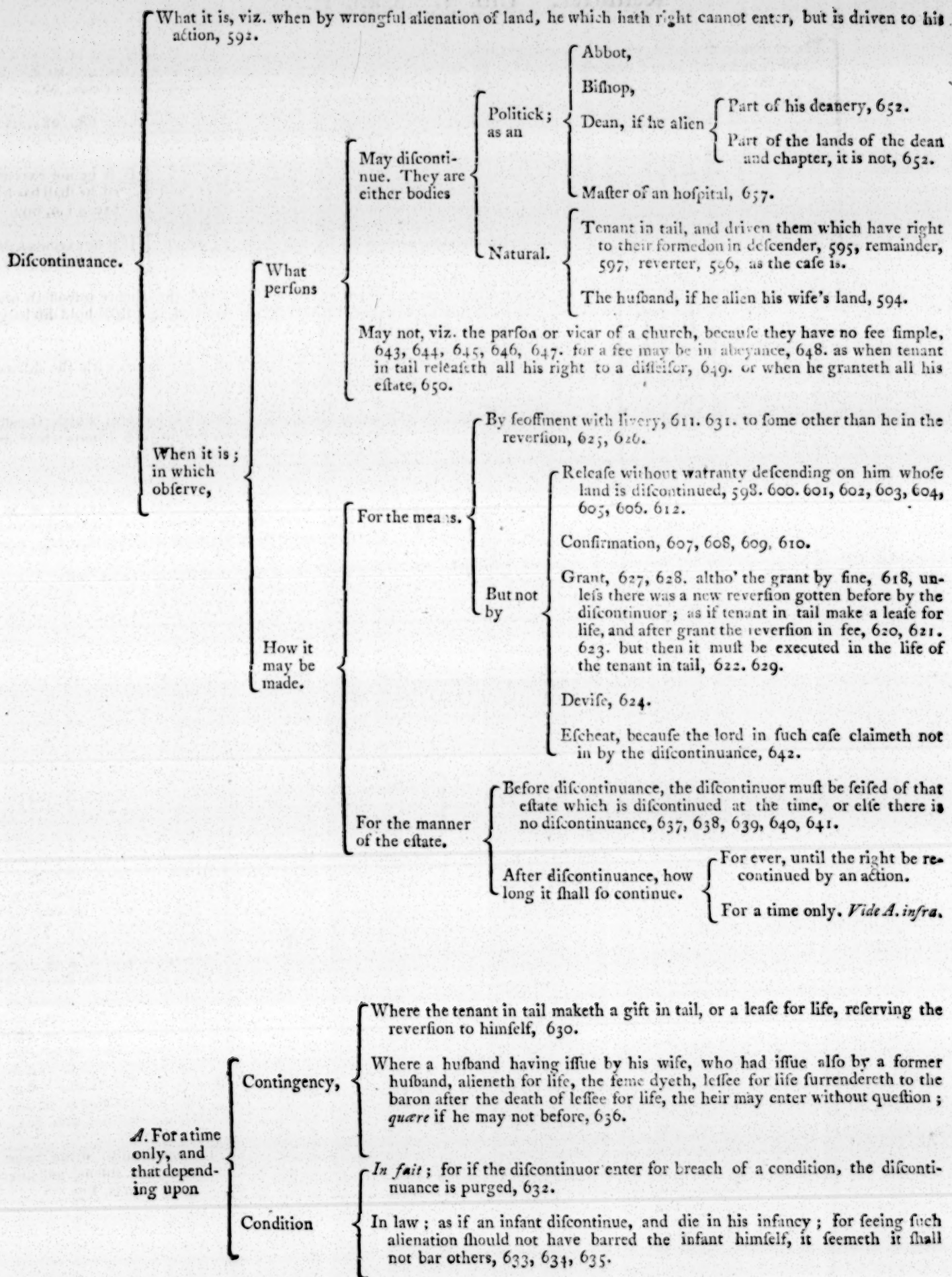
Confirmation. Lib. 3. Cap. 9.



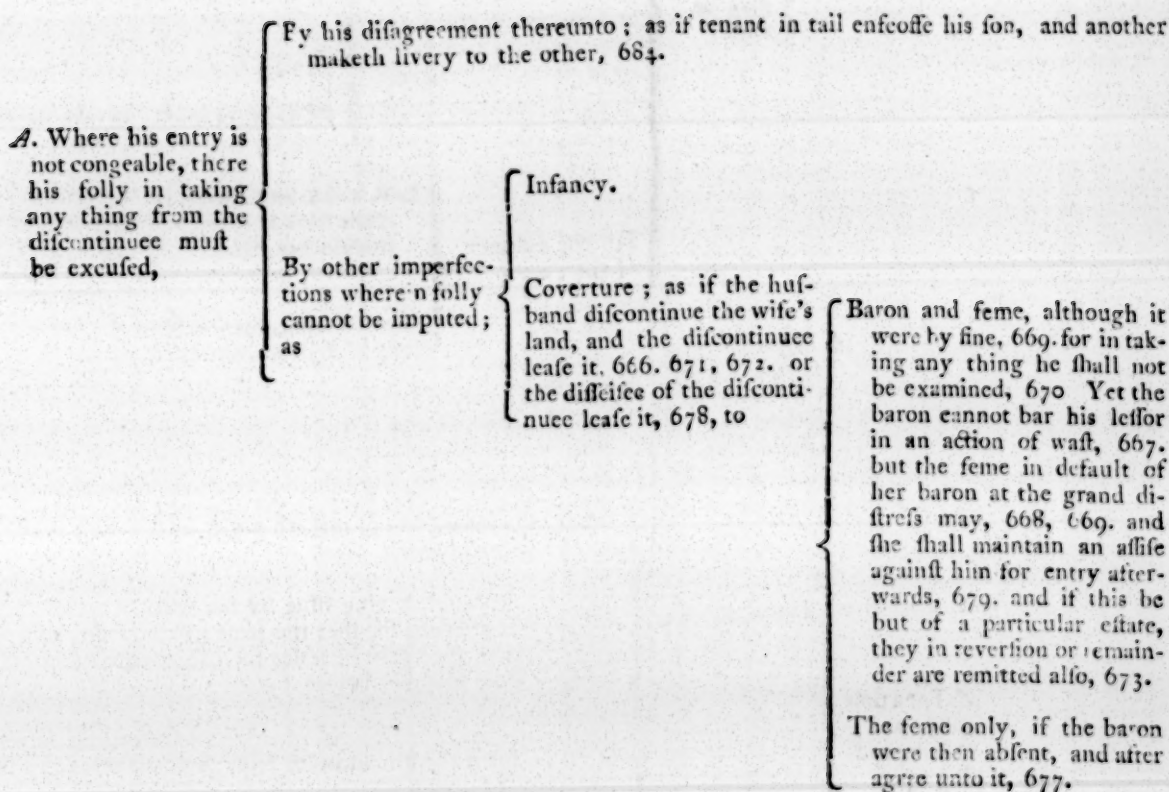
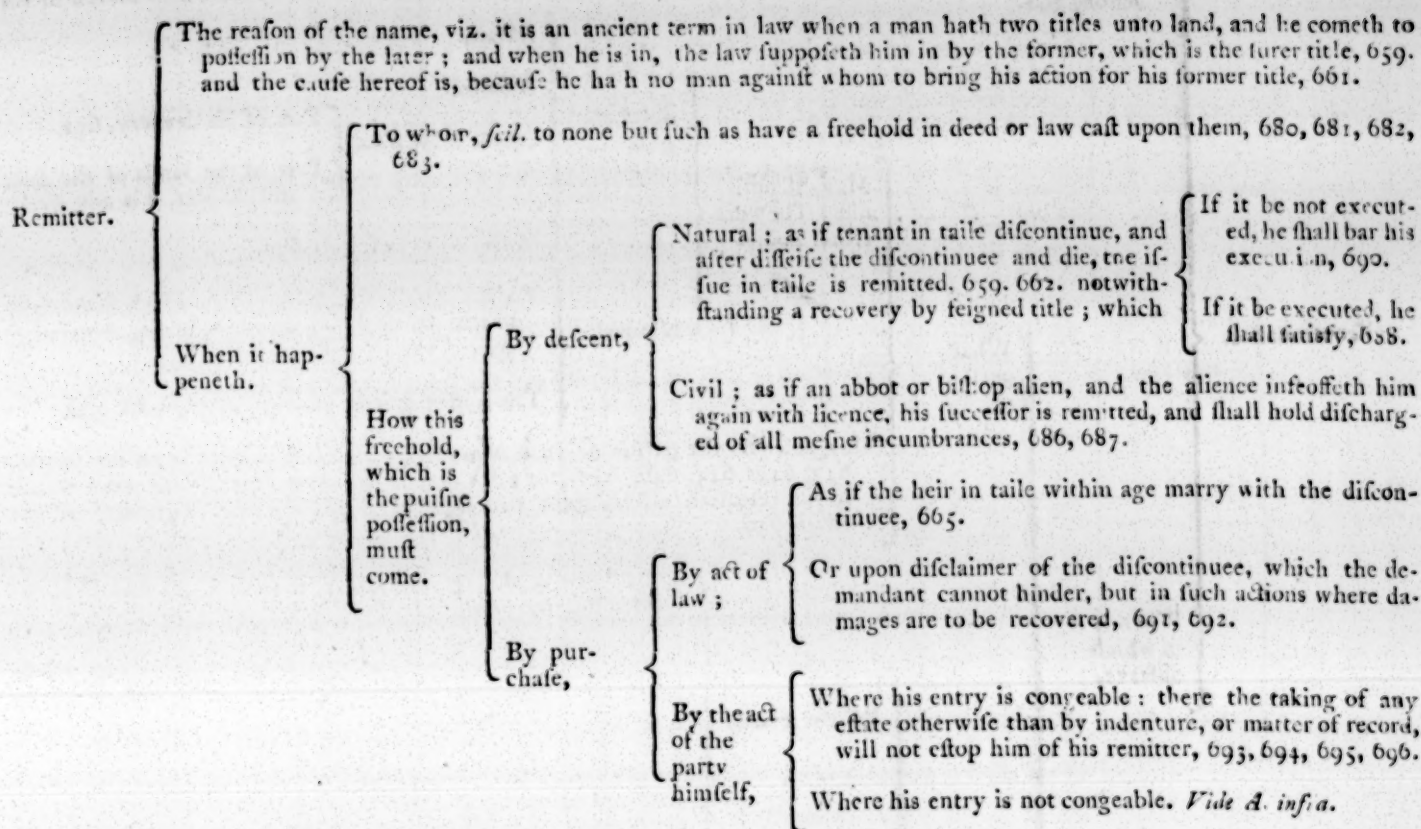
Attornment. Lib. 3. Cap. 10.



Discontinuance. Lib. 3. Cap. 11.



Remitter. Lib. 3. Cap. 12.



Warranty. Lib. 3. Cap. 13.

- Warranty. {
- The several kinds of it; which are,
 - Lineal. where a man maketh a feoffment with warranty, and this descends to his son: the cause of which name is not for the lineal descent of it, but because the land should have lineally descended if such warranty had not been, 703. 706. 715. The like is of the feoffment of the mother with warranty, 713, 714.
 - Collateral. This is where he that maketh the warranty is collateral to the title; and he upon whom the warranty descendeth cannot convey the same land from the warranty, 705. 717; as
 - If the father disseise the son, and after make a feoffment with warranty, 704.
 - If a man be disseised of lands in fee, and have issue two sons, the youngest releaseth with warranty, this is collateral to the eldest, 707, 708.
 - If the disseisee were of lands in taile, the warranty of the uncle is collateral, 719. And so if a man have three sons, and entail his land to the eldest, with remainder to the second, &c. and the eldest doth discontinue with warranty, 716. 719. As it is of sons, so it is of daughters, 710.
 - Commencing by disseisin; as if the father, &c. being lessee for years, or at will, of his sons, make a feoffment with warranty, 698. or if he be jointenant with his son, and make a feoffment of all the warranty, 700. So if guardian in socage or chivalry make feoffment, 699. So if a disseisee immediately make a feoffment over with warranty, 702. or if one make a feoffment of the house of A.B. with warranty to barretors of the country, for fear of whom A. B. departeth the house, 701.
 - The quality of it.
 - What words will make a warranty, viz. *Warrantizo* only, 733.
 - What effect a warranty is of, viz. to bar or rebutt, &c. *Vide A. infra.*

A. What effect a warranty is of, viz. to bar or rebutt, &c.; where note,

- What warranties do bar, viz.
 - Lineal, for lands in fee, but not in fee tail without affets, 712.
 - Collateral barreth both, but in cases especially provided, 712. as by the Stat. of *Gloucester* the warranty of the tenant by the curtesy barreth not without affets, although it be by fine levied by the husband only, 724. 728, 729, 730, 731, 732. But tenant in dower or for life are not within the statute's compass, 725. yet if such warranty descend upon an infant, he shall not be barred, 726.
 - Commencing by disseisin doth never bar, 697.
- Whom they bar, viz. none but those upon whom they do descend; therefore they must needs attach in the ancestor, and the warranty by devise barreth not, 734. and warranty doth descend always upon the heir, therefore it never descends upon the brother of the half-blood, 717. nor where the blood is corrupted, 745. 746, 747, at the common law; not by custom, as borough English, or gavelkind, 718. 735, 736.
- How long they bar, viz. until
 - The estate whereunto they be annexed be
 - At an end, 738.
 - Defeated, 741, 742, 743, 744.
 - The warranty be released, and he on whom the warranty doth descend hath the release to shew, 748.

Services by which all Lands and Tenements are held.

Services by which all lands and tenements are held, are either

Free; which are called tenures in socage; and are

Spiritual.

In frankalmoigne; which is, where a religious house or person having capacity to take the grant of lands holds by prescription, or by grant before 18 *h.d.* 1. of any common person and his heirs, or by grant of the last time of the king and his heirs in *eleemosynam liberam*, without any certain service limited.

Incidents:

No fealty, no distress.

Acquittal by the lord against all lords paramount, for the not doing of which a writ of *mesne lies*.

It may be changed into a simple tenancy by fealty,

When the lord of the land is not heir to the donor.

If the tenant grant over to a secular person.

For divine service; when a religious house or person enabled to take any lands in grant holds of his lord lands by any certain divine service to be done.

Incidents:

Fealty to the lord.

Distress by the lord.

Temporal.

Proper to the king, *petit serjeanty*; which is, where one holds of the king himself, to render at some certain time some piece of armour or other thing touching the war.

Fealty only; where one holds *per fidelitatem tantum*; and it is incident to

Every estate or term, so that it be certain.

Every service but tenure in frankalmoigne.

Every attornment and change of heir.

Homage; a service to be done to the lord himself by the tenant in fee simple, fee tail in his own or another's right once in his life, for which the lord cannot distrain after refusal, till the lord require it, and the tenant refuse. It is

Ordinary; which is to be done sometimes in the life of the tenant, upon legal recovery of lands held to the recoverer.

Common to the king with the subject; and are either,

Simple

Ancestrel; where the homage hath continued time out of memory of man in the blood of the lord and tenant.

Incidents:

Warranty; which binds the lord after the homage received to warranty.

Acquittal; to acquit the tenant of any service paramount.

Compound *.

Bond services are either

Knight's service; and it draws unto it ward, marriage, and relief.

Proper to the king only, grand serjeanty; as to carry his banner, or do some corporal and honourable service,

With escuage; which always draws to it homage, which draws to it fealty.

Without escuage

Common to the king with others:

Special castleguard, by the corporal guarding of a castle or other place, with or without escuage.

Common escuage, uncertain.

Villinage; which binds one and the issue of his body and estate to the will of another; and a villain is

Regardant to a manor.

In gros,

By the confession of the villain himself in a court of record, which binds him and his issue after.

By prescription; that the lord and his ancestors have been seised of the villain and his ancestors by grant of the lord who had him as regardant to his manor.

Every villain may be enfranchised

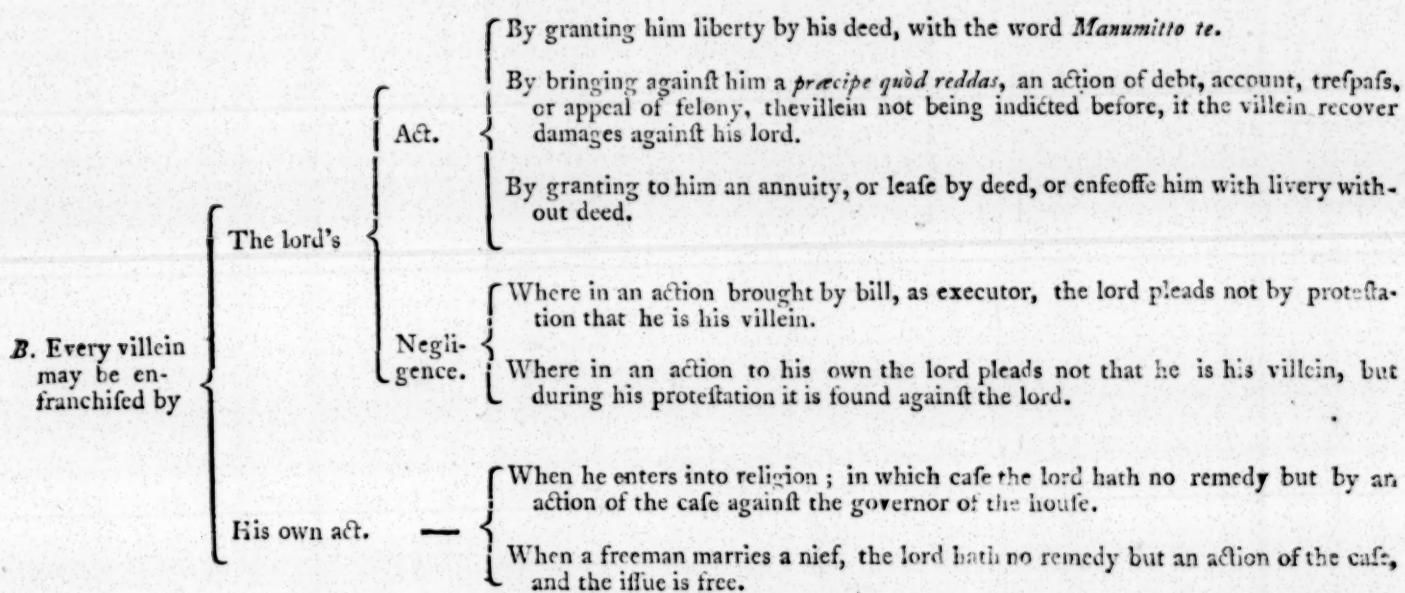
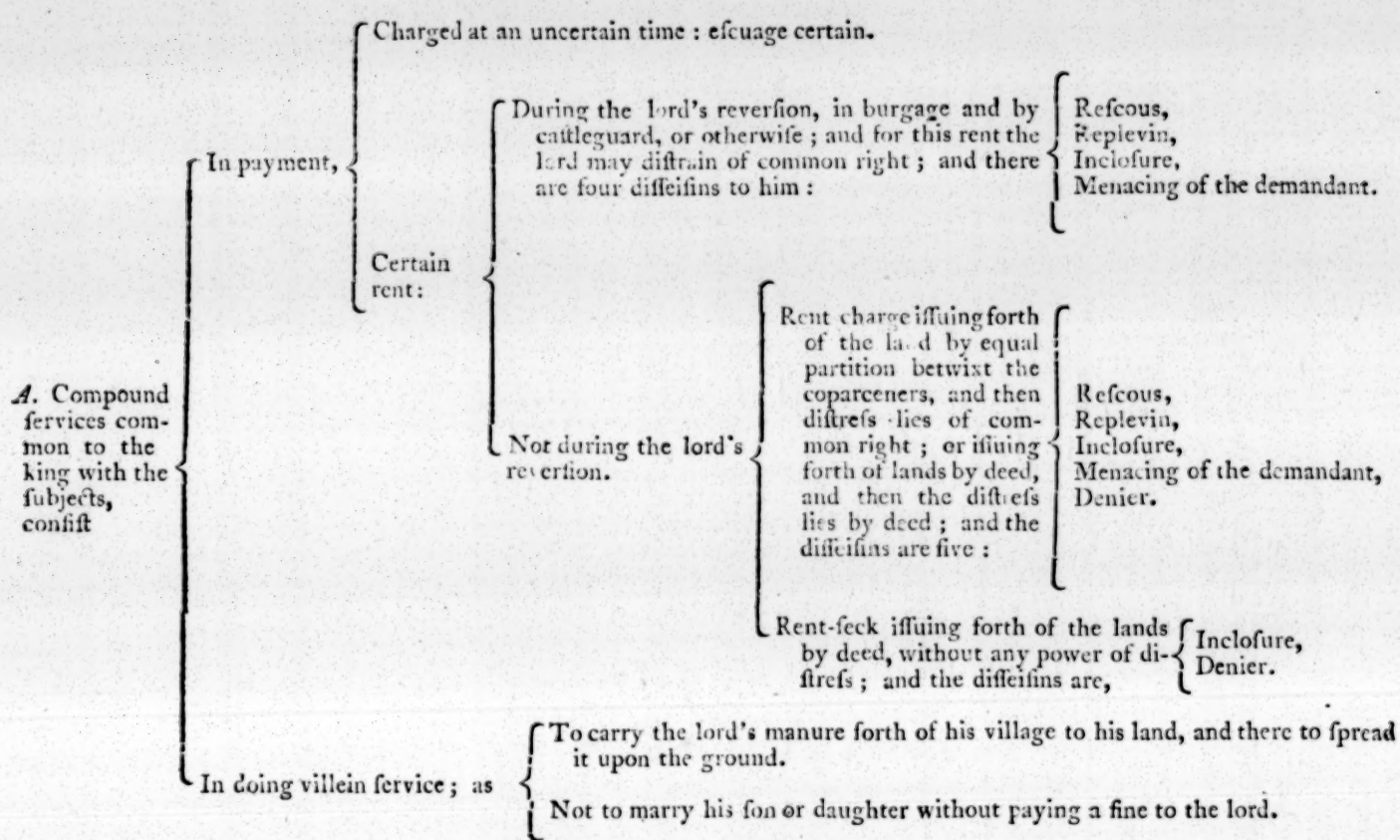
By his lord.

By himself †.

* For which *Vide A.* subsequent page.

† For which also *Vide B.* subsequent page.

Services by which all Lands and Tenements are held. Continued.



END OF THE ANALYSIS.

THE
F I R S T P A R T
OF THE
I N S T I T U T E S
OF THE
L A W S OF E N G L A N D.

Chap. I.

Fee simple.

Se^{ct}. I.

*T*enant en fee simple est celuy, que ad terres ou tenements a tener a luy et a ses beires a tous jours. Et est appel en Latin, feodum simplex, quia feodum idem est quod hæreditas (1), et simplex idem est quod legitimum vel purum. Et sic feodum simplex idem est quod hæreditas legitima, vel hæreditas pura. Car si home voile purchaser terres ou tenements en fee simple, il covient de aver ceux parolx en son purchase, A aver et tener a luy et a ses beires; car ceux parolx (ses beires) sont lestate denheritance. Car si home

*T*enant in fee simple is he, which hath lands or tenements to hold to him and his heires for ever. And it is called in Latin, *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawfull or pure. And so *feodum simplex* signifies a lawfull or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase, To have and to hold to him and to his heires; for these words (his heires) make the estate of inheritance. For if a man pur-

*T*enant, in Latin *tenens*, is derived of the verbe *teneo*, and hath in the law five significations. 1. It signifies the estate of the land, as when the tenant in a *præcipe* of land, pleads, *quod non tenet*, &c. this is as much as to say, that he hath not seisin of the freehold of the land in question. And in this sense doth our author take it in this place: and therefore he saith, tenant in fee simple is he which hath lands to hold to him and his heires. 2. It signifieth the tenure or the service whereby the lands and tenements be holden; and in this sense it is said in the writ of right, *quæ clamat tenere de te per liberum servitium*, &c. And in this signification he is called a tenant or holder; because all the lands and tenements in England, in the hands of subjects, are holden mediately or immediately of

Vide Se^{ct}. 85.

8. H. 7. 10. 18. E. 3. 35.

24. E. 3. 65. 66. 44. E. 3. 5.

48. E. 3. 9.

(2 Inst. 501.)

(4 Inst. 192.)

(1) Sir Thomas Smith and Dr. Cowell find fault with Littleton for this explanation of *fee*; but without the least reason. Though *fee*, in its general acceptation, signifies *land holden*, as distinguished from *land allodial*; yet in our law, it is most frequently used in a particular sense, to denote the *quantity* of estate in land, which is *always* the sense of the word when we say, that one is *tenant* or *seised* in *fee*. Therefore Littleton is not *merely* justified in writing, that *fee* is the same as inheritance; for if in describing who is *tenant in fee simple*, he had explained the word otherwise, he would have misled the student. The censure of Littleton would have been spared, if the difference between attempting to give the etymology of *fee* and its general sense, and professing only to explain a particular use of the word, had been attended to. See *Smith's Commonwealth of Engl.* b. 3. c. 10. *Cow. Interp.* verbum *Fee*, and *Wright's Ten.* 149. In this last book Littleton is well defended. Lord Coke's Comment on *fee* is very full to the same purpose. See *Post.* 1. b.

Lib. 1. Cap. 1. Of Fee simple. Sect. 1.

(12. Co. 9. Case of Stanneries.)

Mir. des Justic. c. 1. sect. 3.
Customs de Normandy. cap. 28.

Leff. de 16. R. 2. cap. 5.
14. El. Dy. 313. a. 1. Co. 47. in
Alton Woods case.
(Cro. Cha. 82.)

Bract. lib. 1. cap. 2.

of the king (1). For in the law of England we have not properly, *allodium*, that is, any subjects land that is not holden; unless you will take *allodium* for *ex solido*, as it is often taken in the Booke of *Domesday* (2): and tenants in fee simple are there called *alodarii* or *alodarii*. And he is called a tenant, because he holdeth of some superior lord by some service. And therefore the king in this sense cannot be said to be a (3) tenant, because he hath no superior but God Almighty; *prædium domini regis est directum dominium, cuius nullus auctor est, nisi Deus*. And

as Bracton saith, *Omnis quidem sub eo, et ipse sub nullo, nisi tantum sub Deo*. The possessions of the king are called *sacra patrimonialia*, and *dominica coronæ regis*. But though a subject hath not properly *directum*, yet hath he *utile dominium*. Of these tenants our author speaketh in his second booke. 3. Also *tenere* signifieth performance, as in the writ of covenant, *quod teneat conventionem*, that is, that he hold or performe his covenant. 4. And likewise it signifieth to be bound, as it is said in every common obligation, *teneri et firmiter obligari*. Lastly, It signifieth to deeme or judge, as in 38. E. 3. c. 4. It shall be holden for none (that is) judged or deemed for none, and so we commonly say, it is holden in our bookes. And these severall significations doe properly belong to our tenant in fee simple. For he hath the estate of the land, he holdeth the land of some superiour lord, and is to performe the services due, and thereunto he is bounden by doome and judgement of law. Of the severall estates of land our author treateth in his first booke, and beginneth with fee simple, because all other estates and interests are derived out of the same.

purchase terres per ceux parolx, A aver et tener a luy a tous jours; ou per tiels parols, A aver et tener a luy et a ses assignes a tous jours: en ceux deux cases il ny ad estate forsque pur terme de vie, pur ceo que il fault ceux parols (ses heires) les queux parolx tantselement font lestate denheritance en tous seoffments et grants.

chafe lands by these words, To have and to hold to him for ever; or by these words, To have and to hold to him and his assignes for ever: in these two cases he hath but an estate for term of life, for that there lacke these words (his heires) which words onely make an estate of inheritance in all seoffments and grants.

Brit. fo. 83. 207. 208. Fleta lib. 5. cap. 5. & lib. 3. cap. 8. Bract. lib. 4. 263. (4 Inst. 202.)
Domesday. Mir. des Just. cap. 2. sect. 15. 17. Bract. lib. 2. cap. 5. 6. 7. Brit. cap. 34. fo. 89. Flet. lib. 3. cap. 2. 8. & 9. & lib. 5. cap. 5. [4] Bract. fo. 263. & 207. Pl. Com. in Walf. cal. 7. H. 4. 46. 8. H. 4. 15. 18. H. 8. 3. b. 27. Aff. 33. 18. Aff. 5. 18. Ed. 3. 46. 24. E. 3. 28. 9. Ed. 4. 18. 16. H. 7. 4. 10. E. 3. Account 56. 22. R. 2. Disc. 50. 12. Ed. 4. 3. 15. E. 4. 8. Dy. 8. El. 232. 253. 12. H. 8. 3. 4. H. 7. 2. The Case of a person which hath a qualified fee, see in the title of Desc.
• Vide Sect. 4.
[b] Bract. lib. 4. fo. 263. Flet. lib. 5. cap. 5. Brit. fo. 205. 207. [c] 2. Aff. p. 4. 12. Aff. 38. 12. E. 3. tit. Hors de son fee. 28. 28. Aff. 41. 7. H. 4. 30. 2. H. 6. 1. (9 Co. 20. & 34. b. 2. Inst. 296. Cro. Jam. 127. Hob. 108. Doctr. Plac. 132. 216.)

Fee simple. Fee (4) commeth of the French *fief*, (i. e.) *prædium beneficium*, and legally signifieth inheritance, as our author himselfe hereafter expoundeth it. And simple is added, for that it is descendible to his heires generally, that is, simply, without restraint to the heires of his body, or the like. *Feodum est quod quis tenet ex quacunque causâ, sive sit tenementum, sive redditus, &c.* In *Domesday* it is called *feodum*. [a] Of fee simple, it is commonly holden, that there be three kinds, *viz.* fee simple absolute, fee simple conditionall, and fee simple qualified or base fee (5). But the more genuine and apt division, were to divide fee, that is, inheritance, into three parts, *viz.* simple or absolute, conditionall, and qualified or base. For this word (simple) properly excludeth both conditions and limitations, that defeat or abridge the fee. • Hereby it appeareth, that fee in our legall understanding signifieth, that the land belongs to us and our heires, in respect whereof the owner is said to be seised in fee, and in this sense the king is said to be seised in fee. [b] It is also taken as it is holden of another by service, and that belongeth onely to the subject; *Item dicitur feodum alio modo ejus qui alium seoffat, et quod quis tenet ab alio, ut si sit qui dicat, talis tenet de me tot feoda per servitium militare*. And Fleta saith, *Poterit unus tenere in feodo quoad servitia, sicut dominus capitalis, et non in dominico; alius in feodo et dominico, et non in servitio, sicut libere tenens alicujus*. [c] And therefore if a stranger claim a feignory, and disteine and avow for the service, the tenant may plead, that the tenancy is *extra feodum*, &c. of him (that is) out of the feignory, or not holden of him that claimeth it; but he cannot plead *extra feodum*, &c. unless he take the tenancy, that is, the state of the land upon him. Of fee in the first sense our author treateth in this first booke; and as it is taken in the second sense in his second booke: and of the third you shall read in our author, Sect. 13. 643. 644. 645. and plentifully in our books quoted in the margin.

Terres ou tenements. Here it is to be observed, that a man may have a fee simple in three kinds of hereditaments, (6) *viz.* reall, personall, and mixt: Reall, as lands and tenements, whereof our author here speaketh. Personall, as king Edward the first in the thirteenth yeare of his raigne, *concessit Edmundo fratri suo charissimo, quod ipse et hæredes sui habeant, ad requisitionem suam, in Cancellariâ nostrâ et hæredum nostrorum, justiciarios*

Rot. pat. 13 E. 1.

(1) Same doctrine, 50. Aff. pl. 1. post. 65. Plowd. 498. The origin and principle of this doctrine is well explained in Wright's Ten. 58. and 2. Blackst. Comm. 48. ed. 5. See also Wright's Ten. 137. and Mad. Baron. Anglic. 25.

(2) See Post. 5. a. For particulars concerning *Domesday* Book, see the books cited in Wright's Ten. 56. in note p. and also an Account of *Domesday* Book, and an Account of *Danegeld*, both printed by order of the Antiq. Soc. in 1756.

(3) For examples and consequences of this doctrine, see Dy. 154. Plowd. 212. Post. 16. a. 6. Co. 5. b. Finch fol. ed. 7. 2. Ro. Abr. 513. 514. post. 2. b. n. 4.

(4) For the derivation of the word *Fee*, see Wright's Ten. 3. and the books there cited.

(5) See the same division of fee in 10. Co. 97. b. 2. Inst. 96. Vaugh. 273. 2. L. Raym. 1148. and for instances of a qualified fee, see post. 27. Plowd. 557. 10. Co. 97. 7. E. 4. 12. a. Cro. Ch. 430. Hardr. 147.

(6) For the extent of the word *hereditament*, and the difference between *that* and *tenement*, see post. 6. a.

ciarios ad placita forestarum, quas idem frater noster habet ex dono domini regis Henrici patris nostri, secundum assis. forestæ tenend', &c. In this case the grantee and his heirs had a personall inheritance in making of a request to have letters patents of commission to have justices assigned to him to heare and determine of the pleas of the forrests, and concerneth neither lands or tenements. And so it is if an annuity be granted to a man and his heirs, it is a fee simple personall; (1) *et sic de similibus.* And lastly hereditaments mixt both of the realty and personalty. As the abbot of Whitbye in the county of Yorke having a forrest of the gift of William of Percie founder of that abby, and by the charters of king John and of other his progenitors, king Henry the third did grant *abbati et conventui de Whitbye, quod ipsi et eorum successores in perpetuum habeant viridarios suos proprios de libertate sua de Whitbye eligend' de cetero in pleno com. Eborum, prout moris est, ad responsiones et presentationes faciend' de transgressionibus, quas amodo fieri continget de venatione intra metas forestæ suæ de Whitbye, quam habent ex donatione Willi. de Percy et Alani de Percy filii ejus, et redditione et concessione domini Johannis quondam regis Angliæ patris nostri, et confirmatione nostrâ, coram justiciariis nostris itinerantibus ad placita forestæ in partibus illis et non alibi, sicut viridarii forestæ nostræ hujusmodi responsiones et presentationes, facere debent, et consueverunt. Et si contingat aliquos forinsecos, qui non sunt de libertate predictorum abbatis et conventus, transgressionem facere de venatione intra metas forestæ predictæ, quos predicti viridarii attachiare non possunt, volumus et concedimus pro nobis et heredibus nostris, quod hujusmodi transgressores per justiciarios forestæ nostræ ultra Trentam attachientur, ad presentationem viridariorum predictæ. ad respondendum inde coram justiciariis nostris itinerantibus ad placita forestæ nostræ in partibus illis, cum ibid. ad placitandum venerint prout secundum assisam et consuetudinem forestæ nostræ fuerint faciend'.* Which charter was pleaded upon the claime made by the abbot of Whitbye, before Willoughby, Hungerford, and Hanbury, justices in eire in the forrest of Pickering, which eire began anno 8. E. 3. And these before them were allowed. And when the king createth an earl of such a county or other place, to hold that dignity to him and his heirs, this dignity is personall and also concerneth lands and tenements. (2) But of this matter more shall be said in the next Chapter, Sect. 14. and 15.

(4. Inst. 314. Cro. Ja. 155.)

Ro. Pat. an. 47. H. 3.
Itun. Pickering. 8. E. 3.
Ro. 42.

(7. Co. 33.)

Et est appel en Latin feodum simplex, quia feodum idem est, quod hæreditas. Here Littleton himselfe teacheth the signification of *feodum*, according to that which hath been said, which only is to be applied to fee simple pure and absolute. And this and all his other interpretations of words and etimologies throughout all his three bookes (wherein the studious reader will observe many) are perspicuous, and ever *per notoria et nunquam ignotum per ignotius*, and are most necessary, for *ignoratis terminis ignoratur et ars.*

Bracl. lib. 4. cap. 9. fo. 263.
Britt. cap. 32. & 79.
For interpretation of words and
etymologies, vid. Sect. 9. 18. 95.
116. 119. 135. 154. 164. 174.
184. 186. 194. 204. 234. 267.
268. 332. 337. 424. 520. 592.
645. 689. 733.

Simplex idem est quod legitimum vel purum, hereof he treateth onely in this place. And Littleton saith well, that *simplex idem est quod purum.* *Simplex enim dicitur quia sine plicis; et purum dicitur, quod est merum solum sine additione.* *Simplex donatio et pura est, ubi nulla addita est conditio sive modus; simplex enim datur, quod nullo additamento datur.*

Bracl. lib. 2. cap. 39. fo. 92.
62. b. lib. 4. cap. 28.
Fleta lib. 3. cap. 8.
Bracl. lib. 2. cap. 5. &c.
Britt. cap. 34.

Hæreditas legitima vel hæreditas pura. And therefore it is well said, *quod donationum alia simplex et pura, quæ, nullo jure civili vel naturali cogente, nullo precedente metu vel interveniente, ex mera gratuitâque liberalitate donantis procedit, et ubi nullo casu vellet donator ad se reverti quod dedit; alia sub modo conditione vel ob causam, in quibus casibus non propriè fit donatio, cum donator id ad se reverti velit, sed quædam potius feodalis dimissio; alia absoluta et larga; alia stricta et coarctata, sicut certis heredibus, quibusdam a successione exclusis, &c.* And therefore seeing fee simple is *hæreditas legitima vel pura*, it plainly confirmeth, that the division of fee is by his authority rather to be divided as is aforesaid than fee simple. And he saith well in the disjunctive *legitima vel pura*, for every fee simple is not *legitimum*. For a disseisor, abator, intruder, usurper, &c. have a fee simple, but it is not a lawfull fee. So as every man, that hath a fee simple, hath it either by right or by wrong. If by right, then he hath it either by purchase or descent. If by wrong, then either by disseisin, intrusion, abatement, usurpation, (3) &c. In this Chapter he treateth onely of a lawfull fee simple, and divideth the same as is aforesaid.

Fleta lib. 3. ca. 3. Plowd. 58. b.

Car si home purchase. Persons capable of purchase are of two sorts, persons naturall created of God, as I. S. I. N. &c. and persons incorporate or politique created by the policy of man; (and therefore they are called bodies politique) and these be of two sorts, *viz.* either sole, or aggregate of many: againe aggregate of many, either of all persons capable, or of one person capable, and the rest incapable or dead in law, as in the Chapter of Discontinuance, Sect. 655. shall be shewed. Some men have capacitie to purchase, but not abilitie to hold. Some capacity to purchase and abilitie to hold or not to hold, at the election of them or others. Some capacitie to take and to hold. Some neither capacitie to take nor to hold. And some specially disabled to take some particular thing.

Persons capable of purchase.

Who have ability to grant. Vide
Sect. 57.

If an alien Christian or infidel purchase houses, lands, tenements, or hereditaments, to him and

11. Eliz. Dier. 283.
11. H. 4. 20. & 26.
7. E. 4. 29.
(1. Ro. Abr. 194.)

(1) An annuity of inheritance is held to be forfeitable for treason as an *hereditament*, 7. Co. 34. b. Yet being only *personal*, it is not an hereditament within the statute of mortmain of the 7. E. 1. st. 2. nor is it intailable within the statute *de donis*. See post. 2. a. b. & 20. a.

(2) Therefore such dignity has been adjudged to be intailable within the statute *de donis*. See post. 20. a.

(3) For the difference between such estates by wrong, see post. 277. a. and that they cannot be said to be by purchase, see post. 3. b. & 18. b.

Lib. 1. Cap. 1. Of Fee simple. Sect. 1.

32. H. 6. 23. Pl. Com. 483.

5. Mar. Br. tit. Denizen. 22.

Pasch. 29. Eliz. in Sir James Crofts case.

49. Aff. pl. 2. 49. E. 3. 11.

(5. Co. 52. b.)

Magna Charta. cap. 36.

7. E. 1. stat. 2. de religiosis.

W. 2. 13. E. 1. cap. 33.

15. R. 2. cap. 5.

23. H. 8. cap. 10.

39. El. cap. 5.

23. H. 3. Aff. 426.

29. Aff. p. 17. Brit. fo. 32.

Fleta lib. 3. cap. 4. & 5.

19. E. 2. tit. Vil. 34.

29. E. 3. Ibid. 13. 21. E. 3. 5.

4. H. 6. 9. 19. H. 6. 63. 65.

3. E. 4. 14. 19. E. 3. Mortm. 8.

34. H. 6. 37. 19. H. 6. 63.

(Plowd. 502. a.)

7. E. 4. 14.

* Pl. Com. 193. in Wroteffeye's case.

1. e. statut. de Religiosis.

7. E. 1. stat. 2.

(Cro. Ja. 320. 1. Ro. Abr. 731.)

43. Aff. p. 23.

Braet. lib. 2. fo. 12. & 32.

and his heires, albeit he can have no heires, yet he is of capacite to take a fee simple (1) but not to hold (2). For upon an office found the king shall have it by his prerogative (3), of whom soever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made denizen and purchase lands, and die without issue, the lord of the fee shall have the escheat and not the king. But as to a lease for yeares, there is a diversitie betwene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for yeares as incident to commerce, for without habitation he cannot merchandize or trade (7). But if he depart, or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king: (8) for he had it only for habitation as necessary to his trade or traffique, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9), and so it is if he be an alienemie. And all this was resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29. of the raigne of queene Elizabeth. Also if a man commit felony, and after purchase lands, and after is attainted, he had capacite to purchase but not to hold it, for in that case the lord of the fee shall have the escheat (10): and if a man be attainted of felony, yet he hath capacity to purchase to him and to his heires, albeit he can have no heire; but he cannot hold it, for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacite to purchase (being a man *civilliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiastical or temporall (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacity to take but not to retaine (unless they have a sufficient licence in that (11) behalfe); for within the yeare after the alienation the next lord of the fee may enter, and if he doe not then the next immediate lord from time to time to have half a yeare, and for default of all the mesne lords then the king to have the land so aliened for ever, which is to be understood of such inheritances as may be holden. But of such inheritances as are not holden, as villeines, rents-charges, commons, and the like, the king shall have them presently by a favourable interpretation of the statute. An annuity graunted to them is not mortmaine, because it chargeth the person only. Some have said that it is called mortmaine *manus mortua, quia possessio eorum est immortalis, manus pro possessione, et mortua pro immortalis*, and the rather for that by the laws and statutes of the realme all ecclesiastical persons are restrained to alien. * Others say it is called *manus mortua per antiphrasin*, because bodies politique and corporate never die. Others say that it is called mortmaine by resemblance to the holding of a man's hand that is ready to die, for that he then holdeth he letteth not goe till he be dead. These and such others are framed out of wit and invention; but the true cause of the name, and the meaning thereof, was taken from the effects, as it is expressed in the statute itself, *per quod quæ servitia ex hujusmodi feodis debentur, et quæ ad defensionem regni ab initio provisæ fuerunt indebitè subtrahuntur, et capitales domini eschaetas suas amittunt*, so as the lands were said to come to dead hands as to the lords; for that by alienation in mortmaine, they lost wholly their escheats, and in effect their knights services for the defence of the realme, wards, marriages, relieves, and the like, and therefore was called a dead hand, for that a dead hand yeeldeth no service.

I passe over villeins or bondmen, who have power to purchase lands, but not to retyne them against their lords, because you shall reade at large of them in their proper place in the Chapter of Villenage.

An infant or *minor* (whom we call any that is under the age of 21 yeares) hath, without consent of any other, capacity to purchase; for it is intended for his benefit, and at his full age he may either agree thereunto, and perfect it, or without any cause to be alledged waive or disagree to the purchase, and so may his heires after him if he agreed not thereunto after his full age.

A man of non sane memory may without the consent of any other, purchase lands, but he himselfe (12) cannot waive it; but if he die in his madnesse, or after his memory recover, without agreement thereunto, his heire may waive and disagree to the state, without any cause shewed; and so of an idiot. But if the man of non sane memory recover his memory, and agree unto it, it is unavoidable.

If an abbot purchase lands to him and his successors without the consent of his convent, he himselfe cannot waive it; but his successor may upon just cause shewed, as if a greater rent were reserved thereupon than the value of the land, or the like; but he cannot waive it unless it be upon just cause, *et sic de similibus, prælati ecclesiæ suæ conditionem meliorare possunt, deteriorare nequunt*. And in another place he saith, *Est enim ecclesiæ ejusdem conditionis, quæ fungitur vice minoris*.

But

(1) Therefore on a covenant to stand seized, an use will arise for an alien. Godb. 275. But by *act of law*, as by descent, he cannot even take for the benefit of the king. 7. Co. Calvin's Case, 25. a. Post. 31. b. and 1. Ventr. 417. See in Dy. 283. b. the case of a feoffment to an alien and another to uses. — (2) If the purchase is made with the king's licence, it seems that he may hold. See 14. H. 4. 20. How the law is, where an alien purchases in the name of a trustee, see King and Holland, Styl. 20. &c. All. 14. and 1. Ro. Abr. 194. See also 13. G. 3. c. 14. which enables aliens to lend money on land, &c. in the West Indies. — (3) But not before office, except in case of the alien's death. Adj. 5. Co. 52. b. Before office, recovery by an alien tenant in tail will bar remainders. Adj. Gouldsb. 102. 4. Leon. 84. — (4) If an alien purchases a copyhold, it is said, that it shall escheat to the lord. Dy. 2. b. in marg. but see 1. Mod. 17. and All. 14. — (5) See in Plowd. 229. several cases, in which, for a like reason, the king is intitled without office. — (6) Accord. 7. Co. Calvin's Case. Dy. 2. b. in marg. — (7) But 32. H. 8. c. 16. f. 13. makes void all leases of houses or shops to an alien being an *artificer* or *handicraftsman*. This law, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed; but in favour of aliens, it has been construed very stricly. See 1. Sid. 309. 1. Saund. 7. 2. Show. 135. 3. Mod. 94. 3. Salk. 29. In the latter book a lease to an *alien artificer* is said to be forfeitable to the king at common law; but for this extraordinary doctrine no authority is cited. As to the capacity of aliens to take personal chattels, see 2. Ro. Rep. 93. — (8) Contra 1. And. 25. N. Bendl. 36. See in Cro. Cha. 8. a case where administration to an intestate alien was granted to his nephews and nieces, who were also aliens, and part of the estate consisted of leases for yeares. — (9) If this be the common law, ought not its severity to be corrected by the legislature? To deny the right of taking a house for habitation, to aliens not being *merchants*, is like forbidding all *other* foreigners to come and reside here. See 7. Co. Calvin's case, 17. a. where lord Coke seems to express himself without distinguishing between aliens being *merchants* and other aliens. — (10) Tenant in tail is guilty of murder, and before conviction levies a fine. It was a question, whether the fine should bar the issue for the lord's benefit; and the court inclined to think that it should; but no judgment was given. 1. Willf. 2. Part 220. — (11) As to this, see post. 98. 20. — (12) Fitzherbert argues strongly, that a noncompos may plead his disability to avoid his own acts as well as an infant. Fitz. Nat. Br. 202. See post. 247. a. & b. much curious learning on the subject, and also 2. Blackst. Com. ed. 5. p. 291. where the progress of the opinions on this subject is critically stated.

But no simile holds in every thing, according to the ancient saying, *Nullum simile quatuor pedibus currit*. [a] An hermaphrodite may purchase according to that sexe which prevaieth. A feme covert cannot take any thing of the gift of her husband (1), but is of capacity to purchase of others without the consent of her husband. And of this opinion was Littleton in our books, and in this book, *Sec. 677*. but her husband may disagree thereunto, and devest the whole estate; but if he neither agree nor disagree, the purchase is (2) good; but after his death, albeit her husband agreed thereunto, yet she may without any cause to be alledged waive the same, and so may her heires also, if after the decease of her husband she herselfe agreed not thereunto.

[b] A wife (*uxor*) is a good name of purchase, without a Christian name; and so it is, if a Christian name be added and mistaken, as *Em* for *Emelyn*, &c. for *utile per inutile non vitiatur*. But the queene, the comfort of the king of England, is an exempt person from the king by the common law, and is of ability and capacity to purchase and grant without the king. Of which see more at large, *Sec. 200*.

[c] The parishioners or inhabitants, or *probi homines* of Dale (3), or the church-wardens are not capable to purchase lands; but goods they are, unlesse it were in ancient time when such grants were allowed (4).

[d] An ancient grant by the lord to the commoners in such a waste, that a way leading to their common should not be streightened, was good; but otherwise it is of such a grant at this day. [e] And so in ancient time a grant made to a lord, *et hominibus suis, tam liberis quam nativis*, or the like, was good; but they are not of capacity to purchase by such a name at this day. But yet at this day if the king grant to a man to have the goods and chattels *de hominibus suis*, or *de tenentibus suis*, or *de residuis infra feodum*, &c. it is good; for there they are not named as purchasers or takers, but for another man's benefit, who hath capacity to purchase or take.

[f] And regularly it is requisite, that the purchaser be named by the name of baptism and his surname, and that speciall heed be taken to the name of baptism, for that a man cannot have two names of baptism as he may have divers surnames (5). [g] And it is not safe in writs, pleadings, grants, &c. to translate surnames into Latin. As if the surname of one be Fitzwilliam, or Williamson, if he translate him to *Filius Willi*, if in truth his father had any other Christian name than William, the writ, &c. shall abate; for Fitzwilliam or Williamson is his surname, whatsoever Christian name his father had, therefore the lawyer never translates surnames. And yet in some cases, though the name of baptism be mistaken, (as in the case before put of the wife) the grant is good.

So it is if lands be given to Robert earl of Pembroke, where his name is Henry, to George bishop of Norwich, where his name is John, and so of an abbot, &c. for in these and the like cases there can be but one of that dignity or name. And therefore such a grant is good, albeit the name of baptism be mistaken. If by licence lands be given to the deane and chapter of the holy and individed Trinity of Norwich, this is good, although the deane be not named by his proper name, if there were a deane at the time of the grant, but in pleading he must shew his proper name. And so on the other side, if the deane and chapter make a lease without naming the deane by his proper name, the lease is good, if there were a deane at the time of the (6) lease; but in pleading, the proper name of the deane must be shewed; and so is the booke of the 18. E. 4. to be intended; for the same judges in 13. E. 4. held the grant good to a maior, aldermen, and commonalty, albeit the maior was not named by his proper name, but in pleading it must be shewed, as is there also holden (7). If a man be baptized by the name of Thomas, and after at his confirmation by the bishop he is named John, he may purchase by the name of his confirmation. And this was the case of sir Francis Gawdie, late chiefe justice of the court of common-pleas, whose name of baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, in anno 36. H. 8. he did beare, and after used in all his purchases and grants (8). [h] And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names. And the court said, that it may be that a woman was baptized by the name of Anable, and 40 years after she was confirmed by the name of Douce, and then her name was changed, and after she was to be named Douce, and that all purchases, &c. made by her name of baptism before her confirmation remain good, a matter not much in use, nor requisite to be put in ure, but necessary to be knowne. [i] But purchases are good in many cases by a knowne name, or by a certaine description of the person without either surname, or name of baptism, as *uxori I. S.* as hath been said, or *primo genito filio*, or *secundo genito filio*, &c. or *filio natu minimo I. S.* or *seniori puero*, or *omnibus filiis* or *filiabus I. S.* or *omnibus liberis seu exitibus* of I. S. or to the right heires of I. S.

[k] But if a man do infranchise a villein, *cum tota sequela sua*, that is not sufficient to infranchise his children borne before, for the incertainty of the *sequela*. [l] But regularly in writs, the demandant or tenant is to be named by his Christian name and surname, unlesse it be in cases of some corporations or bodies politique (9).

[a] 1. H. 7. 16. 7. H. 4. 17. 18. H. 6. 8. 39. E. 3. 30. 15. E. 4. fol. 1. b. 27. H. 8. 24. (Hob. 204. 5. Co. 119. b.)

[b] A name of purchase. 2. H. 4. 25. 1. H. 5. 8. 46. E. 3. 22. 12. Aff. 18. 30. E. 3. 18. 1. Aff. 11. 11. H. 4. 33. 9. E. 4. 49. 13. E. 3. Elloppel. 231. F. N. B. 97. a.

[c] 12. H. 7. 8. 37. H. 6. 30. 10. H. 4. 3. b. (4. Inst. 297.)

[d] 32. E. 3. barre 261. (Hob. 86. 6. Co. 59.)

[e] 33. E. 3. grant 83. 18. E. 3. 50. 12. Aff. 35. 14. H. 6. 12. 34. Aff. p. 11. 40. Aff. p. 21.

[f] Braet. lib. 4. tract. 1. ca. 20. Britton fol. 121. 122. 3. E. 3. 78. 25. E. 3. 43. 26. Aff. 61. 30. Aff. 16. 46. E. 3. 22. 39. E. 3. 17. 3. H. 6. 25. 19. H. 6. 2. 30. H. 6. 1. 34. H. 6. 19. 11. H. 4. 27. 9. E. 4. 29. 5. E. 4. 46. 65. 14. H. 7. 11. 20. Eliz. Dier. 259. 8. E. 3. 436. 20. E. 3. 25. 1. H. 4. 5. 3. H. 6. 26. 19. H. 6. 2. 34. H. 6. 19. 5. E. 4. 55. 27. H. 8. 11. 1. H. 5. 5. 18. E. 3. 32. 27. E. 3. 85. 8. E. 3. 427. 7. H. 6. 29. 9. H. 5. 9.

[g] 40. E. 3. 22. Fitzwilliam. 24. E. 3. 64. Fitzjohn. 39. E. 3. 24. Fitzrobert. 27. E. 3. 85. tit. grant. 67. 18. E. 3. 23. 24. 18. E. 4. 8. b. 14. H. 7. 31. 32. 13. E. 4. 8. 5. E. 3. Vouch. 179. 37. E. 3. 85. where the proper name is mistaken. (6. Co. 65. 10. Co. 132. b. Hob. 32. 2. Ro. Abr. 44. Mo. 232.)

[h] 22. R. 2. briefe 936. 12. R. 2. feffments 58. 9. E. 3. 14. 46. E. 3. 21. 3. H. 6. 26. 34. H. 6. 19. 1. H. 7. 29. 5. E. 2. briefe 741. 14. H. 7. 11.

[i] 17. E. 3. 29. 18. E. 3. 59. 30. E. 3. 18. 11. H. 4. 84. Pl. Com. 525. 21. R. 2. devise. 41. E. 3. 19. 15. E. 3. Counter-pla. de vouch. 43. 35. Aff. 13. 37. H. 6. 30. 11. E. 4. 2. 7. H. 4. 5. 40. E. 3. 9. 37. H. 8. Bro. Nolsme 40.

[k] 15. H. 7. 14. [l] 8. E. 3. 437. 29. E. 2. 44. 19. E. 4. 11. 21. E. 4. 19. 7. H. 6. 29.

A bas-

(1) Adjudged acc. in Chancery. 2. Vern. 385. and 3. Atk. 72. But the doctrine must be understood with various limitations.—1. Though the husband cannot convey to the wife immediately, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by encossing or covenanting with another to stand seized, or surrendering a copyhold estate, to her use. See post. 112. a. 4. Co. 29.—2. According to some books, by custom of a particular place, as of York, the wife may take by immediate conveyance from the husband. Fitz. Prescription 61. Bro. Custom. 56.—3. The husband may give to his wife by *last will*; because such gift cannot take effect till his death, when the coverture is determined. Post. sect. 168.—4. It seems, that a *donatio mortis causa* by husband to wife may be good; because that is in the nature of a legacy. 1. P. Wms. 441. How the wife may give her separate personal property to her husband, see 2. Vef. 669.

(2) Acc. post. 336. a.

(3) See in Dy. 100. the case of a grant by the crown *probi hominibus de Iffington*, rendering a rent.

(4) Acc. as to churchwardens, Finch's Law, 8vo. ed. 178. See Keilw. 32. a. But by 9. Geo. 1. c. 7. they are enabled to purchase a workhouse for the poor; and by custom, in some places, as in London, the parson and churchwardens are a corporation to purchase lands. Cro. Jam. 532.

(5) See Cro. El. 2. 27. 222. 328. Cro. Jam. 558.

(6) But not otherwise, Post. 264. a. See 21. Ed. 4. 15. 16.

(7) See 1. Leon. 307. Dy. 86.

(8) Acc. 2. Ro. Abr. 135. A.

(9) As to naming of persons in writs and pleadings, see Thelo. Dig. Br. Orig. lib. 3. and 6. and the title *Abatement* in Com. Dig.

Lib. i. Cap. i. Of Fee simple. Sect. 1.

[a] 39. E. 3. 11. 24.
17. E. 3. 42.
85. Aff. 13. 41. E. 3. 19.

Vide Sect. 118.

[b] So it was resolved M. 38. &
39. Eliz. in Bre. de errore forland
in Portington in com. Salop.
(S. C. Cro. Eliz. 509.
Noy 35. Mo. 430.
2. Ro. Abr. 43. 44.)
[c] 39. E. 3. 11. 24.
35. Aff. 13.
41. E. 3. 19. 17. E. 3. 42.
(6. Co. 66.)

[d] 5. E. 4. tit. office & officer.
Bro. 48.
Vinter's case. 5. Mar. Dier. fo.
150. b. & Scrogg's case. (Hob. 148.)

(Cro. Jam. 17.)

[e] M. 40. & 41. Eliz. in the
King's bench between Scamler
& Walters.
(Contra March 43. S. C. W. Jo.
310. Cro. Car. 279. 555.)
[f] 11. Co. 2. in Auditor Curle's
case.
(5. & 6. F. 6. c. 15. & post. 231. a.)
Vide Sect. 378.
1. H. 7. 31.
(Post. 7. b. 29. b.)
[g] Bract. lib. 5. fo. 421.
415. Britt. cap. 22. 39.
Fleta lib. 6. cap. 41.
1. E. 3. 9. 44. E. 3. 4.
3. H. 6. 24. 21. R. 2. judgment
263. 7. H. 4. 2.
14. H. 8. 16.
Doct. & Stud. 141.
P. Com. fo. 47. Brit. cap. 33.

(Post. 76. a.)

[h] 27. Eliz. cap. 4.
13. Eliz. cap. 5.
3. Co. 8. 82. 83. Twine's case.
5. Co. 60. Gooche's case.
6. Co. 72. Burrell's case.
11. Co. 71. Pafch. 12. Ja. inter Jones
pl. and Sir Rich. Groobham def.
in ejectione firme in evidence at
Jurie.

[i] Hil. 18. E. 3. coram rege in
thesaur.
[k] 37. H. 8. cap. 6.
13. Eliz. cap. 8.
5. Co. 60. Burton's case. Eodem
lib. 7. Clifton's case.
(Lutw. 271.)

[a] A bastard having gotten a name by reputation may purchase by his reputed or knowne name to him and his heires, although he can have no heir but of his body. A man makes a lease to B. for life, remainder to the eldest issue male of B. and the heires males of his body. B. hath issue a bastard son, he shall not take the remainder, because in law he is not his issue, for *qui ex damnato coitu nascuntur inter liberos non computantur*. And as Littleton saith, a bastard is *quasi nullius filius*, and can have no name of reputation as soone as he is borne. [b] So it is if a man make a lease for life to B. the remainder to the eldest issue male of B. to be begotten of the body of Jane S. whether the same issue be legitimate or illegitimate, B. hath issue a bastard on the body of Jane S. this sonne or issue shall not take the remainder; for (as it hath been said) by the name of issue, if there had been no other words he could not take, and (as it hath been also said) a bastard cannot take, but after he hath gained a name by reputation, (1) that he is the sonne of B. & c. [c] And therefore he can take no remainder limited before he be born; but after he be borne, and that he hath gained by time a reputation to be knowne by the name of a son, then a remainder to be limited to him by the name of the son of his reputed father is good. But if he cannot take the remainder by the name of issue at the time when he is borne, he shall never take it. And so it seemeth, and for the same cause, if after the birth of the issue, B. had married Jane S. so as he became bastard eigne, and had a possibility to inherit, yet he shall not take the remainder.

Persons deformed, having human shape (2), idiots, mad men, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures have power to purchase and retaine lands or tenements. [d] But the common law doth disable some men to take any estate in some particular things: as if an office either of the grant of the king or subject which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safetie of the subject, or the like; if these, or any of them be granted to a man that is unexpert, and hath no skill and science to exercise and execute the same, the grant is meerly (3) void, and the partie disabled by law, and incapable to take the same, *pro commodo regis et populi*; for onely men of skill, knowledge, and ability to exercise the same are capable of the same to serve the king and his people. [e] An infant or minor is not capable of an office of stewardship of the court of a manor, either in possession or reversion (4). [f] No man though never so skilful and expert, is capable of a judiciall office in reversion, (5) but must expect untill it fall in possession. And see Sect. 378. where bargaining or giving of money; or any manner of reward, & c. for offices there mentioned, shall make such a purchaser incapable thereof, which is worthy to be knowne, but more worthy to be put in due execution.

Some are capable of certain things for some special purpose, but not to use or exercise such things themselves. As the king is capable of an office, not to use but to grant, & c. (6)

A monster borne within lawfull matrimonie, that hath not human shape, cannot purchase; much lesse retaine any thing. [g] The same law is *de professis et mortuis seculo*, for they are *civiles mortui* (7), whereof you shall read at large in his proper place, Sect. 200.

Purchase, in Latin *perquisitum*, of the verbe *perquirere*. Littleton describeth it in the end of this Chapter in this manner, *Item, purchase est appel le possession de terres ou tenements, que home ad per son fait, ou per son agreement, a quel possession il ne avient per title de discent de nul de ses ancestres ou de ses cosens mes p r son fait dems*. So as I take it, a purchase is to be taken, when one cometh to lands by conveyance or title, and that disseisins, abatements, intrusions, usurpations, and such like estates gained by wrong, are not said in law purchases (8), but oppressions and injuries.

Note, that purchasers of lands, tenements, leases, and hereditaments, for good and valuable consideration, shall avoid all former fraudulent and covinous conveyances, estates, grants, charges and limitations of uses, of or out of the same, [b] by a statute made since Littleton wrote (9), whereof you may plainly and plentifully read in my Reports, to which I will add this case. I. C. had a lease of certaine lands for 60 yeares, if he lived so long, and forged a lease for 90 yeares absolutely, and he by indenture reciting the forged lease for valuable consideration bargained and sold the forged lease and all his interest in the land to R. G. It seemed to me that R. G. was no purchaser within the statute of 27. Eliz. for he contracted not for the true and lawfull interest, for that was not knowne to him, for then perhaps he would not have dealt for it, and the visible and knowne tearme was forged, and although by general words the true interest passed, notwithstanding he gave no valuable consideration nor contracted for it. And of this opinion were all the judges in Serjeant's Inne in Fleetstreet.

[i] In ancient time when a man made a fraudulent feoffment it was said, *quod posuit terram illam in brigam*, where *brigam* doth signifie wrangle, contention, or intricacy, for fraud is the mother of them all. [k] And on the other side, purchases, estates, and contracts may be avoided since Littleton wrote by certaine acts of parliament against usurie above ten in the hundred, in such manner and forme as by those acts is provided, which statutes are well expounded in my books of Reports, which may be read there. To them that lend money my caveat is, that neither

(1) The severall reports of the case, cited by lord Coke in the margin, differ very much. According to Noy and Moore, it was held by all but Popham, that the remainder was good, though the bastard was not born till after creating it; and Roll represents the case as if the opinion had been for the remainder. But Croke agrees with lord Coke, and writes that a majority of the judges held the remainder void; though indeed it appears by his report, that the party at length claiming as *lawful issue*, it became unnecessary to decide what would be the effect of a remainder to an unborn bastard. The only modern case I meet with on the subject is one, in which lord chancellor Macclesfield inclined against such a remainder, even though to a child *en ventre sa mere*. 1. P. Wms. 329. However, the doctrine doth not seem fully settled. If the objection against the limitation to a bastard not *in esse* is *uncertainty of description*, it must certainly fail where he is described by the *mother only*; and even where the *father* is named, it may sometimes be possible to ascertain him also sufficiently, as well where the limitation precedes, as where it follows the bastard's birth. See Bro. Grant. 17. 2. Ro. Abr. 43. 44. But if the objection is a *policy of law*, which, for the encouragement of marriage, creates a *disability* of providing for illegitimate children before they are born; then lord Coke's doctrine is true in its full extent: See Cro. Eliz. 510. Which of these is the true principle of objection, is left to the judgement of the learned reader.—(2) Who ought to be deemed such, see post. 7. b. 25. b.—(3) See Acc. Godb. 391. Hard. 130. Scrogg's case, cited by lord Coke in the margin, is in Dy. 175.—(4) Acc. Scamler's case and 1. Ro. Abr. 731. J. and Cro. Eliz. 636. But the case in March 43 is *contra*; and there Mr. Justice Jones affirms, that Scamler's case was also *contra*. However, in Cro. Cha. 556. lord Coke's doctrine seems admitted where the office is not granted so as to be exercisable by a *deputy*.—(5) Acc. 11. Co. 4. a. W. Jo. 264. 2. Lev. 245. and Caf. temp. Talb. 99. but *contra* where it has been the usage so to grant. W. Jo. 511. Hardr. 257. 2. Ventr. 188. and it is said that the king may so grant without any usage. March 42. 4. Mod. 280. Dy. 295.—(6) See as to this Plowd. 381.—(7) But it seems, that this doctrine is now become inapplicable; for there is no longer any legal establishment for *professed* persons in *England*, and our law never took notice of *foreign professions*. See post. 132. b. 2. Ro. Abr. 43. C. Wright's Ten. 28. 1. Saik. 162.—(8) Accord. ante 2. b. and post. 18. b.—(9) For cases of fraudulent gifts before the 13. Eliz. c. 5. see Dy. 294. b. and 295. a.

neither directly nor indirectly, by art, or cunning invention, they take above ten (1) in the hundred, for they that seeke by sleight to creepe out of these statutes, will deceive themselves, and repent in the end.

Purchase terres. Littleton here and in many other places putteth lands but for an example; for his rule extendeth to signiories, rents, advowsons, commons, estovers, and other hereditaments of what kind or nature soever. Lands and other things to be purchased.

Terre, Terra, Land, in the legall signification comprehendeth any ground, soile or earth whatsoever, as meadowes, pastures, woods, moores, waters, marishes, furlies and heath. *Terra est nomen generalissimum, et comprehendit omnes species terræ*; but properly, *terra dicitur a terendo quia vomere teritur*; and anciently it was written with a single *r*, and in that sense it includeth whatsoever may be plowed, and is all one with *arvum ab arando*. It legally includeth also all castles, houses, and other buildings: for castles, houses, &c. consist upon two things, viz. land or ground, as the foundation or structure thereupon, so as passing the land or ground, the structure or building thereupon passeth therewith. * Land is anciently called *Fletb*, but land builded is more worthy than other land, because it is for the habitation of man, and in that respect hath the precedency to be demanded in the first place in a (2) *præcipe*, as hereafter shall be said. And therefore this element of the earth is preferred before the other elements, first and principally, because it is for the habitation and resting-place of man; for man cannot rest in any of the other elements, neither in the water, ayre or fire. For as the heavens are the habitation of Almighty God, so the earth hath he appointed as the suburbs of heaven to be the habitation of man; *Cælum cæli domino, terram autem dedit filiis hominum*. All the whole heavens are the Lord's, the earth hath he given to the children of men. Besides, every thing as it serveth more immediately or more meerly for the food and use of man (as shall be said hereafter) hath the precedent dignity before any other. And this doth the earth, for out of the earth commeth man's food, and bread that strengthens man's heart, *confirmat cor hominis*, and wine that gladdeth the heart of man, and oyle that makes him a cheerful countenance. And therefore *terra olim Ops mater dicta est, quia omnia hac opus habebant ad vivendum*. And the divine agreeth herewith, for he saith, *Patriam tibi et nutrivem, et matrem, et mensam, et domum posuit terram Deus, sed et sepulchrum tibi hanc eandem dedit*. Also the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *præcipe*, [3] but the land whereupon the water floweth or standeth is demandable (as for example) *viginti acras terra aquâ coopertas*: and besides the earth doth furnish man with many other necessities for his use, as it is replenished with hidden treasures, namely with gold, silver, brasse, iron, tynne, lease, and other metals, and also with great varietie of precious stones, and many other things for profit, ornament, and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad cælum*, as is holden 14. H. 8. fo. 12. 22. H. 6. 59. 10. E. 4. 14. *Registrum origin.* and in other bookes.

And albeit land, whereof our author here speaketh, be the most firme and fixed inheritance, and therefore it is called *solum, quia est solidum*, and fee simple the most highest and absolute estate that a man can have; yet may the same at severall times be moveable, sometime in one person, and *alternis vicibus* in another, nay sometime in one place, and sometime in another. As for example, if there be 80 acres of meadow which have bene used time out of mind of man, to be divided betweene certaine persons, and that a certaine number of acres appertaine to every of these persons, as for example, to A. 13 acres, to be yearly assigned and lotted out, so as sometime the 13 acres lie in one place, and sometime in another, and so of the rest: A. hath a moveable fee simple in 13 acres, and may be parcell of his mannor, albeit they have no certaine place, but yearly set out in severall places, so as the number only is certaine, and the particular acres or place wherein they lie alter the yeare uncertaine. And so it was adjudged in the King's-Bench upon an especiall verdict (4).

If a partition be made betweene two coparceners of one and the selfe-same land, that the one shall have the land from Easter untill Lammas to her and to her heires, and the other shall have it from Lammas till Easter to her and her heires, or the one shall have it the first yeare, and the other the second year *alternis vicibus*, &c. there it is one selfe-same land wherein two persons have severall inheritances at severall times. So it is if two coparceners have two severall manors by descent, and they make partition, that the one shall have the one mannor for a year, and the other the other mannor for the same yeare, and after that yeare, then she that had the one mannor shall have the other, *et sic alternis vicibus* for ever; and albeit the mannors be severall, yet are they certaine, and therefore stronger than Bridgewater's case, so as this doth make a division of states of inheritances of lands, viz. certaine or unmoveable, whereof Littleton here speaketh, and uncertaine and moveable, whereof these three cases for examples have bene put. Wherein it is to be noted, that the possession is not onely severall, but the inheritance also.

Pl. Com. 168. b. and 170. a. and 151. 4. Co. 87. b. Lutterel's case. 4. E. 3. 161. and 6. E. 3. 283. 8. E. 3. 377. Temps E. 1. Bricie 811. 28. H. 8. Dyer 47.

* Tr. 7. E. 3. coram Rege Northampton. in Thesaur.

Psal. 115. 16.

Psal. 104. 15.

Chrysost. hom. 30.

(Plowd. 313.)

Vid. Sect. 59. where in this case livery shall be made. (Post. 48. b. 7. Co. 5.)

Vide Sect. 648. how these 13 acres may be charged.

(1. Ro. Abr. 829. Cro. Eliz. 421.) Hill. 34. Eliz. Ret. 489. in trans. inter Weldon & Bridgewater in Banco Regis. Temps E. 1. tit. partition. 21. F. N. B. 62. J. Vide 1. Co. 87. per Walmsh. F. N. B. 62. K. (Post. 167. a. 7. Co. 5.)

Vide Sect. 114. where advowsons, &c. may be appendant and in gros.

It

(1) Since Sir Edward Coke's time; the rate of interest has been gradually reduced to 5 per cent. See 21. Ja. 1. c. 17. 12. Cha. 2. c. 13. and 12. Ann. stat. 2. c. 16. But a greater rate of interest is still allowable in Ireland and our Plantations. It has been doubted whether the 12. Ann. did not extend to money lent on lands in Ireland or our Plantations, where the mortgage is executed in Great Britain; but the 14. Geo. 3. c. 79. declares all such securities made previously to that act to be valid, notwithstanding the 12. Ann. where the interest is not more than the established rate of the particular place; and that all future securities of a like kind shall also be valid, where the interest is not more than 6 per cent. It is impossible in the compass of a note to cite the numerous cases on the statutes of usury. One of the most remarkable for the great learning and variety of the arguments is that of the earl of Chesterfield and Janssen. 1 Atk. 301. and 2 Vef. 325.

(2) Acc. Fitzh. Nat. Br. 2. C. Post. 4. b. and 4. Co. 39. a.

(3) Acc. Yelv. 143. See post. 4. b.

(4) S. C. Mo. 302.

By what names, &c. lands, &c. shall passe.

[a] Vide Sect. 289. (Post. 186. b. Contra 1. Ventr. 393.)

14. H. 8. 6. 4. H. 7. 3. 10. H. 7. 24. 11. H. 7. 21. 14. H. 7.

4. 6. 21. H. 7. 36. 37. 9. H. 6. 52. 37. H. 6. 35. 22. E. 4. barre

116. 11. H. 4. 90. 18. E. 3. Execution 56. 4. E. 3. 48. 8. E. 3.

13. 9. Aff. p. 12. 58. E. 3. 24.

[b] Bract. fo. 222. 17. E. 3. 75. 39. H. 6. 38. 11. Eliz. Dy. 285.

(4. Leon. 43. Post. 47. 2. Cro. Cha. 362. Noy. 54.)

[c] Pasch. 12. Ja. inter Dock- wray & Points in evidence al

Jury in Banke le Roy.

[d] Vide Sect. 279. Bract. fo. 208. 40. E. 3. 45. Pl. Com. 154.

10. H. 7. 24. 28. 7. H. 7. 13. 18. H. 6. 29. 34. H. 6. 43. 20.

11. 6. 4. 18. E. 4. 4. 4. E. 3. 48. 1. E. 3. 4. 32. E. 3. Scir.

fac. 100. 22. E. 4. barre 116. 12. H. 3. Aff. 427. 34. Aff. 11.

13. E. 3. tit. entrie. 57. 20. E. 3. Briefe 685. W. 2. c. 24.

(2. Ro. Abr. 2.)

[e] Tr. 11. R. 9. in tresp. nient imprimee ne abridg. 11. H. 7. 4.

[f] 7. E. 3. 342. 5. Aff. 9. 10. 7. Aff. 9.

[g] 45. E. 3. tit. feoffments et fauts. 90. 14. H. 8. 6. Pl. Com. 541. b. F. N. B. 8. 12. E. 3.

Dower 90.

[h] Aff. p. 12. 9. E. 3. 443. 466. Domestday. 7. R. 1. int. fines in

Theaur. (1. Sid. 16.)

[i] Int. Inquisit. apud Launcest. Anno 6. E. 1. in Theaur. Mich.

1. H. 5. coram Rege. Rot. 3. in Theaur.

[k] Tr. 7. Eliz. in banco regis. 5. Co. 11. Ives case. 14. H. 8. 1.

46. E. 3. 22. 28. H. 8. Dyer. 19. 32. H. 8. Bro. reservat. 39. 7. E.

6. Dyer. 79.

* Glanvil. lib. 8. cap. 3.

[l] Domestday Regilt. F. N. B. 2.

[m] 8. E. 2. Waff. 111. 7. Aff. 18. 11. Aff. p. 13. 41. E. 3. Waff. 82.

+ Hill. 14. E. 3. coram Rege Lanc. in Theaur.

* Inter inquisit. apud Lanc. in com. Cornubie coram Jullie. Aud. anno 6. E. 1. in Theaur. the B. of Excester's case.

[n] Domestday.

[o] Camden 460. 151.

[p] Pasch. 41. E. 3. coram Rege in Theaur.

[q] Hill. 13. E. 2. Lanc. coram Rege in Theaur. Camden Brit.

247. Rot. Par. 18. E. 1. 8. Eveque de Carlisle's case.

[r] Pl. Com. 169. a. 4. E. 2. Briefe 792. 793. 3. E. 3. 86.

4. E. 4. 1. 27. H. 8. 12.

[s] 20. Aff. pl. 9.

[t] Pl. Com. 169. a. 13. E. 3. Briefe 241. 33. E. 3. Entrie 80.

[u] Domestday. F. N. B. 2. Regilt.

It is also necessary to be seene by what names lands shall passe. [a] If a man hath 20 acres of land, and by deed granteth to another and his heires *vesturam terræ*, and maketh livery of fei-

fin *secundum formam cartæ*, the land itselfe shall not passe (1), because he hath a particular right in the land, for thereby he shall not have the houses, timber-trees, mines and other reall things

parcell of the inheritance, but he shall have the vesture of the land, (that is) the corne, grasse, underwood, swepage, and the like, and he shall have an action of trespass, *quare clausum fre-*

git. [b] The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit*, but by grant thereof and liverie made,

the foile shall not passe, as is aforesaid. [c] If a man lett to B. the herbage of his woods, and after grant all his lands in the tenure, possession, or occupation of B. the woods shall passe, for

B. hath a particular possession and occupation, which is sufficient in this case, and so it was resolved. [d] So if a man be seised of a river, and by deed doe grant *seperalem piscariam* in the

same, and maketh livery of feisin *secundum formam cartæ*, the foile doth not passe (2) nor the water; for the grantor may take water there, and if the river become dry he may take the be-

nefit of the foile, for there passed to the grantee but a particular right, and the livery being made *secundum formam cartæ* cannot enlarge the grant. [e] For the same reason, if a man

grant *aquam suam*, the foile shall not passe, but the pischary (3) within the water passeth there- with. And land covered with water shall be demanded by the name of so many acres *aquâ* (4)

coopertas, whereby it appeareth that they are distinct things. [f] So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, be-

cause but part of the profit is given, for trees, mines, &c. shall not passe. [g] But if a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold

to him and his heires, and maketh livery *secundum formam cartæ*, the whole land itselfe doth passe; for what is the land but the profits thereof, for thereby vesture, herbage, trees, mines,

and all whatsoever parcell of that land doth passe (5).

[h] By the grant of the boillourie of salt, it is said that the foile shall passe, for it is the whole profit of the foile. And this is called *salina*, of the French word *salure* for a salt pit, and you

may read *de salina* in Domestday, and *selda* signifieth the same thing; [i] and where you shall reade in records *de lacerta in profunditate aque falsæ*, there *lacerta* signifieth a fathom. A man

seised of divers acres of wood grants to another *omnes boscos suos*, all his woods; not onely the woods growing upon the land passe, but the land itselfe, and by the same name shall be recovered

in a *præcipe*; for *boscus* doth not onely include the trees, but the land also whereupon they grow. [k] The same law if a man in that case grant *omnes boscos suos crescentes*, &c. yet the land

itselfe shall passe, as it hath bene (6) adjudged. *Fraxinetum* signifieth a wood, or ground that is woodie. [l] If a man hath a wood of elder trees containing 20 acres, and granteth to another

20 *acras alneti* (with an *n* not a *v*) the wood of elders, and the foile thereof shall passe, but no other kinde of woods shall passe by that name. *Alnetum est ubi alni arbores crescunt* †. And

sellings are taken for elders. [m] *Salicetum* doth signifie a wood of willowes, *ubi salices crescunt*. These trees in our bookes are called *sawces*. * *Selda* is a wood of fallows, willows, or withies.

A brackie ground is called *filecetum*, *ubi filices crescunt*. A wood of ashes is called *fraxinetum*, *ubi fraxini crescunt*, and passeth by that name; and *lupulicetum*, where hoppes grow; and *arundinetum*, where reeds grow. Some say that *dene* or *denne*, whereof *dene* cometh, is properly a

valley or dale. *Dene filvæ*, and the like, [n] as *drofden*, or *drufden*, or *druden*, signifieth a thicker of wood in a valley; for *druf* or *drn* signifieth a thicket of wood, and is often mention- ed in Domestday. And sometime *dene* or *denna* signifieth, as *villa* and *denne*, a towne.

[o] *Cope* signifieth a hill, and so doth *larve*, as *stanlarve* is *saxens collis*. [p] *Howe* also signifieth a hill. And *hope combe* and *flow* are valleys, and so doth *clough*. And *dunum* or *duna* signifieth a hill or higher ground; and therefore commonly the townes that end in *dun*, have hills or higher grounds in them, which we call downs. It cometh of the old French word *dun*.

[q] In our Latin a wood is called *boscus*. *Grava* signifieth a little wood, in old deeds, and *bierf* or *burst* a wood, and so doth *holt* and *shawe*. *Twaite* signifieth a wood grubbed up, and turned to arable. *Stetbe* or *stede* betokeneth properly a banke of a river, and many times a place,

as *flowe* doth, and *wie* a place upon the sea-shore or upon a river. *Lea* or *ley* signifieth pasture.

[r] If a man doth grant all his pastures, *pasturas*, the land itselfe employed to the feeding of beasts doth passe, and also such pastures or feedings as he hath in another man's foile. *Lefwes* or *leswes* is a Saxon word, and signifieth pastures. [s] Between *pastura* and *pasenum*, the legall

difference is, that *pastura* in one signification containeth the ground itselfe called pasture, and by that name is to be demanded. *Pasenum*, feeding, is wheresoever cattell are fed, of what nature

soever the ground is, and cannot be demanded in a *præcipe* by that name.

[t] If a man grant *omnia prata sua*, all his meadowes, the land itselfe of that kinde passeth, *et dicitur pratum quasi paratum*, because it groweth *sponte* without manurance. [u] A man grants *omnes brueras suas*, the foile where heath doth grow passeth, and may be demanded by that name

in

(1) Contra Keilw. 118. and Palm. 174. Also in 1. Ventr. 393. it is argued by North attorney-general, that *vesture* of land means *all* the profits. But 4. Leo. 43. and Ow. 37. are with sir Edward Coke. Indeed his interpretation is conformable to the use of the word in some ancient deeds, and seems warranted by 4. E. 1. st. 1. c. 4. and 13. E. 1. st. 2. c. 25. f. 10. It also appears most agreeable to the derivation of the word, which is from *vestio*. See Cow. Interpret. ed. 1727. voc. *vestura* and *vesture*. Note, the difference taken in Palm. 175. between *vesturam terræ*, *primam vesturam terræ*, and *primam vesturam terræ* from one quarter to another; and between such grants by the king, and those by a subject. As to prescribing for *sola vestura*, see post. 122. a.

(2) Acc. post. 122. a. but see contra by lord ch. j. Holt, in 2. Salk. 637. The truth is, that the authorities on this subject are very numerous, and seem contradictory. Some agree with sir Edward Coke; according to others, one having a *several* fishery must be owner of the soil; and again some hold, that a *several* fishery and the soil may be in *different* persons, but that they shall be *presumed* to be in the same person till the contrary is pleaded. Besides the books cited in the margin, see 17. E. 4. b. 10. 11. 7. 26. Bro. Præcipe 33. and Dav. 55. b.

(3) Acc. Dav. 55. b.

(4) See Acc. Yelv. 143.

(5) Adj. Acc. in the case of a devise Cro. Eliz. 190.

(6) To know when *wood* will include the soil, and when not, see Bro. Grants. 167. Cro. Ja. 487. 524. 2. Ro. Abr. 455. U. pl. 1. 3.

in a *præcipe*. It is derived from *bruyet*, a French word for heath, and it is called *fos* in the Brittainish tongue.

Roncaria or *runcaria* signifieth land full of brambles and briars, and is derived of *roucier*, the French word, which signifieth the same, and as much as *fenticetum*. [a] By the grant of *omnes juncarias* or *joncarias*, the soile where rushes do grow doth passe; for *jonc* in French is a rush, whereof *joncarias* commeth. [b] A man grants *omnes ruscarias suas*, the soile where *rusci*, i. e. kneholme, or butchers pricks, or broome, doe grow, shall passe, and so is the verbe in the Register it is called; but in F. N. B. fol. 2. in the verbe *piscaria* is put instead of *ruscaria*. And *janpna* commeth of *jonc* and *nower*, a waterish place, and is all one in effect with *joncarias*. He that granteth *omnes mariscos suos*, all his fennes or marsh grounds doe passe. *Mariscus* is derived of the French word *mares* or *marets*; the Latin word for it is *palus* or *locus paludosus*. *Mora* is derived of the English word *moore*, and signifieth a more barren and unprofitable ground than marshes, dangerous for any cattell to goe there, in respect of myrie and morish soyle, neither serves it for getting of turves there. [c] You shall reade in record, that such a man *perquisivit trescent. acr. maretti*, &c. This word *marettum* is derived of *mare* the sea, and *tego*, and properly signifieth a morish and gravelly ground, which the sea doth cover and overflow at a full sea, and lyeth betwene the high water marke and low water marke, *infra fluxum et refluxum maris*. By grant of these particular kinds, the lands of these particular kinds onely doe passe; but as hath been said, by the grant of land in generall, all these particular kinds, and some others doe passe. *Non mihi si centum linguæ sint oraque centum, Omnia terrarum percurrere nomina possem.* And therefore let us turn our eye to generall words, which doe include lands of several sorts and qualities. [d] By the name of an honor, (1) which a subject may have, divers mannors and lands may passe. So by the name of an isle, *insula*, many mannors, lands, and tenements may passe.

Isle or *bulmus* signifieth an isle or fenny ground. * A commote is a great feignory, and may include one or divers mannors. [e] By the name of a *castle*, one or more mannors may be conveyed, *et è converso*, by the name of a mannor, &c. a castle may passe (2). In Domestday I read, *Comes Alanus habet in suo castellatu 200 maneria*, &c. *præter castellariam habet 43 maneria*; and in that booke a castle is called *castellum*, and *castrum*, and *domus defensibilis*, and *mansus muralis*. [f] But note by the way, that no subject can build a castle or house of strength imbatellled, &c. or other fortresse defensible, called in law by the names aforesaid, and sometimes *domus kernellata* or *carnellata*, *imbattellata*, *teuellata*, *machecollata*, *nese carnelet*, &c. without the licence of the king, for the danger which might ensue, if every man at his pleasure might do it. And they be called imbatellments, because they are defences against battels in assaults. *Tenellare*, or *tanellare*, is to make holes or loopes in walls, to shoote out against the assailants. *Machecollare*, or *machecollare*, is to make a warlike device over a gate or other passage like to a grate, through which scalding water, or ponderous or offensive things, may be cast upon the assailants (3). But to returne to the matter from whence upon this occasion we are fallen.

By the name of a towne, *villa*, a mannor may passe. In Domestday, *alodium* (in a large sense) signifieth a free mannor (4); and *alodiarum* or *alodarii* lords of the same; and *lannemanni* there signifie lords of a mannor, having *facam et facam de tenentibus et hominibus suis*. [g] And by the name of a mannor, divers townes may passe. *Quod olim dicebatur fundus nunc manerium dicitur*. By the name of a ferme or fearme (5), *ferma*, houses, lands, and tenements may passe; and *ferma* is derived of the Saxon word *feormian*, to feed or releeve; for, in ancient time, they reserved upon their leases cattell and other victuall and provision for their sustenance. [h] Note a fearme in the north parts is called a tacke, in Lancashire a fermeholt, in Essex a wike. But the word fearme is the general word; and anciently *fundus* signifieth a fearme, and sometime land. [i] Lands making a knight's fee (6) shall passe by the grant of a knight's fee *de uno feodo militis*. [k] *Unum solinum* or *solinus terræ* in Domestday booke containeth two plow-lands and somewhat lesse than an halfe; for there it is said, *septem solini* or *solina terræ sunt 17 carucat* (7). *Una bida seu carucata terræ*, which is all one as a plow-land, viz. as much as a plow can (8) till. *Sallerye* also signifieth a plow-land. *Una virgata terræ*, a yard-land, (the Saxons called it *girdland*, and now the *g* is turned to a *y*) is in some countries 10, in some 20, in some 24, in some 30, &c. (9). [l] *Una bovata terræ*, an oxgange, or an oxgate of land, is as much as an ox can till (10). [m] But *carucata terræ* and *bovata terræ* are words compound, and may containe meadow, pasture, and wood necessary for such tillage. *Fuzum terræ* in Domestday containeth halfe a plow-land. And by all these names, in the raigne of R. 1. lands were usually demanded, and long after (11).

[n] By the name of a grange, *grangia*, a house or edifice, not onely where corne is stored up like as in barnes, but necessary places for husbandry also, as stables for hay and horses, and stables and styes for other cattell, and a *curtilage*, and the close wherein it standeth, shall passe; and it is a French word, and signifieth the same as we take it (12).

[o] *Stagnum*, in English a poole, doth consist of water and land; and therefore by the name of *stagnum*

[a] Regill. 1. E. 3. 4. F. N. B. 2.

[b] 16. Aff. p. 9. Register.

Jampna.
(Cro. Cha. 179.)

[c] Pasch. 41. E. 3. coram rege
Lincoln. rot. 28.

[d] Mag. Cart. c. 31. Wallingford
Nott. Bolon. Lanc. &c. Trin. 33.
E. 1. coram rege in Thel. honor
de Huntingdon. Mich. 9. E. 1.
coram rege in Thel. 18. E. 2.
Aff. 377. 26. Aff. p. 60. 6. E.
3. 56. 47. E. 3. 21. honor de
Peverel. 49. E. 3. 324. honor de
Egles. 9. H. 6. 27. 36. H. 8.
Dyer 58. honor de Glouc. F. N.
B. 265. honor Abbath. de Merle.
5. E. 4. 129. 7. H. 6. 39. 1.
E. 3. 4. &c. 13. E. 3. jurisdift.
23. 4. Co. 88. Lutterel's case.
5. H. 7. 9. 14. H. 4. in recordo
longo. 8. H. 4. Pl. Com. 168.
8. H. 7. 1. 4. E. 4. 16. (4. Inst. 294.)
* 13. E. 3. jurisdift. 23.

[e] 26. Aff. 54. 29. E. 3. 15.
29. H. 6. travers 4. Bract. fo.
434. 1. E. 3. 4. 5. H. 7. 9. 3.
E. 2. avowry 188. 37. H. 6. 26.
18. H. 6. 11. Lib. rub. fac. fo. 18.
[f] In veter. Mag. Cart. cap. 16.
chatriæ, fo. 162. Britton. cap.
23. Rot. Parliam. 45. E. 3. m.
31. 6. H. 4. m. 19. 1. E. 4.
cap. 1. Rot. Parliam. 1. E. 3. 2.
pars Alano Charleton. 22. E. 3.
2. pars Thoma Barkley, &c.
(3. Inst. 201.)

[g] Lamb. exposit. verb. ferme.
Pl. Com. 195.

[h] Pl. Com. 169. Regill. 227.
b. eject. sumae.

[i] 17. E. 3. fo. 8. 5. E. 3. 213.
16. E. 3. bre. 165. 12. E. 2. bre.
814.

[k] 4. E. 3. 161. 6. E. 3. 283.
2. E. 3. 5. 35. H. 6. 29. Pl.
Com. 168. 7. Aff. 18. 11. Aff.

13. Lamb. exposit. verb. Hyda et
Virgat. terræ. Glauv. lib. cap.

Domestday. Bract. lib. 2. cap. 26.
27. & lib. 5. fo. 434. Regill. 72.

[l] 5. E. 3. fine 49. 13. E. 3.
fine 67. 39. H. 6. 8. 4. E. 3.

159. 8. E. 3. 377. Bracton fo.
180. 269. 431. 5. H. 3. Droit.

66. Pl. Com. 168.

[m] 13. E. 3. bre. 241. 2. E. 3.
57. temps E. 1. bre. 811. Pl.

Com. 168.

[n] Pl. Com. 169. Linwood. 44.
E. 3. 21. 4. E. 3. 32.

[o] 4. E. 3. tit. feoffments et fait
79. 14. E. 3. Formedon. 34.
34. Aff. pl. 11.

(1) For the nature of a land-honor or barony, see Mad. Bar. Angl. 2.

(2) Acc. 2. Inst. 31.

(3) See further as to castles, Mad. Baron. Anglican. 17. to 20. Discours. by Emin. Antiq. ed. 1773. v. 1. p. 100, 186, and 191.

(4) See ante 1. b.

(5) See 2. Inst. 145.

(6) As to the contents of a knight's fee, see post. 69.

(7) Some think, that *solinus terræ* was frequently synonymous with *carucata terræ*. See Somn. Rom. Ports 82. Cow. Interpr. ed. 1727. voc. *solinus terræ*.

(8) See further as to this, Post. 69. and 86. b.

(9) See Post. 69.

(10) See Post. 69.

(11) See further on the dimensions of land in England, Post. 200. b. and 69. Crompt. on Courts, 222. and Disc. by Emin. Antiq. ed. 1773. v. 1. p. 39. to 50. and 107, 195, and 197.—By what names, and in what order, lands, &c. ought to be demanded, see Post. 5. b. Fitzh. N. Br. 2. C. Hugh. Comment. on Orig. Writs. 2. and Theloal's Dig. Br. Orig. l. 8. c. 1. p. 118. and particularly the latter book.

(12) *Grange* sometimes comprehends a whole farm. See 4. Co. 42. b.

[a] 13. E. 3. 4. 4. E. 3. 143. 8. E. 3. 381. 10. E. 3. 482. 13. E. 3. entry 57. F. N. B. 191. h. Domesday.

[b] Temps E. 1. bre. 861. 4. E. 3. 5. 10. H. 7. 30. 44. E. 3. 12. 43. E. 3. 24. 35. H. 6. 55. 3. H. 6. 2. Domesday. Bracton lib. 4. fo. 235. Int. ad judicat. coram rege p. 39. E. 3. lib. 3. fo. 95. in Thesaur. (4. Inlt. 289.)

[c] 40. Aff. 38. 4. H. 6. 14. 35. E. 1. ca. 6. Anno 10. R. 1. inter fines in Thes. Ferlingus terræ continet 32 acras. Domesday. Frustrum. 16. E. 3. tit. comon. 9.

[d] Mich. 8. H. 3. incipien. 9. coram rege. Warr. Ro. 6.

[e] Virg. Eclog. 1. 2.

[f] Bract. 211. 233. 22. E. 4. trans. 140. Pl. Com. 168. 171. 23. H. 8. Br. feoffments 53. 9. Aff. p. 21. 35. H. 6. 44. Pl. Com. 169. (1. Sid. 309.)

[g] Domesday.

[h] Pasch. 30. E. 1. coram rege. Kanc. in Thesaur. Statut. de extent. manerii. Domesday.

Domesday.

[i] Int. placita coram domino rege Mich. 10. E. 3. Rot. 26. Lamb. exposit. verb. Thanus.

[k] Lib. Rub. cap. 15. & cap. 41. & 76. W. 2. c. 46. 7. H. 4. 38. Lib. d'entries Aff. corps pol. 2. (4. Inlt. 294.) Domesday.

[l] 7. H. 4. 28. Fleta lib. 2. cap. 35. Domesday. 10. R. 1. inter fines.

[m] 9. E. 3. 39. Temps E. 1. Br. 866. Mich. 30. E. 1. coram rege Gloc. in Thesaur.

[n] Bract. fo. 377. 431. 43. E. 3. 27. Regist. fo. 1. 94. 248. 249. F. N. B. fo. 87. F. 1.

[o] Regula.

7. R. 1. inter fines Suffex.

flagnum or a poole, the water and land shall passe also. [a] In the same manner *gorges*, a deepe pit of water, a gors or gulfe, consisteth of water and land; and therefore by the grant thereof by that name, the soile doth passe, and a *præcipe* doth lye thereof, and shall lay his esplees in taking of fishes as breames and roches. In Domesday it is called *guort*, *gort*, and *gors* plurally; as for example, *de 3 gors mille anguille*.

[b] So it is of a forrest, parke, chafe, vivarye, and warren in a man's owne ground, by the grant of any of them, not onely the priviledge, but the land itselfe passeth; for they are compound. In the booke of Domesday, that is called *lewad*, and *lenga*, and *lewed*, and *lewe*, which in Latin is called *leuca*.

[c] *Stadium* or *ferlingus* sive *ferlingum*, or *quarentena terra*, is a furlong of land, and is as much as to say, a furrow long, which in ancient time was the eighth part of a mile; and land will passe by that name. And some hold that by that name land may be demanded. And *de ferlingis et quarentenis*, you shall read divers times in the book of Domesday; and there you shall read *in insula rex habet unum frustrum terræ unde exeunt sex vomeres*. Nota, *frustrum* signifieth a parcel. [d] *Warectum*, or *wareccum*, or *warectum*, doth signifie fallow; *terra jacet ad warectum*, the land lyeth fallow: but in truth the word is *vervacum* quasi *vere novo victum* seu *subactum*, *terra novalis seu requieta*, quia *alternis annis requiescat*; [e] *tam culta novalia*. [f] By the grant of a messuage, or house, *mesuagium*, the orchard, garden, and curtilage doe (1) passe, and so an acre or more may passe by the name of a house. It is derived of the French word *mes*. [g] In Domesday, a house in a city or burrough is called *baga*; other houses are called there *mansiones*, *mansura*, and *domus*; [h] and in an ancient plea concerning Feverham in Kent, hawes are interpreted to signifie *mansiones*. In Normans French it is called *mesnil* or *mesuil*. *Bye* signifieth a dwelling, *bye* an habitation, and *byan* to dwell.

It is to be noted, that in Domesday there be often named *bordarii* seu *borduanni*, *cofces*, *cofset*, *cotucami*, *cotarii*, who are all in effect bores or husbandmen, or cotagers, saving that *bordarii*, which cometh of the French word *borde* for a cottage, signifieth there bores holding a little house, with some land of husbandry bigger than a cottage; and *coterelli* are meere cottagers, *qui cotagia et curtilagia tenent* (2).

Villani in Domesday (often named) are not taken there for bondmen, but had their name *de villis*, because they had fermes, and there did worke of husbandry for the lord; and they were ever named before *bordarii*, &c. and such as are bondmen are called there *servi*.

[i] *Coleberti*, often also named in Domesday, signifieth tenants in free socage by free rent; and so it is expounded of record. *Radmans* and *radebemisfres*, (*rad*, or *rede*, signifieth firme and stable) there also often named, these are *liberi tenentes qui arabant et berciebant ad curiam domini*, seu *falcabant*, aut *metebant*, because their estates are firme and stable; and they are many times called *sokemans* and *sokemanni*, because of their plough service.

Dreuchs signifieth free tenants of a manor, there also named. *Taini* or *thaini* *mediocres* were freeholders, and sometime called *militis regis*, and their land called *tainland*, and there it is said, *hæc terra T. R. E. fuit tainland, sed postea conversa in reueland*. [k] But *thainus regis* is taken for a baron; for it is said in an ancient author, *thainus regis proximus comiti est, et ibidem mediocris thainus, et alibi baro sive thainus* (3). *Berquarium* or *bercaria* cometh of *berc*, an old Saxon word, used at this day for barks or rindes of trees; and signifieth a tanhouse, or a heath house, where barks or rindes of trees are laid to tan withal, and *berquarii* are mentioned in Domesday. It signifieth also, and more legally, a sheep-coat, of the French word *bergerie*.

[l] By *vaccaria* in law is signified a dairy house, derived of *vacca* the cow. In Latin it is *lactarium* or *lactitium*, and *vaccarius* is mentioned in Domesday. And Fleta maketh mention of *porcaria*, a swinetye.

The content of an acre is known. The name is common to the English, German, and French. In legall Latin it is called *acra*, which the Latinists call *jugerum*. In Domesday it is called *arpen prati*, sive, &c. 10. R. 1. inter fines. *Acra* in Cornwall continet 40 *pericatas in longitudine, et 4 in latitudine, et qualibet pericata de 16 pedibus in longitudine* (4).

[m] By the grant of a felion of land, *selio terræ*, a ridge of land, which containeth no certainty, for some be greater and some be lesser; and by the grant *de una porca*, a ridge doth passe. *Selio* is derived of the French word *fellon* for a ridge.

[n] By the grant *de centum libratibus terræ*, or *50 libratibus terræ*, or *centum solidatis terræ*, &c. land of that value passeth, and so of more or lesse, and in ancient time by that name it might have been demanded. [o] And many things may passe by a name, that by the same name cannot be demanded by a (5) *præcipe*, for that doth require more prescript forme; but whatsoever may be demanded by a *præcipe* may passe by the same name by way of grant.

Frythe is a plaine betweene woods, and so is *lawnd* or *lound*. *Combe*, *bope*, *dene*, *glyn*, *hævgh*, *bowgh*, signifieth a vally. *Howe*, *boo*, *knol*, *law*, *pen*, and *cope*, a hill. *Ey*, *ing*, and *worth*, signifieth a watry place or water. *Falsia* is a bank or hill by the sea-side: it cometh of *falaise*, which signifieth the same. Of all these you shall read in ancient bookes, charters, deeds, and

(1) Contra as to the garden, Keilw. 57. Mo. 24. Dal. in N. Bendl. 29. But see acc. Post. 56. a. and b. Plowd. 171. 2. Co. 32. 2. Saund. 401. S. p. adj. acc. in case of a devise, 3. Leon. 214. and Cro. Eliz. 89. See acc. 2. Cha. Caf. 27. See further Latt. Rep. 6. where the court held, that the devise of a messuage was not sufficient to pass 2 acres 4 miles distant from the messuage, though occupied with it. In Keilw. 57. a difference is taken between *messuage* and *domus*; and it is there said, that *messuage* extends to the *curtilage*, though not to the *garden*, but that *domus* only comprehends buildings. Also in some of the cases cited, particularly that from Plowden, the grant was of a *messuage* with the *appurtenances*; on which latter word some stress seems to have been laid.

(2) See as to *cottages*, 2. Inlt. 736.

(3) See further as to *thane* and *thane land*, in Reliq. Spelm. 11, &c. See also post. 6. a. n. 6.

(4) This differs from the common acre, because each perch usually contains 16 feet and an half. In some places the custom is to measure by a perch of 24 feet, and in others by one of 20 feet. See Crompt. on Courts, 222.

(5) See Ant. 3. a. n. 11.

and records : and to the end that our student should not be discouraged for want of knowledge, when he meeteth with them (*nescit enim generosa mens ignorantiam pati*) we have armed him with the signification of them, to the end he may proceed in his reading with alacrity, and set upon, and know how to worke into with delight these rough mines of hidden treasure.

[m] By the name of *minera* or *fodina plumbi*, &c. the land itselfe shall passe in a grant, if livery be made, and also be recovered in an assise, *et sic de similibus*.

By the grant of a fouldcourse or the like, lands and tenements may (1) passe [n]. *Tenementum*, tenement, is a large word to passe, not onely lands and other inheritances, which are holden; but also offices, rents, commons, profits, apprender out of lands and the like, wherein a man hath any franktenement, and whereof he is icised, *ut de libero tenemento* (2). But *hereditamentum*, hereditament, is the largest word of all in that kind; for whatsoever may be inherited is an hereditament, be it corporeall or incorporeall, reall or personall, or mixt (3).

[o] A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs: the purchaser shall have all the charters, deeds, and evidences, as incident to the lands, *et ratione terra*, to the end he may the better defend the land himselfe, having no warrantie to recover in value; for the evidences are as it were the sinewes of the land, and the feoffor not being bound to warrantie hath no use of them. But if the feoffor be bound to warrantie, so that he is bound to render in value, then is the defence of the title at his perill; and therefore the feoffee in that case shall have no deeds that comprehend warrantie, whereof the feoffor may take advantage. Also he shall have such charters as may serve him to deraigne the warrantie paramount. Also he shall have all deeds and evidences, which are materiall for the maintenance of the title of the land; but other evidences, which concerne the possession, and not the title of the land, the feoffee shall have them (4).

A aver et tener. These two words do in this place prove a double signification, *viz.* a *aver*, to have an estate of inheritance of lands descendible to his heirs, and *tener* to hold the same of some superior lord.

There have beene eight formall or orderly parts of a deed of feoffment, (5) *viz.* 1. the *premisses* of the deed implied by Littleton; 2. the *habendum*, whereof Littleton here speaketh; 3. the *tenendum*, mentioned by Littleton; 4. the *reddendum*; 5. the *clause of warrantie*; 6. the *in cuius rei testimonium*, comprehending the sealing; 7. the date of the deed, containing the day, the month, the yeare, and stile of the king, or of the yeare of our Lord; [p] lastly, the *clause of his testibus*. And yet all these parts were contained in very few and significant words, [q] *hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt*.

The office of the *premisses* of the deed is twofold; first, rightly to name the feoffor and the feoffee; and secondly, to comprehend the certainty of the lands or tenements to be conveyed by the feoffment, either by expresse words, or which may by reference be reduced to a certaintie, for *certum est quod certum reddi potest*. The *habendum* hath also two parts, *viz.* first, to name againe the feoffee; and secondly, to limit the certaintie of the estate. The *tenendum* at this day, where the fee simple passeth, must be of the chiefe lords of the fee. And of the *reddendum* more shall be said in his proper place, in the chapter of Rents. Of the *clause of warrantie* more shall be said in the chapter of Warranties. In *cuius rei testimonium sigillum meum apposui* was added, for the seale is of the essentiall part of the deed. The date of the deed many times antiquity omitted; and the reason thereof was for that the limitation of prescription, or time of memory, did often in proesse of time change, and the law was then holden, that a deed bearing date before the limited time of prescription was not pleadable; and therefore they made their deedes without date, to the end they might alledge them within the time of prescription. And the date of the deedes was commonly added in the raigne of E. 2. and E. 3. and so ever since.

And sometime antiquitie added a place, as *datum apud D.* which was in disavantage of the feoffee; for being in generall he may allege the deed to be made where he will. And lastly, antiquitie did add *his testibus* in the continent of the deed after the *in cuius rei testimonium*, written with the same hand that the deed was, which witnesses were called, the deed read, and then their names entered. [r] And this is called charter land, and accordingly the Saxons called it *bockland*, as it were booke land (6). Which clause of *his testibus* in subjects deedes continued untill and in the raigne of H. 8. but now is wholly omitted. And it appeareth by the ancient authors and authorities of the law, that before the statute of 12. E. 2. ca. 2. proesse should be awarded against the witnesses named in the deed, *testes in carta nominatos*, [s] and that the same statute was but an affirmance of the common law; which not being well understood hath caused varietie of opinions in our books. But the delay therein was so great, and sometimes (though rarely) by exceptions against those witnesses, which being found true, they were not to be sworne at all, neither to be joined to the jury, nor as witnesses; [t] as if the witness were infamous, for example, if he be attainted of a false verdict, or of a conspiracie at the suite

(1) Here *fold course* seems to be understood for land used as a *sheep-walk*; but the word has various other senses. Sometimes it signifies land to which is appurtenant the sole right of folding the cattle of others. Sometimes it means merely such right of folding. It is also used to denote the right of folding on another's land, which is called *common of foldage*. See in W. Jo. 375. and Cro. Cha. 432. a case, in which *common of foldage* was claimed, and 2. Ventr. 139. one in which the right of folding the cattle of others is prescribed for.—(2) See further as to the extent of the word *tenement*, Perk. sect. 114. & 11. H. 6. 22.—(3) See further as to *hereditament*, Ant. 3. Plowd. 58. Mo. 176. 3. Co. 2. Dy. 323. b. pl. 30. With the word *hereditament* lord Coke ends his laborious inquiries about the names, by which things will pass in grants and other conveyances. His etymologies and explanations of the several words are certainly open to many observations, besides the few made by the editor of this edition. But the omission on his part proceeds from the nature of his undertaking, which confines him to narrow limits. To supply his unavoidable deficiencies in this instance, and for the sake of recommending assistances which are too much neglected, he refers the student to the glossaries which are so peculiarly adapted for the libraries of such as study English law, history, and antiquities. Of these a good list is given in a tract by Dr. Thomas Barlow, intitled *Directions for the Study of the English History and Antiquities*, and published in 1742 by Dr. Taylor with his Commentary on the Decemviral Law *De inope Debitore in partes dissecando*. To this list of Glossaries should be added Du Fresnoy's Glossary *ad Scriptores Med. et Infim. Latin. ed. Par. 1733*, the *Glossarium Novum* by Charpentier, *ed. Par. 1766*, the Glossary by Dr. Kennett, at the end of his *Parochial Antiquities*, that at the end of Wilkins's *Leg. Anglo-Saxon.* and Lye's *Dis. Saxon. & Gothic. Latin. ed. 1772*.—(4) See Cro. Eliz. 347. Cro. Cha. 442. Noy 145. In all of these books it is said, that in the case of conveyances to uses the possession of deeds appertains to the feoffee or covenantor, and not to cestuique use; and the reason given is, that it was so at common law, and the statute of uses, though it transfers the legal estate to cestuique use, doth not transfer the deeds. But this doctrine seems questionable.—(5) See the observations on this part of the Commentary in Mad. Form. Angl. Dissert. p. 5. See also on the subjects of ancient deeds and charters, the whole of the same Dissertation, and Nich. Engl. Hist. Libr. 2d ed. 240. Seld. Jan. Angl. b. 2. c. 2. and 3. to which may be added Mabillon de Re Diplomatica.—(6) See further

[m] 17. E. 3. 7. 43. E. 3. 35. b. Regist. 65. 10. H. 7. 21. Pl. Com. 191. 195. Bract. 211. 326. [n] 45. E. 3. Vouchee 72. 33. E. 3. grant 102. 11. H. 6. 22. 27. 14. E. 4. 4. 20. Aff. p. 9. 3. E. 4. 19. 11. H. 7. 25. (Post. 19. b. 20. and 154.)

[o] 1. Co. fo. 1. & 2. in Seignior Buckhurst's case. 44. E. 3. 11. b. 39. E. 3. 17. a. 19. H. 6. 65. b. 34. H. 6. 1. a. 10. E. 4. 9. b. 18. E. 4. 14. 15. 6. H. 7. 3. b. 11. 7. 33. a. (2. Ro. Abr. 31.)

Vid. Sect. 40. & 370. 371. many things de cartis et factis. Fleta, lib. 3. ca. 14. Britton 100. 101. Bract. lib. 5. fo. 396. a. 399. 38. H. 6. 33. 36. Pl. Com. Wrottesleve's case, fol. 96.

[p] Vid. Throgmorton's case, Pl. Com.

[q] 6. Co. 43. in fir Anthony Mildmay's case. Vid. Sect. 278. (2. Ro. Abr. 23.)

Brit. fo. 101.

[r] Lamb. exposit. verb. terra ex scripto. Vid. Fortescue, cap. 32. See the Second Part of the Instit. cap. 38. 12. E. 2. c. 2. See the Second Part of the Institutes. Marlb. cap. 6. and cap. 14. [s] Brit. fo. 65. 101. 11. E. 3. procel. 170. 6. H. 3. procel. 209. 8. H. 3. procel. 210. 4. E. 2. gard. 119.

[t] Mirror ca. 4. sect. de infamies et perjurie. Glanv. lib. 2. cap. 15. Bract. lib. 5. fo. 288. 292. Brit. fo. 134. 135. 101. Fleta, lib. 5. ca. 21. 8. E. 2. Aff. 396. 2. E. 3. 22. 24. E. 3. 34.

(5. Co. 99. Flower's case.)
43. E. 2. conspir. 11. 27. Aff. 59.
33. H. 6. 55. 21. H. 6. 36. (4.
Inst. 279. 1. Sid. 51. Godb.
288. 2. Bull. 154. Raym. 369.
1. Ventr. 349. 1. Kelynge, 38.
18. 4. Inst. 279. T. Jo. 155.
2. Ro. Abr. 636.)
[4] Fortesc. ca. 26. Pat. 55. H.
3. m. 3. Stanf. Pl. Cor. 174. a.
[6] Fortescu. ca. 25.

[c] 22. Aff. 12. and 41. 23.
Aff. 11. 19. E. 2. tit. Aff. 409.

[d] 34. E. 1. procel. 208.

[e] 34. E. 1. tit. procel. 208.
11. Aff. p. 10. 20. 12. Aff. p.
1. 12. 41. 18. Aff. p. 11. 22.
Aff. 15. 23. Aff. 15. 40. Aff.
23. 48. Aff. p. 5. 21. H. 6. 39.

[f] 48. E. 3. 30. 12. H. 6. fo.
6. a. 50. E. 3. 16. 43. E. 3.
32. 12. H. 4. 9. 19. E. 2. Aff.
408. Patch. 14. E. 3. coram rege
Devon. in Theaur. Fleta, lib.
6. cap. 6. F. N. B. 106. h. and
97. c. (Post. 303.)
[g] Mirror ca. 3. Pl. Com. fo.
10. Bract. lib. 5. fo. 400. (Post.
373. a.)

Fleta lib. 6. ca. 33. 8. E. 3. 290.
39. E. 3. 21. b.

Glanv. lib. 10. ca. 12. Fleta,
lib. 6. ca. 33.

[h] Patch. 10. Ja. in Com. Banco
upon the stat. of bankrupts. (1.
Brownl. 47. 2. Ro. Abr. 585.
Hutt. 115. Raym. 1. 1. Ventr.
243. 3. Keb. 193. 1. Sid. 431.)
[i] Fleta, lib. 2. ca. 44. 13. E.
1. tit. Vil. 36. 37. 19. E. 2. ibid.
32. (Post. 25.)

[k] Tr. 8. Ja. in Com. Banco.
Smithe's case, in evidence upon an
information upon the statute of
usury. Brit. fo. 134. (Raym.
291. 7. Mod. 118.)

suited of the king, or convicted of perjury, or of a premunire, or of forgery upon the statute of 5. Eliz. cap. 14. and not upon the statute of 1. H. 5. cap. 3. or convicted of felony, or by judgement lost his eares, or stood upon the pillory or tumbrell, or beene *stigmaticus*, branded, or the like (1), whereby they become infamous; for some offences, *quæ sunt minoris culpe, sunt majoris infamiae*. [a] If a champion in a writ of right become recreant or coward, he thereby loseth *liberam legem*, and thereby becomes infamous, and cannot be a witness; for regularly he, that loseth *liberam legem*, becometh infamous, and can be no witness. Or if the witness be an infidell (2), or of non sane memory, or not of discretion, or a partie interested, or the like. [b] But oftentimes a man may be challenged to be of a jury, that cannot be challenged to be a witness. And therefore though the witness be of the neereſt alliance, or kindred, or of counsell, or tenant, or fervant to either partie, or any other exception that maketh him not infamous, or to want understanding, or discretion, or a partie in interest, though it be proved true, shall not exclude the witness to be sworne; [c] but he shall be sworne, and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact; inſomuch as some bookes have said, that though the witness named in the deed be named a disseisor in the writ, yet he shall be sworne as a witness to the deed. [d] A witness amongst others named in a deed was outlawed, and no proces was awarded against him by the statute, because he was *extra legem*, and an outlawed person cannot be an auditor. And the court in some bookes have said, that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid; but such as are returned to be of a jury are to be challenged for the causes abovesaid for outlawry, and divers other causes, (for the which a witness cannot be challenged) and such proces against witnesses (3) banished. But seeing the witnesses named in a deed shall be joyned to the inquest, and shall in some sort joyne also in the verdict (in which case if jurie and witnesses finde the deed that is denied to be the deede of the partie, the adverse partie is debarred of his attaint because there is more than 12 that affirme the verdict) (4) it is reason, that in that case of joyning such exception shall be taken against the witness as against one of the jury, because he is in the nature of a juror. [e] And therefore to put one example, if he be outlawed in a personall action he cannot be joined to the jury, but yet that is no exception against him to exclude him to be sworne as a witness to the jury. And the reason of all this is, for that if he with others should joyne in verdict with the jurie in affirmance of the deed, the partie should be barred of his attaint. But note, there must be more than one witness that shall be joyned to the inquest. And albeit they joyne with the jury, and finde it not his deed, notwithstanding this joyning, the partie shall have his attaint; for it is a maxim in law, [f] that witnesses cannot testify a negative (5), but an affirmative. And if one of the witnesses named in the deed be one of the panel, he shall be put out of the panel. And all these secrets of law do notably appear in our bookes.

To shut by this point, it is to be knowne, [g] that when a triall is by witnesses, regularly the affirmative ought to be proved by two or three witnesses; as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of 12 men, there the judgement is not given upon witnesses, or other kinde of evidence, but upon the verdict, and upon such evidence as is given to the jury they give their verdict. And Bracton saith, there is *probatio duplex, viz. viva, as by witnesses viva voce; and mortua, as by deedes, writings, and instruments*. And many times juries, together with other matter, are much induced by presumptions, whereof there be three sorts, *viz. violent, probable, and light or temerary*. *Violenta presumptio* is many times *plena probatio*; as if one be runne thorow the bodie with a sword in a house, whereof he instantly dieth, and a man is seene to come out of that house with a bloody sword, and no other man was at that time in the house. *Presumptio probabilis* moveth little, but *presumptio levis seu temeraria* moveth not at all. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time wearieth out all men) then violent presumption, which stands for a proove, is continuall and quiet possession; for *ex diuturnitate temporis omnia presumuntur solemniter esse acta*. Also the deed may receive credit *per collationem sigillorum, scripturæ, &c. et super fidem cartarum, mortuis testibus, erit ad patriam de necessitate recurrendum*.

Note, it hath been resolved by the justices, that a wife [h] cannot be produced either against or for her husband (6); *quia sunt duæ animæ in carne una*, and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience. But [i] in some cases women are by law wholly excluded to beare testimony, as to prove a man to be a villeine: *mulieres ad probationem status hominis admitti non debent*. It was also agreed by the whole court [k], that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witness against the usurer; for in effect he should be *testis in propria causa*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet *in rei veritate* he is the partie (7). And herewith in effect agreeth Brit-

ton,
further as to *bockland* and *falkland*, Reliq. Spelm. 12. 39. and Durymp. Feud. Prop. 9. In this last book the very spirited writer attempts a new distinction between the two kinds of laud, and to shew that *bockland* or *thane land* was *feudal*, and that *falk* or *reveland* was *allodial*.

(1) But according to the modern cases, it is the *infamy* of the *crime* and not of the *punishment*, which disqualifies from being a witness; and therefore persons stigmatized by an *infamous* punishment, such as being set on the pillory, are admissible witnesses, unless the punishment was inflicted for forgery, perjury, or any species of the *crimen falsi*, or any other crime of an infamous nature. See further on this subject, Gilb. Law of Evid. 142. the Law of Nisi Prius, 1st ed. 413. and 1. Willf. part 2. p. 18.

(2) But now it is settled, that all persons professing to believe in a God, though neither believing in the Old or New Testament, may be witnesses, if sworn according to the ceremonies of their own religion. See in 1. Atk. 19. 2. Eq. Caf. Abr. 397. and 1. Willf. part 1. p. 84. the great case of Omichund and Barker, in which lord chancellor Hardwicke, assisted by the two chief justices and the chief baron, determined, that the deposition of one who was of the *Gentoo* religion should be read in evidence.

(3) See further on this subject of joining with the jury the witnesses named in a deed, and the procel for that purpose, 33. H. 6. 19. and in Vin. Abr. Evidence. H. a. and J. a.

(4) Acc. 1. Ro. Abr. 280. pl. 14. and 2. Inst. 662. See infra n. 5.

(5) Acc. 4. Inst. 279. and the references supra in n. 4. But see 1. Ro. Rep. 83. Comb. 18. 57. Gilb. Law of Evid. 157. Law of Nisi Prius, 1st ed. 422.

(6) There are many exceptions to this rule, as well at common law, as under acts of parliament. See Gilb. Law of Evid. 135. Law of Nisi Prius, 1st ed. 435. See further as to admitting or refusing the evidence of the wife or husband against each other, in Caf. B. R. temp. Hardwicke, 265. Rep. of Caf. B. R. temp. Hardw. 140. 1. Atk. 451. 2. Kel. 62.

(7) But this objection fails, where the debtor previously to his examination has paid the money borrowed, there being, as it is said, no remedy to recover the money back again; and therefore in such a case his testimony hath been received. See the addit. refer. supra in marg. letter [k] and Caf. B. R. temp. Hardw. 266. and Gilb. Law of Evid. 127.

ron, that he that challengeth a right in the thing in demand, cannot be a witness, for that he is a party in interest (1). But now let us returne to that from the which by way of digression (upon this occasion) we are fallen.

And the ancient charters of the king, which passed away any franchise or revenue of any estate of inheritance, had ever this clause of *hiis testibus*, of the greatest men of the kingdome, as the charters of creation of nobility yet have at this day. When *hiis testibus* was omitted, and when *teste me ipso* came into the king's grants, you shall reade in the Second Part of the Institutes (2), *Magna Charta*, cap. 38. I have tearmed the said parts of the deed formall or orderly parts, for that they be not of the essence of a deed of feoffment; for if such a deed be without *premisses*, *habendum*, *tenendum*, *reddendum*, clause of *warrantie*, the clause of *in cuius rei testimonium*, the date, and the clause of *hiis testibus*, yet the deed is good. [f] For if a man by deede give lands to another and to his heires without more saying, this is good, if he put his seale to the deed, deliver it, and makelivery accordingly. [g] So it is if A. give lands, to have and to hold to B. and his heires, this is good, albeit the feoffee is not named in the (3) premisses. And yet no well advised man will trust to such deeds, which law by construction maketh good *ut res magis valeat*; but when forme and substance concur, then is the deed faire and absolutely good. The sealing of charters and deeds is much more ancient than some out of error have imagined (4); for the charter of the king Edwyn, brother of king Edgar, bearing date *anno Domini* 956. made of the land called *Jecklea* in the isle of Ely, was not only sealed with his owne seale (which appeareth by these words, *ego Edwinnus gratia Dei totius Britannicæ telluris rex meum donum proprio sigillo confirmavi*) but also the bishop of Winchester put to his seale, *ego Ælfwinus, Winton. ecclesiæ divinus speculator, proprium sigillum impressi*. And the charter of king Offa, whereby he gave the Peter-pence, doth yet remaine under seale. But no king of England before or since the Conquest sealed with any seale of armes before king R. 1. but the seale was the king sitting in a chaire on the one side of the seale, and on horsebacke on the other side in divers formes. And king R. 1. sealed with a seale of two Lyons, for the Conqueror for England bare two Lyons; and king John in the right of Aquitaine (the duke whereof bare one Lyon) was the first that bare three Lyons, and made his seale accordingly, and all the kings since have followed him. And king E. 3. in *anno* 13. of his raigne, did quarter the armes of France with his three Lyons, and tooke upon him the title of king of France, and all his successors have followed him therein.

In ancient charters of feoffment there was never mention made of the delivery of the deed, or any livery of seisin indorsed; for certainly the witnesses named in the deed were witnesses of both: and witnesses either of delivery of the deed, or of livery of seisin by expresse tearmes was but of latter times, and the reason was in respect of the notoriety of the feoffment. And I have knowne some ancient deeds of feoffment having livery of seisin indorsed suspected, and after detected of forgerie. As if a deed in the stile of the king name him *defensor fidei* before 13. H. 8. or *supreme head* before 20. H. 8. at what time he was first acknowledged supreme head by the cleargy, albeit the king used not the stile of *supreme head* in his charters, &c. till 22. H. 8. or *king of Ireland*, before 33. H. 8. at which time he assumed the title of *king of Ireland* (5), being before that called lord of Ireland, it is certainly forged, *et sic de similibus*.

And some have observed that *grace* was attributed to king H. 4. excellent *grace* to king H. 6. *majesty* to king H. 8. and before, the king was called *soveraigne lord*, *liege lord*, *highnesse*, and *kingly highnesse*, which in Latin in legall proceedings is called *regia celsitudo*, as the beginning of the petition of right to the king is *humillimè supplicavit vestra celsitudini regia*, &c. and the like. And upon this occasion it shall not be impertinent, seeing it is part of the formall deed, to set downe the severall stiles of the kings of England since the Conquest.

William the Conqueror commonly stiled himselfe *Willielmus rex*, and sometimes *Willielmus rex Anglorum*. And the like did William Rufus, and sometimes *Willielmus Dei gratia rex Anglorum*. Henry the first, *Henricus rex Anglorum*, and sometimes *Henricus Dei gratia rex Anglorum*.

Mawde the sole daughter and heire of H. 1. wrote *Matildis imperatrix Henrici regis filia et Anglorum domina*. Divers of whose creations and grants I have seene.

King Stephen used the stile that king H. 1. did.

Henry the 2. *Fitz-Empress* omitted *Dei gratia*, and used this stile, *Henricus rex Angliæ, dux Normanniæ, et Aquitaniæ, et comes Andegaviæ*; he having the duchy of Aquitaine and earldome of Poitiers in the right of Elianor his wife heire to both, and the earldome of Anjowe Tournie and Maine, as sonne and heire to Jeffery Plantagenet by the said Mawde his wife, daughter and sole heire of king H. 1. She was first married to Henry the emperor, and after his death to the said Jeffery Plantagenet. Which duchie of Aquitaine doth include Gascoigne and Guian.

King R. 1. used the stile that H. 2. his father did; yet was he king of Cyprus, and after of Jerusalem, but never used either of them.

King

(1) Besides the books already cited on the subject of evidence, see *Duncombe's Trials per Pais* in the chapter on evidence, the *Law of Evidence*, and the title *Evidence* in the severall Treatises on the Pleas of the Crown and in the severall Abridgments of Law and Equity. As to the book intituled the *Theory of Evidence*, it is included in the *Law of Nisi Prius*. The writings of the civilians on evidence are very numerous; and the curious reader may see an account of them in *Baderus's* edition of the *Bibliotheca Juris selecta* by *Struvius*. Amongst the most admired of their professed writers on the subject are *Menochius de Præsumptionibus*, *Mascardus de Probationibus*, *Everardus de Testibus et Fide Instrumentorum*, and *Farinacius de Testibus*. *Struvius's* *Bibliotheca Juris* will be found very useful to the diligent student, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of most of the countries in Europe, and of the characters of the severall writers. It is to be wished, that we had a *Bibliotheca Juris Anglicani*, written on the same critical and enlarged plan. Such a work has been attempted by Mr. *Gatzert*, a German writer, who has lately published at Gottingen a book entitled *Commentatio Juris Exotici Historico-Litteraria de Jure Communi Angliæ*. But though Mr. Gatzert, when the disadvantage of his being a foreigner is considered, has really done wonders; yet it is not to be conceived, that such a work can ever be executed with the requisite judgment, accuracy, and nicety, until the task is undertaken by one of our own country, who hath been regularly trained in the study of the English law, and is familiarly acquainted with all the writers on our laws constitution and history.—(2) In the Second Institute, sir Edward Coke seems to think, that the clause of *teste me ipso* was first introduced into the king's grants in the time of Richard the second; but Mr. Madox dates the use of it much earlier, and gives an instance in the reign of Richard the first. See 2. Inst. 77. and *Mad. Form. Anglic. Dissert.* p. 32.—(3) The cases in 3. Leon. 33. and 2. Ro. Abr. 66. pl. 13. are *contra*. That in Cro. Eliz. 902. and 917. also seems *contra* on the first reading; though, on examination, the question appears to have been rather on the manner of pleading the deed, than on the operation of it. But in Car. Rep. 123. there is a case of the 21. and 22. Eliz. in which the two chief justices and the chief baron certified to the chancellor, that a lease was good in law, though the lessee was named in the *habendum* only; and the case in Allen 41. is also with lord Coke.—(4) See further as to the antiquity of sealing deeds, in *Seld. Jan. Angl. b. 2. c. 2. Mad. Form. Anglic. Dissert.* p. 27. and *Nichols. Engl. Histor. Libr.* 2d ed. 241.—(5) See post. 7. b. n. 1.

[f] Mirror cap. 1. sect. 6. and cap. 5. sect. 1. Glanvil. l. b. 10. cap. 12. Bract. lib. 5. fol. 396. Flet. lib. 6. ca. 32. Brit. fo. 66. [g] Vid. Tearmes of the Law, verb. Faits. Vid. Glanvil. lib. 10. c. 12. Mir. c. 1. sect. 3. and c. 3. (2. Ro. Abr. 66. pl. 13. Cro. Eliz. 903.)

21. H. 8. cap. 16.

Vid. 2. H. 4. c. 15. where to all majesty is attributed to the king, and crimen læsæ majestatis fact more ancient.

King John used that stile, but with this addition, *dominus Hiberniæ*; and yet all that he had in Ireland was conquered by his father king H. 2. which title of *dominus Hiberniæ* he assumed as annexed to the crowne, albeit his father, in the 23. yeare of his raigne, had created him king of Ireland in his life time (1).

King H. 3. stiled himselfe, as his father king John did, untill the 44. yeare of his raigne, and then he left out of his stile, *dux Normanniæ, et comes Andegaviæ*, and wrote onely *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*.

King E. 1. stiled himselfe in like manner as king H. 3. his father did, *rex Angliæ, dominus Hiberniæ, et dux Aquitaniæ*. And so did king E. 2. during all his raigne. And king E. 3. used the selfe same stile untill the 13. yeare of his raigne, and then he stiled himselfe in this forme, *Edwardus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ*, leaving out of his stile *dux Aquitaniæ*. He was king of France as sonne and heire of Isabel wife of king E. 2. daughter and heire of Philip le Beau king of France. He first quartered the French armories with the English in his great seale, *anno Domini 1338. et regni sui 14.*

King R. 2. and king H. 4. used the same stile that king E. 3. did. And king H. 5. untill the 8. yeare of his raigne continued the same stile, and then wrote himselfe *rex Angliæ, hæres et regens Franciæ, et dominus Hiberniæ*, and so continued during his life.

King H. 6. wrote, *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ*. This king being crowned in Paris king of France used the said stile 39. yeares, till he was dispossessed of the crowne by king E. 4. who after he had raigned also about ten yeares, king H. 6. was restored to the crowne againe, and then wrote, *Henricus Dei gratiâ rex Angliæ et Franciæ, et dominus Hiberniæ, ab inchoatione regni sui 49. et recaptationis regni potestatis primo.*

King E. 4. R. 3. and H. 7. stiled themselves, *rex Angliæ et Franciæ, et dominus Hiberniæ*.

King H. 8. used the same stile till the tenth yeare of his raigne, and then he added this word (*oſſavus*) as *Henricus octavus Dei gratiâ, &c.* In the 13. yeare of his raigne he added to his stile *fidei defensor* (2). In the 22. yeare of his raigne, in the end of his stile he added, *supremum caput ecclesiæ Anglicanæ* (3). And in the 23. yeare of his raigne he stiled himselfe thus, *Henricus octavus, Dei gratiâ Angliæ Franciæ et Hiberniæ rex, fidei defensor, &c. et in terrâ ecclesiæ Anglicanæ et Hiberniæ supremum caput* (4).

King E. 6. used the same stile, and so did queene Mary in the beginning of her raigne, and by that name summoned her first parliament, but soone after omitted *supremum caput*. And after her marriage with king Philip, the stile notwithstanding that omission was the longest that ever was, *viz. Philip and Mary, by the grace of God, king and queene of England and France, Naples, Jerusalem, and (5) Ireland, defenders of the faith, princes of Spaine and Sicilie, archdukes of Austria, dukes of Millaine Burgundy and Brabant, countes of Halburgh Flanders and Tyroll.* And this stile continued till the fourth and fifth yeare of king Philip and queene Mary, and then Naples was put out, and in place thereof both the Sicilies put in, and so it continued all the life of queene Mary.

I need not mention the stile of queene Elizabeth, king James, nor of our soveraigne lord king Charles, because they are so well knowne; and I feare I have beene too long concerning this point, which certainly is not unnecessary to be knowne for many respects. But to shew the causes and reasons of these alterations would aske a treatise of itselfe (6), and doth not fort to the end that I have aimed at. And now let us returne to the learning of charters and deeds of feoffments and grants.

Very necessary it is that witnesses should be underwritten or indorsed, for the better strengthening of deeds, and their names (if they can write) written with their owne hands. For livery of feisin see hereafter, Sect. 59. and for deeds, Sect. 66. and of conditionall deeds see our author in his chapter of Conditions. And now let us proceed to the other words of our author.

Livery of feisin incident to a feoffment. Vid. sect. 59.

Mirr. cap. 2. sect. 15. Bract. lib. 2. fol. 62. b. Flet. lib. 6. cap. 1. & 54. & lib. 1. cap. 13. Glanvil. lib. 7. ca. 1. & ca. 12. & 13. (Post. 237. b.)

Aluy et a ses heires. Hæres, in the legall understanding of the common law, implyeth, that he is *ex justis nuptiis procreatus*, for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments by the act of God and right of blood do descend of some estate of inheritance. For *solus Deus hæredem facere potest, non homo: dicuntur autem hæredes et hæres ab hærendo, quod est arctè insidendo, nam qui hæres est hæret; vel dicitur ab hærendo, quia hæreditas sibi hæret; licet nonnulli hæredem dictum velint, quod hæres fuit, hoc est dominus terrarum, &c. quæ ad eum perveniunt.*

[a] Bract. lib. 5. fol. 437. 438. Brit. ca. 66. fol. 167. & ca. 83. Fleta lib. 1. ca. 5. (Post. 29. b.)

A monster, which hath not the shape of mankind, cannot be heire or inherit any land, albeit it be brought forth within marriage; [a] but although he hath deformity in any part of his body, yet if he hath human shape he may be heire. *Hii, qui contra formam humani generis converso more procreantur, ut si mulier monstrosam vel prodigiosam enixa, inter liberos non computentur. Partus tamen, cui natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter (ut si sex digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari.*

Si

(1) See further as to the deduction and change of the king's title in respect to Ireland, in Seld. Tit. Hon. b. 1. c. 4. f. 1.

(2) This title was given to Henry by pope Leo X. in consequence of the king's publishing his book, in defence of the seven sacraments, against Martin Luther, and dedicating it to the pope. Coll. Eccl. Hist. v. ii. p. 11. to 17.

(3) See Burn. Hist. Reform. v. i. p. 136.

(4) See the 35. H. 8. c. 3. which ratifies the king's stile.

(5) Though Henry the 8th and Edward the 6th had both used the title of king of Ireland, yet pope Paul the 4th, dissembling notice of it, conferred the same title as a *new* one upon Philip and Mary, in order that the world might deem their use of the title merely the effect of his power. Heyl. Hist. Reform. 69. 70.

(6) See further concerning the stiles of the kings of England, and also of Great Britain, since the union of the two kingdoms, in Nicholl. Engl. Histor. Libr. 2d ed. p. 248. and the several Treatises which have been published on the English Coins.

Si inutilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus monstrosus. Another faith, *ampliatio seu diminutio membrorum non nocet.* [b] A bastard cannot be heir, for (as hath been said before) *qui ex damnato coitu nascuntur inter liberos non computantur.* Every heir is either a male, or female, or an hermaphrodite, that is, both male and female. And an hermaphrodite (which is also called *Androgynus*) shall be heir, either as male or female, according to that kinde of the sexe which doth prevaile. *Hermaphrodita, tam masculo, quam femina comparatur, secundum praevalentiam sexus incalescentis.* And accordingly it ought to be baptized. See more of this matter, Sect. 35.

[c] A man seized of lands in fee hath issue an alien that is borne out of the king's ligeance; he cannot be heir, *propter defectum subjectionis* (1), albeit he be borne within lawful marriage. If made denizen by the king's letters patent, yet cannot he inherit to his father or any other. But otherwise is it, if he be naturalized by act of parliament; for then he is not accounted in law *alienigena*, but *indigena*. But after one be made denizen, the issue that he hath afterwards shall be heir to him, but no issue that he had before. If an alien cometh into England and hath issue two sonnes, these two sonnes are *indigenae* subjects borne, because they are borne within the realme. And yet if one of them purchase lands in fee, and dyeth without issue, his brother shall not be his heir (2); for there was never any inheritable blood between the father and them; and where the sonnes by no possibility can be heir to the father, the one of them shall not be heir to the other. See more at large of this matter, Sect. 198.

If a man be attainted of treason, or felony, although he be borne within wedlocke, he can be heir to no man, nor any man heir to him *propter delictum*, for that by his attainder his blood is corrupted. And this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament; for albeit the person attainted obtaine his charter of pardon, yet that doth not make any to be heir whose blood was corrupted at the time of the attainder, either downward or upward. [d] As if a man hath issue a sonne before his attainder, and obtaineth his pardon, and after the pardon hath issue another sonne, at the time of the attainder the blood of the eldest was corrupted, and therefore he cannot be heir. But if he die living his father, the younger sonne shall be heir; for he was not in *esse* at the time of the attainder, and the pardon restored the blood as to all issues begotten afterwards. But in that case if the eldest sonne had survived the father, the younger sonne cannot be heir; because he hath an elder brother which by possibilitie might have inherited: but if the elder brother had been an alien, the younger sonne should be heir, for that the alien never had any inheritable blood in him (3). See more plentifully of this matter, Sect. 746, 747.

If a man hath issue two sonnes, and after is attainted of treason, or felony, and one of the sonnes purchase land and dieth without issue, the other brother shall be his heir; for the attainder of the father corrupteth the lineall blood onely, and not the collateral blood between the brethren, which was vested in them before the attainder, and each of them by possibilitie might have been heir to the father, and so hath it been adjudged (4). * But otherwise in the case of the alien-née, as hath been said. [e] But some have holden that if a man after he be attainted of treason or felony have issue two sonnes, that the one of them cannot be heir to the other; because they could not be heir to the father, for that they never had any inheritable blood in them (5).

[f] One that is borne deafe and dumbe may be heir to another, albeit it was otherwise holden in ancient time. And so if borne deafe dumbe and blinde, for *in hoc casu vitio partitur naturali*. But contract they cannot. Ideots, leapers, madmen, outlaws in debt trespasses or the like, persons excommunicated, men attainted in a *præmunire* or convicted of heresie, may be heires.

[g] If a man hath a wife, and dyeth, and within a very short time after the wife marrieth againe, and within 9 months (6) hath a childe, so as it may be the childe of the one or the other, some have said, that in this case the childe may choose (7) his father, *quia in hoc casu filiatio non potest probari*, and so is the booke to be intended; for avoiding of which question and other inconveniencies, this was the law before the Conquest, *Sit omnis vidua sine marito duodecim mensibus, et si maritaverit perdat dotem* (8).

[h] A man by the common law cannot be heir to goods or chattels, for *haeres dicitur ab hereditate*. [i] If a man buy divers fishes, as carps, breames, tenches, &c. and put them in his pond, and dyeth, in this case the heir shall have them, and not the executors, but they shall goe with the (9) inheritance; because they were at libertie and could not be gotten without industrie, as by nets, and other engines. Otherwise it is, if they were in a trunke or the like. Likewise deere in a parke, conies in a warren, and doves in a dove-house; young and old, shall goe to the (10) heir. [k] But of ancient time the heir was permitted to have an action of debt upon a bond made to his auncestor and his heires; but the law is not so holden at this day. Vid. Sect. 12.

[l] It is to be noted that one cannot be heir till after the death of his auncestor. Before he is called *haeres apparens* heir apparent.

(1) If the father in this case is to be supposed a *natural-born* subject at the birth of the issue, the child would now be also a *natural-born* subject by force of the 7. Ann. c. 5. and 4. Geo. 2. c. 21. But the children of persons attainted of, or liable to the penalties of treason, or in the service of a foreign state in enmity with Great Britain, are excepted from the benefit of this provision. See the 25. E. 3. st. 2. which declares, that at common law, the children of the king, wherever born, may inherit. The same statute enables children born abroad to inherit, if at their birth both their parents are within the king's allegiance, and their mothers pass the sea with the licence of their husbands. Amongst the MSS. in Lincoln's-Inn library, there is a very learned dialogue between two serjeants on the 25. E. 3. See lib. no. 80. See also post. 128. b. 129. and Cro. Cha. 601.—(2) In the case of Collingwood and Pace, the court denied this to be law; and held, that the sons of aliens were inheritable to each other. See in 1. Sid. 193. and 1. Ventr. 413. the very elaborate speech by lord chief justice Hale, on giving the judgment of the court. Also now by the 11. and 12. W. 3. c. 6. *natural-born* subjects may derive a title by descent through their parents, though aliens; but the 25. G. 2. c. 40. confines the benefit of the former statute to such heirs, as shall be living and capable of taking at the death of the person last dying seized, unless such heirs happen to be daughters, and there is afterwards a son or another daughter, for which cases the statute makes a special provision.—(3) Besides the authorities in the margin, see W. Jo. 34.—(4) S. p. arc. Noy 158. 4. Leon. 5.—(5) The principle, on which it has been adjudged that the children of an alien may be heirs as between themselves, though not to their father, seems to reach the case of children born after their father's attainder. See the cases cited in n. 2. supra.—(6) See post. 123. b. where this is said to be the utmost time the law supposes a woman to go with child, and the authorities which the reader will find there cited on the subject.—(7) Brooke questions this doctrine; from which it seems as if he thought it reasonable, that the circumstance of the case, instead of the choice of the issue, should determine who is the father. See Bro. Abr. Bastardy, pl. 18. and Palm. 10.—(8) See 11. and 12. W. 3. c. 4. which disables persons educated in the popish religion, or professing it, from inheriting, but in respect of themselves only, if they do not conform within 6 months after the age of 18; and provides, that till they do conform, their protestant next of kin shall enjoy. By the same statute papists are disabled from taking lands by *purchase*, which should have been mentioned before. For cases on the construction of this statute, see 1. Stra. 267. 2. P. Wms. 3. 6. and 132. 3. P. Wms. 46. 1. Atk. 526. 528. 2. Atk. 210. 3. Atk. 155. 457. 2. Vell. 398. 1. Will. part i. p. 176. Rep. Caf. B. R. temp. Hardw. 149. Caf. B. R. temp. Hardw. 91. and Vin. Abr. *Devise*, l. 7. pl. 4. and 5.—(9) Acc. Cro. Eliz. 372.—(10) It is said, that though the party has only a term of years, still such things will go as accessory to the land. See Wentw. Off. Ex. ed. 1676. c. 5. p. 75.

[b] Vid. Sect. 188. 399. Bract. lib. 2. fo. 92. Brit. fo. Fleta li. i. ca. 5. & l. 6. c. 8. Fleta ubi supra. 3. R. 2. entr. cong. 38. (1. Ro. Abr. 625.)

[c] Mirror ca. 1. ca. 3. sect. ca. 5. sect. Bract. lib. 5. fo. 415. 427. Brit. fo. 29. Fleta lib. 6. ca. 47. 13. E. 3. br. 677. 25. E. 3. de natis ultra mare. 31. E. 3. Cousinage. 5. 42. E. 3. 2. 11. H. 4. 26. 14. H. 4. 19. 20. 3. H. 6. 55. 22. H. 6. 38. 9. H. 4. 7. Co. 1. in Calvin's case. (Cro. Jam. 539. Godb. 275. 1. Sid. 195. 201. Noy 158. T. Jo. 10. Vaugh. 274. 2. Sid. 23. Hardr. 224. 2. Ventr. 1.)

1. Ed. 3. 4. 6. Ed. 3. 55. 27. E. 3. 77. 3. E. 2. discent. Br. 64. 31. E. 1. discent. 17. 46. E. 3. Petition 20. 26. Ail. p. 2. 49. Ail. pl. 4. 29. Ail. pl. 11. 9. H. 5. 9.

[d] Stanf. pl. cor. 195. 196. Bract. lib. 3. fo. 132. 133. 276. & lib. 5. fo. 374. Briton fo. 215. b. Fleta lib. 1. ca. 28. (Noy 170. Finch 8vo. ed. 207. Ant. 2. b. Poff. 129. Cro. Cha. 543. 1. Sid. 195. 202. 1. Ro. Abr. 625. Cro. Jam. 539.)

* In the Exchequer Mic. 40. & 41. Eliz. in le case de Hobby.

[e] Bract. lib. 3. fol. 130. Briton fol. 15. Fleta lib. 1. cap. 58. (1. Sid. 193. 1. Lev. 60. Vaugh. 274. 1. Ventr. 414.)

[f] Bract. lib. 5. fo. 421. 430. 434. lib. 2. fo. 12. Fleta lib. 6. ca. 39. 47. 14. H. 3. br. 877. 32. E. 3. Age 8. 10. E. 3. 535. 18. E. 3. 53. 13. E. 3. Ley 49. (1. Ro. Abr. 626.)

[g] 21. E. 3. 39. Panarollus nova rep. 485. &c. Opus eximium 48. b. Lambard de precibus Anglorum legibus 120. 72. acc. (1. Ro. Abr. 357. Cro. Jam. 541. 3. S. C. Godb. 281.)

[h] Bract. lib. 4. ca. 9. fo. 265. lib. 2. fo. 62. b. Fleta lib. 6. ca. 1. 8. Co. 54. Sym's case.

[i] Mich. 36. & 37. E. 1. Rot. 25. Inter Gray and Poulet in the king's bench. Stanf. 25. b. 18. E. 4. 8. 22. Ail. 25. 18. H. 8. 2.

[k] 13. E. 3. det. 135. 139. 140. 47. E. 3. 73. 25. E. 3. fo. 48. 26. E. 3. fo. Vid. for an heretome hereditary or principalis, sect. 12.

In [l] Mirror ca. 1. sect. 3.

[a] Bract. lib. 2. fo. 85. Heref. p. 8. E. 1. Ro. 80. de Banco. Mirror cap. 2. sect. 18. Britton 251. b.
[b] Registr. fo. 227. Bracton lib. 2. fo. 69. Britton fo. 165. Fleta lib. 1. ca. 14. (Cro. Eliz. 566. Cro. Jam. 685.)

Britton fo. 165. b. Registr. ubi supra.

Vid. Bracton, Britton and Fleta ubi supra. Registr. ubi supra. Bracton and Fleta ubi supra have (ad exheredationem.)

[c] 10. H. 6. 7. 22. H. 6. 15. Pl. Com. 28. b. 22. E. 4. 16. 2. H. 4. 13. 20. E. 3. bre. 377.
[d] 5. Co. 96. 97. Brit. fo. 23. H. 8. Dyer. Pl. Com. 287. 288. (Poll. 22. a. 5. Co. 112.)
[e] Bract. lib. 2. cap. 39. fo. 92. b. Br. ca. 39. fo. 99. b. Fleta lib. 6. ca. 1. 2. & lib. 3. cap. 2. 20. H. 6. 35. 36. 19. H. 6. 17. 22. 74. 22. E. 4. 16. b. 4. E. 6. Pl. Com. 26.
[f] Vid. Sect. 413.
[g] 7. E. 3. 25. Vid. Sect. 686. 25. E. 3. 35. Bract. lib. 2. fo. 62. b. Vid. Sect. 413. (5. Co. 112. 1. Leon. 2.)
[h] Pl. Com. 242. Seignior Berkeley's case.
[i] Vid. Brit. fo. 86. 121. & 130. 17. E. 3. 25. b. 33. H. 6. 22. 10. H. 7. 13. 14. 9. H. 7. 11. 16. H. 7. 9. 15. F. 4. 13. 14. H. 6. 12. 35. H. 6. 34. 24. Aff. 14. 40. Aff. 21. (Poll. 94.) Tr. 5. E. 3. Rot. 4. in Scaccario. 3. E. 3. 32. 7. E. 2. 40. 11. H. 4. 84. 12. H. 4. 12. 18. E. 3. Conusans 39. b. 5. E. 4. 121. 38. E. 3. 4. Co. 9. 28. in Case de Abb. de Strata Marcella.

In our old bookes and reco^ds there is mention made of another heire, viz. *hæres astrarius*, so called of *astre*, that is, an harth of a house; because the auncestor by conveyance hath set his heire apparent, and his family, in a house and living in his life-time, of whom Bracton saith thus. [a] *Item esto quod hæres sit astrarius, vel quod aliquis antecessor restituat hæredi in vitâ suâ hereditatem, et se dimiserit, videtur, quod nullo tempore jacebit hereditas, et ideo quod nec relevari possit, nec debeat, nec relevum dari.* [b] For the benefit and safety of right heires *contra partus suppositos*, the law hath provided remedie by the writ *de ventre inspiciendo*, whereof the rule in the register is this. *Nota si quis habens hereditatem duxerit aliquam in uxorem, et postea moriatur ille sine hærede de corpore suo exeunte, per quod hereditas illa fratri ipsius defuncti descendere debeat, et uxor dicat se esse prægnantem de ipso defuncto cum non sit, habiat frater et hæres breve de ventre inspiciendo.* It seemeth by Bracton, and Fleta which followed him, that this writ doth lie, *Ubi uxor alicujus in vitâ viri sui se prægnantem fecit cum non sit, vel post mortem viri sui se prægnantem fecit cum non sit, ad exheredationem veri hæredis, &c. ad querelam veri hæredis per preceptum domini regis, &c.* which is to be understood according to the rule of the register. When a man having lands in fee simple dieth, and his wife soon after marrieth againe, and faines herselfe with childe by her former husband, in this case though she be married, the writ *de ventre inspiciendo* doth lie (1) for the heire. But if a man seised of lands in fee (for example) hath issue a daughter, who is heire apparent, she in the life of her father cannot have this writ for divers causes. First, because she is not heire, but heire apparent; for as hath been said, *nemo est hæres viventis*, and this writ is given to the heire to whom the land is descended. And both Bracton and Fleta say, that this writ lyeth *ad querelam viri hæredis*, which cannot be in the life of his auncestor, and herewith agree Britton and the register. Secondly, the taking of a husband in the case aforesaid being her owne act, cannot barre the heire of his lawfull action once vested in him (2). Thirdly, the law doth not give the heire apparent any writ, for it is not certaine whether he shall be heire, *solus Deus facit hæredes*. Fourthly, the inconvenience were too great, if heires apparent in the life of their auncestor should have such a writ to examine and trie a man's lawfull wife in such sort as the writ *de ventre inspiciendo* doth appoint; and if she should be found to be with childe, or suspect, then she must be removed to a castle and there safely kept untill her delivery, and so any man's wife might be taken from him against the lawes of God and man.

The words of the writ *de ventre inspiciendo* make this evident. *Rex vic. salutem. Monstravit nobis A. quod cum R. quæ fuit uxor Clementis B. prægnans non sit, ipsa falsò dicit se esse prægnantem de eodem Clemente, ad exheredationem ipsius A. defuncti terra quæ fuit ejusdem C. ad ipsum A. jure hereditario descendere debeat tanquam ad fratrem et hæredem ipsius C. si predicti R. prolem de eo non habuerit, &c.* But this rather belongs to the treatise of originall writs, and therefore thus much herein shall suffice (3).

And it is to be observed, that every word of Littl. is worthy of observation. First (Heires) in the plurall number; for if a man give land to a man and to his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take (4) nothing. Also observable is this conjunctive (*Et*). For if a man give lands to one, To have and to hold to him *or* his heires, he hath but an (5) estate for life, for the uncertaintie. (*Ses, suis*). If a man give land unto two, To have and to hold to them two *et hæredibus* [c] omitting *suis* (6), they have but an estate for life for the uncertainty, whereof more hereafter in this section. But it is said, if land be given to one man, *et hæredibus*, omitting *suis*, that notwithstanding a fee simple passeth; but it is safe to follow Littleton.

[d] *Et de assignes*. Assignee cometh of the verb *assigno*. And note there be assignes in deed, and assignes in law, whereof see more in the chapter of warrantie, Sect. 733.

Ceux parolx (ses heires) tantselement font lestate denberitance en tous feoffments et grants. [e] *Si autem facta esset donatio, ut si dicam, do tibi talem terram, ista donatio non extendit ad hæredes sed ad vitam donatoris, &c.* [f] Here Littleton treateth of purchases by naturall persons, and not of bodies politique or corporate; [g] for if lands be given to a sole bodie politique or corporate, (as to a bishop, parson, vicar, master of an hospital, &c.) there to give him an estate of inheritance in his politique or corporate capacitie, he must have these words, To have and to hold to him and his successors; for without these words *successors*, in those cases there passeth no inheritance (7); for as the heire doth inherite to the ancestor, so the successor doth succeed to the predecessor, and the executor to the testator. [h] But it appeareth here by Littleton that if a man at this day give lands to I. S. and his successors, this createth no fee simple in him; for Littleton speaking of naturall persons saith that these words (his heires) make an estate of inheritance in all feoffments and grants, whereby he excludeth these words (his successors). [i] And yet if it be an ancient grant, it must be expounded as the law was taken at the time of the grant. [k] A chantry priest incorporate tooke a lease to him

(1) But in such a case the manner of proceeding on the writ *de ventre inspiciendo* is not the same, as where the party remains a widow. In the case in Cro. Jam. 685. the wife was married to a second husband, when the writ *de ventre inspiciendo* was sued. Therefore, instead of ordering her into the sheriff's custody, and to be kept by him till delivered of the child, as the practice is, if the party is a widow, the court permitted the wife to remain with her husband, on his entering into a recognizance, that she should not remove from the house they then inhabited, and that some of the women returned by the sheriff should see her every day, and that three or more of them should be present at her delivery. (2) This is a reason, why the *actual* heir should have his writ notwithstanding the wife's marrying a second husband, but is foreign to the *heir apparent's* not having the writ; and therefore I presume has been placed here by mistake. (3) See further on the writ *de ventre inspiciendo* Ailcough's Case Mos. 391. & 2 P. Wms. 591. in which the lord cha. King, on a petition, granted the writ, though the persons applying were only tenants in tail; and note the special manner in which he ordered the writ to issue, and what he said as to the execution of it. In Mosely's Report, a case of *personal* estate is cited, in which the then master of the Rolls, in conformity to the reason of the common law, directed, that the master should appoint two matrons to inspect a woman. Some perhaps may think this a great stretch of power. I cannot conclude this note, without suggesting the necessity of an act of parliament to regulate the proceedings on the writ *de ventre inspiciendo*. If the writ was to be strictly executed, it would be an *intolerable grievance*. On the other hand, if our courts of justice should, without authority from the legislature, change the established form for the sake of softening its rigour, it would be a *dangerous precedent*, and something very like the exercise of a dispensing power. (4) According to many authorities, *heir* may be *nomen collectivum* as well in a deed as a will, and operate in both in the same manner as *heirs* in the plurall number. See 2. Ro. Abr. 253. See also 1. Ro. Abr. 832. K. pl. 1. 2. Godb. 155. T. Jo. 111. Cro. Eliz. 313. Robins. Gavelk. 95. 96. Burr. 4. part v. 1. p. 38. & Vin. Abr. Devise U. a. pl. 13. & Parols H. (5) See 5. Co. 112. post. 214. & Plowd. 286. 289. in which last book it is particularly considered, where the *disjunctive* shall be construed as the *conjunctive*. (6) See 2. Ro. Abr. 833. M. & Vin. Abr. Estate M. (7) But a fee will pass to a corporation aggregate without the word *successors*, and sometimes to a corporation sole. See post. 94. b. and Vin. Abr. Estate L.

him and his successors for a hundred yeares, and after tooke a release from the leasor to him and his successors, and it was adjudged that by the release he had but an estate for life, [k] for he had the lease in his naturall capacity, for it could not go in succession (1), and (his successors) gave him no estate of inheritance for want of these words (his heires). [l] If the king by his letters patents giveth lands *decano et capitulo, habendum sibi et heredibus et successoribus suis*, in this case, albeit they be persons in their naturall capacity to them and their heires, yet because the grant is made to them in their politique capacity, it shall enure to them and their successors. And so if the king do grant lands to I. S. *habendum sibi et successoribus sive heredibus suis*, this grant shall enure to him and his heires.

[m] B having divers sonnes and daughters, A giveth lands to B, *et liberis suis, et a lour heires*, the father and all his children do take a fee simple jointly by force of these words (their heires); (2) but if he had no child at the time of the feoffment, the child borne afterward shall not take (3).

These words (his heires) do not onely extend to his immediate heires, but to his heires remote and most remote, borne and to be borne, [n] *sub quibus vocabulis (heredibus suis) omnes heredes propinqui comprehenduntur, et remoti, nati, et nascituri*. And *heredum appellatione veniunt heredes heredum in infinitum*. And the reason wherefore the law is so precise to prescribe certaine words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.

There be many words so appropriated, as that they cannot be legally expressed by any other word, or by any periphrasis or circumlocution: some to estates of lands, &c. as here and in [a] other places of our author. In this place these words *tantsolement*, not *solement* alone, but *tantsolement* all onely, i. e. *solummodo*, or *duntaxat*, are to be observed. [b] Some to tenures; [c] some to persons; [d] some to offences; [e] some to forms of original writs, either for recovery of right, or removing, or redresse of wrong; [f] some to warrantie of land. These have I touched foreexamples. I leave others to the studious reader to observe, and add, holding this for an undoubted verity, that there is no knowledge, case, or point in law, seeme it of never so little account, but will stand our student in stead at one time or other, and therefore in reading, nothing to be pretermitted.

Font lestate. *Status dicitur a stando*, because it is fixed, and permanent. The Isle of Man, which is no part of the kingdom, but a distinct territory of itselfe, hath beene granted by the great seale to divers subjects and their heires. [g] It was resolved by the lord chancellor, the two chiefe justices and chiefe baron, that the same is an estate descendible according to the course of the common law; for whatsoever state of inheritance passe under the great seale of England, it shall be descendible according to the rules, and course of the common law of England (4).

En tous feoffments et grants. Here he giveth the feoffment the first place, as the ancient and the most necessary conveyance, both for that it is solemne and publike, and therefore best remembred and proved, [g] and also for that it cleareth all disseins, abatements, intrusions, and other wrongfull or defeasible estates, where the entry of the feoffor is lawfull, which neither fine, recovery, nor bargain and sale by deede indented and inrolled doth. And here is implied a division of fee, or inheritance, *viz.* [b] into corporeall, as lands and tenements which lie in livery, comprehended in this word feoffment, and may passe by livery by deed, or without deed, which of some is called *hereditas corporata*, and incorporeall, (which lie in grant, and cannot passe by livery, but by deede, as advowsons, commons, &c. and of some is called *hereditas incorporata*, and, by the delivery of the deede, the freehold, and inheritance of such inheritance, as doth lie in grant, doth passe) comprehended in this word Grant. And the deed of incorporeate inheritances doth equall the livery of corporeate. And therefore Littleton saith, in all feoffments and grants, *hereditas, alia corporalis, alia incorporalis: corporalis est, quæ tangi potest et videri, incorporalis quæ tangi non potest, nec videri*.

Feoffment is derived of the word of art *feodum*, *quia est donatio feodi*, for the ancient writers of the law called a feoffment *donatio* of the verb *do* or *dedi*, which is the aptest word of feoffment (5). And that word Ephron used, * when he enfeoffed Abraham, saying, I give thee the field of Machpelah over against Mamre, and the cave therein I give thee, and all the trees in the field and the borders round about, all which were made sure unto Abraham for a possession, in the presence of many witnesses.

By a feoffment the corporeate fee is conveyed, and it properly betokeneth a conveyance in fee, as our author himselfe hereafter saith, † in his chapter of Tenant for life. And yet sometime improperly it is called a feoffment when an estate of freehold onely doth passe, *donec est nomine generalis plus que nesci feoffment, car donec est generalis a tous choses meubles et nient meubles, feoffment est riens forsque del soyle*. And note there is a difference *inter cartam et factum*, for *carta* is intended

(1) The reason is, because a chantry priest was a corporation *sole*, which regularly could not take in succession chattels *real* or *personal*, in *possession* or *action*, though a corporation *aggregate* may. Acc. Post. 46. b. 4. Co. 65. Hob. 64. But by *custom*, some chattels will go in succession to a *sole* corporation, as in London, where the chamberlain is a special corporation for taking bonds, which has been frequently adjudged a good custom. Cro. Eliz. 464. 682. 4. Co. 64. b. Also in some instances, particularly of chattels in *action*, the law is the same *without* a custom. See 1. Ro. Abr. 515. pl. 3. 5. and Vin. Abr. *Corporation*, L. As to the king's taking the ancient jewels of the crown, which are a kind of *heir-looms*, it is not to be considered as an instance of a *sole* corporation's taking *chattels* in succession, but rather as one of a *personal* chattel's descending like a thing of inheritance. See Post. 18. b. — (2) But in this case, the children must be understood to be parties to the grant; for it is said, that otherwise they can only take, where the limitation is to them by way of remainder. Cro. Eliz. 10. — (3) Acc. Cro. Eliz. 121. 334. Ow. 152. Lord C. J. Hale adds, that *the father takes the whole fee simple*. Hal. MS. But if the limitation to the children be a remainder, then the children born *after* may take. See Wild's case, 6. Co. 18. b. where will be found several other distinctions on this subject. See further 1. Ro. Rep. 254. See also Vin. Abr. *Devise*, Y. a. I am the more frequent in my reference to Mr. Viner's Abridgment, because it tends to facilitate the use of that immense body of law and equity; which, notwithstanding all its defects and inaccuracies, must be allowed to be a necessary part of every lawyer's library. It is indeed a most useful compilation, and would have been infinitely more so, if the author had been less singular and more nice in his arrangement and method, and more studious of avoiding repetitions. These faults, in great measure, proceeded from the author's error of judgment, in attempting to engraft his own very extensive Abridgment on that of Mr. Serjeant Rolle, whose work, though most excellent in its kind, and in point of method, succinctness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of law, was by no means calculated for the excessive enlargement from 2 vols. to 23 vols. in folio. It is not to be wondered at, that an incorporation of works, so widely different in *proportion* as well as *execution*, should produce much confusion and disorder in the *effect*. Mr. Viner's labours would probably have advanced his reputation as a compiler much higher, if he had not attempted an union so unnatural. — (4) S. C. 4. Inst. 284. and 2. And. 115. See further concerning the Isle of Man in Pryn. on 4. Inst. 201. 384. Hale's Hist. Com. L. 183. Palm. 344. 1. P. Wms. 329. 1. Vef. 202. 2. Vef. 337. 1. Blackst. Comment. 5th ed. p. 104. and Camp. Polit. Surv. of Brit. v. 1. p. 524. — (5) See more as to the word *feoffment*, in Mad. Formul. Angl. Dissert. p. 3. 2. Inst. 110.

[k] Hil. 21. El. 2. Dyer's manuscript, inter Ansley and Johnson in Com. Banco. (4 Co. 65.)
[l] 18. H. 6. 11. b. &c. adjudged.

[m] 15. E. 3. tit. Counterplea de Voucher. 43. 17. H. 6. 30.
11. E. 4. 2. (Cro. Jam. 374
6. Co. 16. b. 1 Leon. 287.)

[n] Fleta lib. 3. cap. 8.

Pl. Com. 163.

[a] Sect. 17. 62. 133.

[b] Sect. 156. 161.

[c] Sect. 184.

[d] Sect. 190. 194. 746.

[e] Sect. 9. 67. 194. 204. 234.
236. 241. 405. 485. 488. 651.
655. 646. 620. 614. 637. 674.
692.

[f] Sect. 733.

[g] Tr. 40. Eli. in le Count de Derby's case, by the Lo. Chancellor, les 2 chiefe Justices, & chiefe Baron.

[g] Vide Sect. 59. and 66.

[b] Mirror c. 2. sect. 15. & c. 5.
sect. 1. Bract. lib. 2. fo. 53. 366.
368. Fleta lib. 3. ca. 1. 2 15.
Britt. 84. 87. a. & fol. 63. 101.
102. 141. 142 agreeeth herewith.
Pl. Com. 171. Hill & Grange.

Mirror cap. 5. sect. 1.
Britton cap. 34.

For the Antiquity of Feoffments see the second part of the Institutes, Marlebridge, ca. 9. 8. E. 3. 24. 18. H. 6. 14. 39. H. 6. 39.
* Genesis 23.

† Vide sect. 57.

Britton cap. 34. 44. E. 3. 41.
See more of feoffments, sect. 66.
See of factum, sect. 259.

Lib. 1. Cap. 1. Of Fee simple. Sect. 1.

intended a charter which doth touch inheritance, and so is not *factum* unless it hath some other addition (1).

3. Co. 63. in Lincolne Colledge case.
(1. Ro. Abr. 833. 6. Co. 16. b.)

[i] Litt. lib. 3. c. de Attorn. sect. 5. 8. 6. 4. E. 6. Estates Br. 78. 29. H. 8. Testaments 18. 22. Eliz. Dier 371. Temps H. 8. tit. Conscience Br. 25. (3. Co. 21.)

[k] 21. E. 3. 16. 34. H. 6. 7. 19. H. 8. 9. Co. 3. 21. in Boraston's case, Co. 6. 16. 17. 20. Co. 67.

[l] Vide sect. 585.
[m] Mich. 40. & 41. Eliz. in Error Int. Downhall & Catesby adjudge. Brooke tit. taile 21.

[n] 1. Co. 100 Shellye's case. 42. E. 3. 7. 19. H. 6. 17. b. 22. b. Pl. com. 248.

[o] Litt. lib. 2. ca. tenant in common, sect. 304. 305. cap. Attorn. sect. 374. Dier 9. Eliz. 263.

[p] Litt. lib. 3. c. Releases, sect. 479. 480. 20. H. 6. 17. 19. H. 6. 17. 22.

[q] Litt. cap. Releases sect. 467.

27. H. 6. Lo. Vescie's case, (7 Co. 33. b.)

[r] 39. Aff. 12. 41. E. 3. tit. Feoffments & faits 254. 14. H. 4. 13. 34. E. 3. Avowry 258.

[s] Vide Sect. 17. 12. H. 4. 19. in Formedon.

[t] 8. E. 3. 27. 11. H. 7. 12. 22. E. 4. 11. H. 4. 84. 2. H. 4. 13.

[u] 19. H. 6. 74. 20. H. 6. 36. (1. Ro. Abr. 43.)

[w] Pl. Com. Lo. Berkleye's case.

Grant, concessio, is properly of things incorporeall, which (as hath been said) cannot passe without deed. And here it is to be observed, (that I may speak once for all,) that every period of our author in all his three books contains matter of excellent learning, necessarily to be collected by implication, or consequence. For example he saith here, that these words (*his heires*) make an estate of inheritance in all feoffments and grants. He expressing feoffments and grants, necessarily implyeth, that this rule extendeth not, first, to *last wills* and *testaments*; for thereby, [i] as he himselfe after saith, an estate of inheritance may passe without these words (*his heires*.) [k] As if a man devise 20 acres to another, and that he shall pay to his executors for the same ten pound, hereby the devisee hath a fee simple by the intent of the devisor (2), albeit it be not to the value of the land. [l] So it is if a man devise lands to a man *imperpetuum*, or to give and to sell, or in *feodo simplici*, or to him and to his assigns for ever. In these cases a fee simple doth passe by the intent of the devisor. But if the devise be to a man and his assigns without saying (for ever), the devisee hath but an estate for life. [m] If a man devise land to a man *et sanguini suo*, that is a fee simple; but if it be *semini suo*, it is an estate taile (3).

[n] Secondly, that it extendeth not to a *fine sur consans de droit come ceo que il ad de son done*, by which a fee also may passe without this word (*heires*) in respect of the height of that fine, and that thereby is implied that there was a precedent gift in fee.

Thirdly, Nor to *certain releases*, and that three manner of waies, [o] first when an estate of inheritance passeth and continueth, as if there be three coparceners or joyntenants, and one of them release to the other two, or to one of them generally without this word (*heires*), by Littleton's own opinion they have a fee simple as appeareth hereafter. 2. By release [p] when an estate of inheritance passeth and continueth not, but is extinguished, as where the lord releaseth to the tenant, or the grantee of a rent, &c. release to the tenant of the land generally all his right, &c. hereby the feignory, rent, &c. are extinguished for ever, without these words (*heires*). [q] When a bare right is released, as when the disseisee release to the disseisor all his right, he need not (saith our author in another place) speake of his heires. But of all these, and the like cases, more shall be treated in their proper places. 4. Nor to a *recovery*. A feised of land suffereth B to recover the land against him by a common recovery where the judgment is *quod prædictus B. recuperet versus præd. A. tenementa prædicta cum pertin.*, yet B recovereth a fee simple without these words (*heires*); for regularly every recoveror recovereth a fee simple. 5. Nor to a *creation of nobilitie by writ*; for when a man is called to the upper house of parliament by writ, he is a baron and hath inheritance therein without the word (*heires*). (4) Yet may the king limit the generall state of inheritance created by the law and custome of the realme to the heires males, or generall, of his body by the writ, as he did to Bromflete, who in 27. H. 6. was called to Parliament by the name of the lo. Vescye, &c. with the limitation in the writ to him and the heires, males of his bodie. But if he be created by patent, he must of necessitie have these words (*his heires*) or the heires males of his bodie, or the heires of his body, &c. otherwise he hath no inheritance. The first creation of a baron by patent that I finde was of John Beauchampe of Holte, created baron by patent in 11. R. 2. (5). for barons before that time were called by writ. And it is to be observed, that of ancient times earles, &c. were created by girding them with a sword, and nominating him earle, &c. of such a countie or place, and this with a calling of him to parliament by writ, by that name was a sufficient creation of inheritance.

But out of this rule of our author the law doth make divers exceptions (*et exceptio probat regulam*); for sometime by a feoffment a fee simple shall passe without these words (*his heires*). For example, first, [r] if the father infeoffe the sonne, to have and to hold to him and to his heires, and the sonne infeoffeth the father as fully as the father infeoffed him, by this the father hath a fee simple, (6) *quia verba relata hoc maxime operantur per referentiam ut in esse videntur*. [s] Secondlie, in respect of the consideration, a fee simple had passed at the common law without this word (*heires*), and at this day an estate of inheritance taile. As if a man had given land to a man with his daughter in frankmarriage generally, a fee simple had passed without this word (*heires*) for there is no consideration so much respected in law, as the consideration of marriage, in respect of alliance and posteritie. [t] Thirdly, if a feoffment or grant be made by deed to a mayor and communaltie or any other corporation aggregate of manie persons capable, they have a fee simple without the word (*successors*); (7) because in judgment of the law they never dye. [u] Fourthly, in case of a sole corporation a fee simple shall sometime passe without this word (*successors*). As if a feoffment in fee be made of land to a bishop, to have and to hold to him in *libera elemosina*, a fee simple doth passe without this word (*successors*). [w] And so if a man give lands to the king by deede inrolled; a fee simple doth passe without these words (*successors* or *heires*); because in judgment of law the king never dieth. Fifthly, in grants sometimes an inheritance shall passe without this word (*heires*)

(1) See further as to the distinction between *charters* and *deeds*, and the various other names of writings before and since the Conquest, in Mad. Form. Angl. Dissert. p. 2. and Mad. Hist. Exch. Pref. Ep. p. 8.

(2) The reason is, because the devisee is to pay the money at all events, and he may die before he repays himself out of the estate; in which case, he would be a loser by the devise, if he was not to have a fee. But if the will directs the payment to be out of the profits of the land, then the devisee cannot lose by the will, and therefore only an estate for life passes. Cro. Cha. 157. Most of the cases relative to this point are abridged or referred to in Vin. Abr. *Devise*, S. a.

(3) As to the passing of an estate of inheritance in *last wills* without the word *heirs*, see the title *Devise*, in the several Abridgments of Law and Equity, and Gilb. Law of Devises.

(4) See as to this, Mr. Serj. Rolle's argument in Coll. Proc. on Claims of Baronies, 209. 221.

(5) Acc. Post. 16. b. Seld. Jan. Angl. b. 2. c. 15. and Seld. Tit. Hon. ad ed. p. 747. which latter book contains the form of the letters patent to lord Beauchamp.

(6) Adj. contra 39. lib. Aff. pl. 12. but Rolle abridges the case with a *quære*. See 1. Ro. Abr. 833. pl. 7.

(7) Acc. Post. 94. b. But according to some authorities it is otherwise, if only the head of the corporation is capable, and the body is dead in law, as in the case of an abbot and convent. Post. 94. b. See, however, contra 1. Ro. Abr. 832. pl. 1.

(heires) [x] as if partition be made between coparceners of lands in fee simple, and for owelty [x] 29 Aff. 23. 15. H. 7. 14. of partition the one grant a rent to the other generally, the grantee shall have a fee simple with- 2. H. 7. 5. 11. H. 4. 3. 21. out this word (heires) (1); because the grantor hath a fee simple in consideration whereof he E. 3. 1. 21. Aff. granted the rent, *ipse etenim leges cupiunt ut jure regantur*. Sixthly, by the forreist law if an assart be granted by the king at a justice seat (which may be done without charter) to another *habendum et tenendum sibi imperpetuum*, he hath a fee simple without this word (heires) [y] for there [y] 40. H. 7. 7. (4. Infl. 314.) is a speciall law of the forreist, as there is a law marshall for wars, and a marine law for the seas. [z] And this rule of our author extendeth to the passing of estates of inheritances in ex- [z] 22. E. 3. 3. 45. E. 2. 20. changes, releases, or confirmations that enure by way of enlargement of estates, warranties, 6. E. 3. 22. 4. Co. 1. Buf- bargain and sales by deed indented and inrolled, and the like in which this word (heires) is also tard's case. Vide sect. 465. 469. 610. 19. H. 6. 17. 22. 19. E. necessary, for they do tantamount to a feoffment or grant, or stand upon the same reason that a 2. garr. 85. feoffment or grant doth, for like reason doth make like law, *ubi eadem ratio, ibi idem jus* (2). And this is to be observed throughout all these three books, that where other cases fall within the same reason, our author doth put his case but for example, for so our author himselfe in another place * explaneth it, saying, *et memorandum que en tous autres cas, coment que ne sont icy ex- * Sect. 301. pressment mores et specifics, si sont en semblable raison sont en semblable ley*. And here our author is to be understood to speak of heires when they are inheritable by descent, for they are capable of land also by purchase, and then the course of descent is sometimes altered. As if lands of the na- (Post. 10. b. Dy. 133. b. Hob. 31. 1. Co. 101. 103.) ture of gavelkind be given to B, and his heires having issue divers sons, all his sons after his decease shall inherit (3); but if a lease for life be made the remainder to the right heires of B and B dieth, his eldest son only shall inherit, for he only to take by purchase is right heire by the common law (4). So note a diversity between a purchase and a descent. But where the remain- der is limited to the right heires of B it need not to be said, and to their heires, for being plural- ly limited it includeth a fee simple, and yet it resteth but in one by purchase.

Out of that which hath beene said it is to be observed, that a man may purchase lands to him and his heires by ten manner of conveyances, (for I speake not here of estoppells.) First, by feoffment; secondly, by grant (of which two our author here speaketh). Thirdly, by fine, which is a feoffment of record. Fourthly, by common recovery, which is a common conveyance and is in nature of a feoffment of record. Fifthly, by exchange, which is in nature of a grant. Sixthly, by release to a particular tenant. Seventhly, by confirmation to a particular tenant, both which are in nature of grants. Eighthly, by grant of a reversion or remainder with at- tornment of the particular tenant, of all which our author speaketh hereafter. Ninthly, by bargain and sale by deede indented and inrolled ordained by statute since Littleton wrote. 27. H. 8. ca. 16. Tenthly, by devise by custome of some particular place, as he sheweth hereafter, and since he 32. H. 8. ca. 2. 34. H. 8. ca. 5. wrote, by will in writing, generally by authority of parliament.

What words are apt words for a feoffment or grant, vide sect. 531. Our author speaketh of Sect. 531. feoffments and grants, whereby is implied lawfull conveyances, and therefore this rule extendeth 37. Aff. p. 3. 38. Aff. p. 9. not to disseisins, abatements or intrusions into lands or tenements or to usurpations to advow- 12. E. 4. 9. &c. sons, &c. in which cases estates in fee simple are gained by the act and wrong of the disseisors, abators, intruders and usurpers; (5) and if a disseisin, abatement, or intrusion be made to the use of another, if *cessui que usi* agreeth thereunto in *pays*, by this bare agreement he gaineth a fee simple without any livery of seisin or other ceremony.

Sect. 2.

ET si home pur- **A**ND if a man pur-
chase terres en chase land in fee
fee simple et devy sans simple and die with-
issue, chescun que est out issue, he which is
son prochain cosin col- his next cosen collate-
lateral delentire sanke, rall of the whole blood,
de quel plus long de how farre so ever he
gree qu'il soit (6), poet be from him in de-
inheriter et aver meme gree, may inherite and
la terre come heire a have the land as heire
luy. to him.

concerning them in this chapter, sect. 5. and in his chapters of Parceners; but this is intended

LITTLETON sheweth (plowd. 444.) here who shall be heire to lands in fee simple, for he intendeth not this case of an estate taile, for that he speaketh of an heire of the whole blood, for that extendeth not to estates in taile, as shall be said hereafter in this chapter, section 6.

Prochein cosin colla- terall. Neither excludeth he brethren or sisters, because he hath a speciall case where

(1) Acc. Plowd. 134. b.—(2) For other instances in which a fee will pass by deed or grant without the word *heirs*, see Vin Abr. Estate, K. 2. and L. To the cases in Viner, add 8. H. 4. 16. b. 19. H. 6. 17. 20. H. 6. 36. 27. H. 8. 3. b. Dy. 169. which I do not see cited by him. See also Ash. Repertor. tit. Estate.—(3) Here *heirs* being a word of limitation, none can take under it but by descent; and the land being *gavelkind*, the descent is to all the sons, who are as much heirs to such land, as the eldest son is heir to land descending according to the common law. The custom of *gavelkind* extends to estates tail, and so irresistible is the customary descent both of *gavelkind* and *borough-english* land according to some authorities, that, even in the case of estates tail, it cannot be changed by express words directing a descent *secundum cursum communis legis*. Dy. 178. b. pl. 45. See Robins. Gavelk. 94. Mr. Robinson's book on *Gavelkind* is a very excellent *law-treatise*, and generally comprehends every thing relative to his subject; but in this part of it, he is rather short in his explanation; for though he takes notice of the custom's applying to estates tail, yet he neither mentions the case from Dyer, nor hints whether *express* words are as insufficient to exclude the custom from estates tail, as they certainly are to controul the descent of estates in fee. Perhaps the author's silence might proceed from his doubts on the subject. See further the case of *tanistry*, Dav. 31. a. & 36. b. In that case it was resolved, that the customary descent was interrupted by the grant of an estate tail; but then the judges proceeded on a principle quite consistent with the general doctrine in Dyer. They held, first, that the custom of *tanistry* only applied to lands going with the *chiefry* or *seignory*, from which the lands in question had been severed by the grant of the estate tail; and secondly, that the custom of *tanistry* was not *inherent in the land*, like the customs of *gavelkind* and *borough-english*, but merely *personal to the eldest and most worthy*, and therefore became extinguished for ever, when the land was conveyed to another person, that is, the heir at common law.—(4) Acc. Rob. Gavelk. 117. 118. and the authorities there cited. The reason seems to be, that though the subject of the gift is *customary* land, the heir at common law is presumed to be meant, unless words are added to describe the *customary* heir. But if such special words are used, the presumption fails; and then it is said, that though the subject of the gift is *common-law* land, yet the *customary* heir shall be preferred. On this principle, lord ch. Cowper, in a case before him, declared, that if one, having *borough-english* land and also lands at *common law*, devises the latter to his heir by the custom of *borough-english*, this will be a sufficient description of the youngest son, though not heir at common law, and though the devise is not of the *customary*, but of the *common-law* land; and that a like devise to *gavelkind* heirs would entitle all the sons. 2. Vern. 732. and Prec. in Cha. 464. But see further on this latter subject, Post. 24. b. where lord Coke writes, that to take by purchase under a limitation to the *heirs female*, the person claiming must be both *heir* and *female*. See also the note, in which it is attempted to justify lord Coke for that doctrine, and to explain the qualifications with which it ought to be understood.—(5) See Ante. 3. b. and Post. 18. b. (6) *De lui*. L. and M. Roh. Red.

Glanvill lib. 7. ca. 3. 4.
 Bract. lib. 2. c. 30. fo. 65.
 Britton cap. 119.
 Fleta lib. 6. cap. 1. & 2.
 (Plowd. 444.)
 Bract. lib. 2. ca. 30. fo. 64.
 Fleta lib. 5. cap. 5. & lib. 6. ca.
 1. & 2. Britton ca. 119. Mir-
 ror 11. ca. 1. sect. 3. 30. Aff.
 p. 47. (3. Co. 40. 42.)

19. R. 2. tit. gar. 100.

(2 Inst. 7.)

30. Aff. p. 47.

where a man purchaseth lands and dieth without issue, and having neither brother nor sister, then his next cousin collateral shall inherit⁽¹⁾. So as here is implied a division of heires, viz. lineall (whoever shall first inherit) and collateral, (who are to inherit for default of lineall.) For in descents it is a *maxime* in law, *quod linea recta semper præfertur transversali*. Lineall descent is conveyed downward in a right line, as from the grandfather to the father, from the father to the sonne, &c. Collateral descent is derived from the side of the lineall, as grandfather's brother, father's brother, &c. *Prochein cousin collateral enheritera* doth give a certain direction to the next cousin to the sonne, and therefore the father's brother and his posterity shall inherit before the grandfather's brother and his posterity. *Et sic de cæteris*, for *propinquior excludit propinquum, et propinquus remotum, et remotus remotiorem*.

Upon this word (*prochein*) I put this case. One hath issue two sonnes A and B and dieth, B hath two sonnes C and D and dieth. C the eldest sonne hath issue and dieth: A purchaseth lands in fee simple and dieth without issue. D is his next cousin, and yet shall not inherit, but the issue of C, for he that is inheritable is accounted in law next of blood. And therefore here is understood a division of next, viz. *next jure representationis*, and *next jure propinquitatis*, that is, by right of representation and by right of propinquity. And Littleton meaneth of the right of representation, for legally in course of descents he is next of blood inheritable. And the issue of C doth represent the person of C, and if C had lived he had been legally next of blood. And whensoever the father if he had lived, should have inherited, his lineall heire by right of representation shall inherit before any other, though another be *jure propinquitatis* neerer of blood. And therefore Littleton intendeth his case of next cousin of blood immediately inheritable. So as this produceth another division of next blood, viz. immediately inheritable, as the issue of C, and mediately inheritable as D, if the issue of C die without issue; for the issue of C and all that line be they never so remote shall inherit before D or his line, and therefore Littleton saith well *de quel plus long degre que il soit*. And here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase. And therefore in the case before mentioned if a lease for life were made to A, the remainder to his next of blood in fee, in this case as hath been said D shall take the remainder, because he is next of blood and capable by purchase, though he be not legally next to take as heire by descent ⁽²⁾.

Sect. 3.

*UNcore le pier est
 plus prochein de*

*MES si soit pier
 et fits, et le pier*

*BUT if there be father
 and son, and the*

5. E. 6. tit. Administr. Br. 47.
 Ratcliffe's case ubi sup. See after
 in the chapter of socage.

(Hob. 33.)

(3. Co. 40.)

[p] Pl. Com. 293. b. Osborne's
 case.

(Post 67.)

sanke. And therefore some do hold upon these words of Littleton, that if a lease for life were made to the sonne the remainder to his next of blood, that the father should take the remainder by purchase, and not the uncle, for that Littleton saith the father is next of blood, and yet the uncle is heire. As if a man hath issue two sons, and the eldest sonne hath issue a sonne and die, a remainder is limited to the next of his blood, the younger son shall take it, yet the other is his heire.

[p] *Est un Maxime
 en le ley, que enheri-
 tance poet linealment
 discender, mes nemy a f-
 cender.*

Maxime, i. e. A sure founda-
 tion or ground of art, and a

*ad un frere que est
 uncle a le fits, et le fits
 purchase terre en fee
 simple et mort sans
 issue vivant son pier,
 luncle avera la terre
 come heire al fits et
 nemy le pier, uncore
 le pier est plus pro-
 chein de sanke; pur
 ceo que est un maxime
 en le ley, que enhe-
 ritage poet lineal-
 ment discender, mes
 nemy⁽³⁾ ascender. Un-
 core si le fits en tiel
 case mort sans issue, et
 son uncle entra en la
 terre come heire a le*

father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heire to the son, and not the father, yet the father is neerer of blood; because it is a *maxime* in law, that inheritance may lineally descend, but not ascend. Yet if the son in this case die without issue, and his uncle enter into the land as heire to the *fits*

(1) In the preceding page, lord Coke begins his comment on that part of Littleton, which describes the course of descent by the common law of England; and this seems to be a proper place for referring the student to some valuable writings, published since lord's Coke's time on the same subject. See Hal. Hist. C. L. c. 11. Wright's Ten. 174. Gilb. Ten. 2. Dalrymp. Feud. Prop. 4th ed. c. 5. p. 159. and Blackst. Law of Descents. To the first and last of these books it is that we principally call the attention of the student; though it must be confessed, that in all of them, the history of the law is so learnedly and critically traced, and the feudal principles, on which it chiefly depends, are so clearly unfolded, that a subject, in itself dry and abstruse, becomes not only plain and intelligible, but even agreeable and interesting. Mr. R. Robinson's *Discourse concerning the Law of Inheritances in Fee-simple* is another treatise on the same subject, which should not be passed over without notice. Many parts of it are ingeniously written; but unfortunately the author has chiefly exerted his talents in inventing a new kalendar of consanguinity, the explanation of which employs a very considerable part of the work; and by always referring to this, and by introducing a number of arbitrary terms, which are only intelligible as he explains them, he involves his subject, before too much embarrassed with difficulties, in still greater perplexity.

(2) Harpur having a son and 4 daughters, viz. A, B, C, and D, devises to the son in tail, remainder to B and C for life, remainder proximo consanguinitatis et sanguinis of the devisor; and Easter 17. Jam. by two justices against one, the remainder vests in all the daughters when the son dies without issue. But afterwards, Mich. 10. Jam. per totam curiam, it vests in the eldest daughter only, and not in all the daughters; 1. because proximo; 2. because an express estate is limited to two of the daughters—Periman and Pierce.—Hal. MS.—See S. C. in Palm. 11. and 303. 2. Ro. Rep. 256. Bridgm. 14. O. Bendl. 102. 106.—Lord chief justice Hale also gives a note on the words, *proximus de sanguine vel consanguinitate*; in which, after citing from Radcliffe's case, 3. Co. 40. that on the stat. 21. H. 8. the father or mother shall be preferred in administration to the son, as next of blood before the brother, he adds, *Nota*, ruled that in administration, the sister of the half blood shall be preferred in administration before the son of the sister of the whole blood; but when they are in æquali gradu, the sister of the whole blood shall be preferred before the sister of the half blood. M. 23. Cha. and M. 1650. B. R. Brown's case. Hal. MSS. See further as to *proximus de sanguine* in Dy. 333. b.

(3) *Linealment*.—P. and Red.

fits (siccome il devoit per la ley) et apres l'un-cle devia sans issue, vivant le pier, donques le pier avera la terre come heire al uncle, et nemy come heir a son fits, pur ceo que il veigne al terre per collateral discent et nemy per lineal ascention.

sonne (as by law he ought) and after the uncle dieth without issue, living the father, the father shall have the land as heire to the uncle, and not as heire to his sonne, for that he commeth to the land by collateral discent and not by lineall ascent.

conclusion of reason, so called [q] *quia maxima est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur*, so sure and uncontrollable as that they ought not to be questioned. [r] And that which our author here and in other places calleth a maxime, hereafter he calleth a principle, and it is all one with a rule, a common ground, *postulatum*, or an *axiome*, and it were too much curiositie to make nice distinctions between them. And it is well

[q] Pl. C. m. 27. b. (3. Co. 46.)

[r] Sect. 90. 643.

saïd in our bookes, [s] *nest my a disputer l'ancien principes del ley*. I never read any opinion in any booke old or new against this maxime, but onely in lib. rub. where it is said, [t] *si quis sine liberis discesserit, pater aut mater ejus in hereditatem succedat, vel frater et soror si pater et mater defuncti, si nec hos habeat, soror patris vel matris, et deinceps qui propinquiores in parentela fuerint hereditario succedant, et dum virilis sexus extiterit, et hereditas abinde sit, femina non hereditat*. But all our ancient authors and the constant opinion ever since do affirme the maxime.

[s] 12. H. 4. Glanvill lib. 7. cap. 1. Bract. lib. 2. cap. 29.
[t] Lib. Rub. cap. 70.

By this maxime in the conclusion of his case, onely lineall ascention in the right line is prohibited, and not in the collateral, [u] *Quelibet hereditas naturaliter quidem ad heredes hereditabiliter descendit, nunquam quidem naturaliter ascendit. Descendit itaque jus quasi ponderosum quod cadens deorsum recta linea vel transversali, et nunquam reascendit ea via qua descendit post mortem antecessorum, à latere tamen ascendit alicui propter defectum heredum inferius provenientium*; so as the lineall ascent is prohibited by law, and not the collateral (.) And in prohibiting the lineall ascent, the common law is assisted with the law of the 12 tables (2).

[u] Brit. cap. 119. Fleta lib. 6. ca. 1. Num. ca. 27. Ratcliff's case ubi supra. (3. Co. 42.)

Here our author for the confirmation of his opinion draweth a reason and a prooffe (as you have perceived) from one of the maxims of the common law. Now that I may here observe it once for all, his proofes and arguments, in these his three books, may be generally divided into two parts, viz. from the common law and from statutes, of both which, and of their several branches I shall give the studious reader some few examples, and leave the rest to his diligent observation.

For the common law his proofes and argument are drawn from 27 several fountaines or places.

[a] First, from the maxims, principles, rules, intendment and reason of the common law, which indeed is the rule of the law, as here, and in other places our author doth use.

[b] Secondly, from the bookes, records, and other authorities of law cited by him *ab auctoritate, et pronuntiatis*.

[c] Thirdly, from originall writs in the register *à rescriptis valet argumentum*.

[d] Fourthly, from the forme of good pleading.

[e] Fifthly, from the right entrie of judgements.

[f] Sixthly, *à precedentibus approbatis et usu*, from approved precedents and use,

[g] Seventhly, *à non usu*, from not use.

[h] Eightly, *ab artificialibus argumentis, consequentibus et conclusionibus*, artificial arguments, consequents and conclusions.

Ninthly, [i] *a communi opinione jurisprudentum*, from the common opinion of the sages of the law.

Tenthly, [k] *ab inconvenienti*, from that which is inconvenient.

Eleventhly, [l] *a divisione* from a division, *vel ab enumeratione partium*, from the enumeration of the parts.

Twelvethly, [m] *a majore ad minus*, from the greater to the lesser, or [n] from the lesser to the greater, [o] *a simili*, [p] *a pari*.

13. [†] *Ab impossibili*, from that which is impossible.

14. [q] *A fine*, from the end.

15. [•] *Ab utili vel inutili*, from that which is profitable or unprofitable.

16. [r] *Ex absurdo*, for that thereupon shall follow an absurditie, *quasi a furdo prolutum*, because it is repugnant to understanding and reason.

17. [s] *A natura et ordine naturæ*, from the nature or the course of nature.

18. [t] *Ab*

[a] Sect. 5. 8. 90. 96. 32. 53. 57. 59. 65. 99. 130. 146. 156. 169. 178. 231. 293. 302. 352. 360. 376. 377. 399. 410. 440. 441. 346. 347. 462. 43.

[b] Sect. 20. where a number of others are quoted.

[c] Sect. 67. 132. 170. 234. 241. 263. 613. 614. (Plowd. 228.)

[d] Sect. 38. 176. 183. 369.

[e] Sect. 248. 249.

[f] Sect. 88. 74. 76. 145. 332. 371. 372. 445.

[g] 108. 733.

[h] Sect. 170. 264. 283. 302. 429. 464. 629. 633. 686. 340. 413. 613. 686. 739.

[i] Sect. 697. 59. 104. 283. 332. 478.

[k] Sect. 87. where many others are quoted.

[l] Sect. 13. where many more are quoted, but see chiefly sect 381.

[m] Sect. 438. 439. 441.

[n] Sect. 18. [o] 301. &c.

[p] 291. 293. 409. &c.

[†] 129. 440.

[q] Sect. 146. 194.

[•] Sect. 360.

[r] Sect. 722.

[s] Sect. 114. 223. 129. 211.

[t] 107. 108.

(1) In Ratcliffe's case, 3. Co. 40. the reasons given for excluding lineal ascent are, *first*, that fathers and mothers are not of the blood of their children; *secondly*, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and *thirdly*, that it tends to avoid that confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the civil law is said to be the occasion. Lord Coke himself controverts the *first* of these reasons, by the words of Littleton in the section here commented upon, and by the case of administration, in which the father or mother is preferred as *nearest of blood* to their children, and also by the case of a remainder to the sons *nearest of blood*, under which description the father is entitled to take by purchase. But as to the two other reasons, lord Coke rather appears to adopt them. However, neither of them seems satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shewn, that it was promulgated as a law for mankind in general, instead of being, like many other parts of the Mosaic law, a rule for the direction of the Jewish nation only. Besides, by the Jewish law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Blackst. Law Tracts, v. 1. p. 182. 8vo ed. and Seld. de Success. Ebraeor. c. 12. there cited. The argument from the supposed confusion and uncertainty, which might arise, if lineal ascent should be permitted, is not less liable to objection; because lineal ascent might be governed by the same rules as lineal descent; and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our law's disallowance of lineal ascent in a very different way; and, according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates tail, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount them and also his collateral relations. How this rule in practice became extended so as to exclude lineal ascent *universally*, without confining it to the cases to which the feudal reason for the rule is applicable, and yet at the same time is so contrived, as to let in all collateral relations, and even the father himself collaterally, and by the medium of others, is not now very easy to explain, though this has been attempted. See Wright's Ten. 180. and Blackst. Law Tracts, v. 1. p. 183. 8vo ed. See also a learned note on the subject in Littleton avec Observat. par M. Houard. This edition of Littleton is in 2. vol. 4to. and was published at Rouen in 1766.

(2) See Tab. 5 l. de successionibus ab intestato; but neither in this, nor in any other part of the 12 tables, do I see any thing to exclude lineal ascent; and as I have not met with any book on the Roman law in which such an exclusion is mentioned, I conclude,

[1] Sect. 202.
 [u] Sect. 440.
 [w] Sect. 481.
 [x] Sect. 13, &c. Sect. 731. 692.
 635. 633. 441. 103. 193. 154.
 140. 2. (Plowd. 57. b. 49. b.)
 [y] Sect. 464. (Cro. Ja. 474.)
 [z] Sect. 731. 685. (Plowd. 105.)
 [a] 17. E. 5. Rot. Parl. nu. 19.
 25. E. 3. cap. 1. Regist. inter Ju-
 ra regia 61. &c. (Post 360.)
 [b] Commonly spoken of in Par-
 liament Rolls. (4. Inst. 14. Post.
 15. b.)
 [c] 13. E. 4. 9. 7. Co. Calvin's
 case. Pl. Com. Sherington's case.
 (Dr. and Stud. Dial. 1. c. 2.)
 [d] This law appeareth in our
 bookes and judicall records
 [e] These are of record in Rolls
 of Parliament.
 [f] Whereof you shall read in
 our author, and in our bookes.
 [g] Rot. Parl. 2. R. 2. nu. 3.
 13. R. 2. ca. 2. (Post 249.)
 [h] 7. Co. Caudrie's case articul.
 super cartas, &c.
 [i] 37. H. 6. 21. Fortesc. ca. 32.
 13. H. 4. 4. 28. H. 8. ca. 15.
 [k] Carta de Foresta, &c. the charters
 of the Forests.
 [l] 27. E. 3. ca. 17. Wi. ca. 23.
 4. H. 5. ca. 7.
 [m] Mirror des Justic. c. 1. Bract.
 334. 444. Fleta lib. 2. ca. 51. 52.
 &c. 5. E. 3. 11. 38. E. 3. 7.
 27. E. 3. cap. 8. Fortesc. 32.
 F. N. B. 117. 13. E. 4. 9. Rot.
 Parl. 6. H. 4. nu. 43. 10. H. 7.
 16. 47. E. 3. 22. 30. E. 1. Ac-
 count 127. Carta mercatoria 31.
 E. 1. rot. patent. (4. Inst. 237.)
 [n] Mich. 41. E. 3. coram rege
 in Thesaur. 12. E. 3. 5. b. 12. H.
 8. fol. 5. Rot. Pat. an. 20. E. 1.
 7. Co. Calvin's case fol. 21. Re-
 gift. fol. 22.
 [o] 50. E. 3. Rot. Parl. 50. E.
 3. Rot. Patent, &c.
 [p] 31. H. 6. ca. 3. 4. Ja. c. 1.
 [q] 11. H. 4. 11. 10. Aff. 27.
 34. Aff. p. 20. 19. E. 2. quar.
 impd. 177. 45. E. 3. 13. 40.
 Aff. p. 6.
 [r] 11. Aff. p. 6. Doct. and
 Stud. 12. b. 32. H. 6. 35.
 [s] 19. H. 6. 61.

18. [1] *Ab ordine religionis*, from the order of religion.

19. [u] *A communi presumptione*, from a common presumption.

20. [w] *A lectionibus jurisprudentium*, from the readings of learned men of law.

From statutes his arguments and proofes are drawne,

1. [x] From the rehearfall or preamble of the statute.

2. By the bodie of the law diversly interpreted.

Sometime by other parts of the same statute, which is *benedictio expositio, et ex visceribus causae*.

[y] Sometime by the reason of the common law. But ever the generall words are to be in-
 tended of a lawfull act, [z] and such interpretation must ever be made of all statutes, that
 the innocent or he in whom there is no default may not be damnified (1).

En la ley. There be divers lawes within the realme of England. As first, [a] *Lex*
coronae, the law of the crowne.

2. [b] *Lex et consuetudo parliamenti.* *Ista lex est ab omnibus quaerenda, à multis ignorata, à*
paucis cognita.

3. [c] *Lex naturae*, the law of nature.

4. [d] *Communis lex Angliae*, the common law of England, sometime called *lex terrae*, in-
 tended by our author in this and the like places.

5. [e] Statute law. Lawes established by authoritie of parliament.

6. [f] *Consuetudines.* Customes reasonable.

7. [g] *Jus belli.* The law of armes, war, and chivalrie, *in republica maxime conservanda*
sunt jura belli.

8. [h] Ecclesiastical or canon law in courts in certaine cases.

9. [i] Civil law in certaine cases not onely in courts ecclesiasticall, but in the courts of the
 countable and marshall, and of the admiraltie, in which court of the admiraltie is observed *la ley*
Olyron, anno 5. of Richard the first, so-called, because it was published in the ille of Olyron.

10. [k] *Lex foreste*, forest law.

11. [l] The law of marque or reprisall (2).

12. [m] *Lex mercatoria*, merchant, &c.

13. [n] The lawes and customes of the isles of Jerfey, Gernsey and Man.

14. [o] The law and priviledge of the Stannaries.

15. [p] The lawes of the east, west, and middle Marches, which are now abrogated.

But hereof this little taste for our student, that he may be capable of that which he shall reade
 concerning these and others in records, and in our books, and orderly observe them, shall suffice.

Et son uncle enter en la terre. For if the uncle in this case doth not enter into
 the land, then cannot the father inherit the land; for there is another maxime in law herein
 implied, [q] that a man, that claimeth as heire in fee simple to anie man by descent, must
 make himself heir to him that was last seised of the actuall freehold and inheritance (3). And if
 the uncle in this case doth not enter, then had he but a freehold in law, and no actuall free-
 hold, but the last that was seised of the actuall freehold was the sonne to whom the father cannot
 make himself heire; and therefore Littleton saith, *et son uncle enter en la terre (siccome devoit per*
la ley) to make the father to inherite, as heire to the uncle. [r] Note, that true it is that
 the uncle in this case is heire, but not absolutely heire; for if after the descent to him the fa-
 ther hath issue a sonne or daughter, that issue shall enter upon the uncle (4). [s] And so it is
 if a man hath issue a sonne and a daughter, the sonne purchaseth land in fee and dyeth with-
 out issue, the daughter shall inherite the land, but if the father hath afterward issue a sonne,
 this sonne shall enter into the land as heire to his brother, and if he hath issue a daughter and
 no sonne, she shall be coparcener with her sister.

Siccome il devoit per la ley. These words as a key doe open the secrets of the
 law, for hereupon it is concluded, that where the uncle cannot get an actuall possession by en-
 trie or otherwise, there the father in this case cannot inherit. And therefore if an advowson be
 granted to the sonne and his heires, and the sonne die without issue, and this descend to the un-
 cle, and he die before he doth or can present to the church, the father shall not inherit, because he
 should make himself heire to the sonne, which he cannot doe. And so of a rent and the like. But
 if the uncle had presented to the church, or had seisin of the rent, there the father should have in-
 herited. For Littleton putteth his case of an entry into land but for an example. If the sonne
 make a lease for life, and die without issue, and the reversion descend to the uncle, and he die, the
 reversion shall not descend to the father, because in that case he must make himselfe heire to the
 sonne. A infeoffe the son with warrantie to him and his heires, the sonne dies, the uncle en-
 ters into the land and dies, the father if he be impleaded shall not take the advantage of this war-
 rantie

clude, that lord Coke is mistaken in his idea of our law's conforming to the law of the 12 Tables. The mother was indeed ex-
 cluded; but it was not because the law of the 12 Tables did not permit lineal ascent, but on account of her sex, that law prefer-
 ring the *agnati* or those related through males, and excluding the *cognati*, or those related through females. See Inst. 3. 3. Princ.

(1) As to the construction of statutes, see lord ch. Hatt. Treat. on Stat.—Aff. Expof. Stat. by Eq.—Vin. Ab. Statutes E. 6.—
 Com. Dig. Parliament R. 10.

(2) Besides the books more generally known, see Lee's Capt. in War, which is a Treatise on this subject.

(3) *Grandfather, father, and son; grandfather dies; father is bound in an obligation or warranty, and dies before entry. Held, that*
the son is not liable, because he shall make himself heir to the grandfather. 24. E. 3. Hal. MSS.

(4) Here lord Coke is silent as to the right to the intermediate profits from the death of the father. In the case of *Basset and*
Basset, lord ch. Hardwicke held, that a posthumous son, claiming under a remainder in a settlement, was, by construction of the
 10. and 11. W. 3. c. 16. which preserves remainders for posthumous children, where no estate is limited to trustees for that pur-
 pose, intitled to the mean profits. See 3. Atk. 203. But in the same case, lord Hardwicke seems to have taken it for granted,
 that on a descent the mean profits belong to the uncle; for he directed, that the profits of the *estate descended* should be account-
 ed for by the uncle, only from the birth of the posthumous son. See Post 55. b. where lord Coke puts the case of a daughter's
 being intitled against a posthumous brother to corn sowed before his birth; which seems to shew, that lord Coke did not consi-
 der the posthumous child as intitled to any mean profits on a descent. See also Will. Rep. vol. 2. p. 526. where lord ch. j. De
 Grey, in delivering the opinion of the court of C. P. on a question whether a *posthumous* son was *actually seized*, denies that the
 posthumous son, in the case of a descent, can be intitled to any profits received before his birth, and cites 9. H. 6. 25. as an au-
 thority in point.

warrantie, for then he must vouch A as heire to his sonne, which he cannot doe (1), for albeit the warrantie descended to the uncle, yet the uncle leaveth it as he found it, and then the father by Littleton's (*devoit*) cannot take advantage of it. For Littleton Sect. 603. saith that warranties shall descend to him that is heire by the common law, and Sect. 718. he saith that everie warrantie which descends, doth descend to him that is heire to him which made the warrantie by the common law, which proveth that the father shall not be bound by the warrantie made by the sonne, for that the father cannot be heire to the sonne, that made the warrantie. And a warrantie shall not goe with the tenements, whereunto it is annexed, to any speciall heire, but alwaies to the heire at the common law (2). And therefore if the uncle be seised of certaine lands, and is disseised, the sonne release to the disseisor, with warrantie, and die without issue, this shall bind the uncle; but if the uncle die without issue, the father may enter, for the warranty cannot descend upon him. So if the sonne concludeth himselfe by pleading concerning the tenure and services of certaine lands, this shall bind the uncle; but if the uncle die without issue, this shall not bind the father, because he cannot be heire to the sonne, and consequently not to the estoppel in that case; but if it be such an estoppel as runneth with the land, then it is otherwise (3).

Vid. Sect. 603. 718. (Post 329.)

Vid. Sect. 735. 736. 737.

35. H. 6. 33. John Crook's case. (5. Co. 79.)

Sect. 4.

ET en tiel case, lou le fits purchase terre en fee simple, et devie sans issue, ceux de son sang de part son pier enheriteront come heires a luy, devant aucun de sang de part sa mere: mes fil nad aucun heire de part son pier, donques la terre descendra a les heires de part la mere (4). Mes si home prent (5) enheretrix des terres en fee simple, queux ont issue fits, et deviont, et le fits enter en les tenements, come fits et heire a sa mere, et puis devie sans issue, les heires de part la mere doyent enheriter, les tenements et jammes les heires de part le pier. Et fil ny ad aucun heire de part la mere, donque le seignior, de que la terre est tenu, avera la

AND in case where the sonne purchaseth land in fee simple, and dies without issue, they of his blood on the father's side shall inherite as heires to him, before any of the blood on the mother's side. But if he hath no heire on the part of his father, then the land shall descend to the heires on the part of the mother. But if a man marieth an inheritrix of lands in fee simple, who have issue a sonne, and die, and the sonne enter into the tenements, as sonne and heire to his mother, and after dies without issue, the heires of the part of his mother ought to inherit, and not the heires of the part of the father. And if he hath no heire on the part of the mother, then the lord

BY this it appeareth, that our author divideth heires into heires of the part of the father, and into heires of the part of the mother. [a] And note, it is an old and true maxime in law, that none shall inherite any lands as heire, but only the blood of the first purchaser, for * *refert à quo fiat perquisitum*. As for example, Robert Coke taketh the daughter of Knightley to wife, and purchaseth lands to him and to his heires, and by Knightley hath issue Edward, none of the blood of the Knightleys, though they be of the blood of Edward, shall inherite, albeit he had no kindred but them, because they were not of the blood of the first purchaser, viz. Robert Coke (6).

Vide Sect. 354. an excellent point.

[a] Pl. Com. Sir Edward Clere's case. 447.

[*] Fleta lib. 6. ca. 1. 2. &c. Bracton lib. 2. fo. 65. 67. 68. 69. &c. Britton ca. 119. 24. E. 3. 50. 39. E. 3. 29. 30. 38. 49. E. 3. 12. 49. Aff. p. 4. 12. E. 4. 14. Pl. Com. 445. & 450. 7. E. 6. Dyer 6. 24. E. 3. 24. 37. Aff. 4. 40. E. 3. 9. 42. E. 3. 10. 45. E. 3. Releases 28. 7. H. 5. 3. 4. 8. Aff. 6. 35. Aff. 2. 5. E. 4. 7. 3. H. 5. 21. H. 7. 33. 40. Aff. 6. Ratcliffe's case, 3. Co. 42.

Post 220. b.

[b] *Ceux del sang de part son pier*. Here it is to be understood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother (7), both these bloods are of the part of the father. [c] And this made ancient authors say, that if a man be seised of lands in the right of his wife, and is attainted of felony, and after hath issue, this issue should not inherit his mother, for that he could derive no blood inheritable from the father. And both these bloods of the part of the father must be spent before

[b] Bracton ubi supra. Fleta ubi supra. Britton ca. 118. 119. Pl. Com. 444. Clere's case. Tr. 19. E. 1. in Banco Rot. 25. Linacoln. Will. Scel's case.

[c] Britton fol. 15. Fleta lib. 1. ca. 18. Pl. Com. 445. 446. &c. Clere's case. (1. Sid. 200.)

(1) Quere of this case of warranty; for though the lieu of warranty descends from him, who makes the warranty, to the heir at common law, and it cannot descend to the special heir, because it is a thing in gross, yet the benefit of a warranty, being once annexed to land, shall go in divers cases as incident to the land to the special heir or offessee. Thus a gift of borough english, with a warranty, shall go to the youngest son with the land. Hal. MSS. See Acc. 2. Ro. Ab. 743. where it is said, that the father may vouch on such a warranty to the uncle. In Gilb. Ten. 18. there is a reference to lord ch. j. Hale's note on this part of lord Coke, from which it appears that lord ch. bar. Gilbert had seen lord Hale's MSS. notes.—(2) See Acc. both as estoppels and warranties. Hob. 31. 8. Co. 54. but observe what is said by lord Hale in the preceding note.—(3) The son makes lease for life, and dies; the uncle releases to the lessee for life in tail on condition, and dies. Quere, who shall enter for the condition broken, as the reversion in fee doth not descend to the father? Hal. MSS.—(4) Et cest l'opinion de toutes les justices M. 12. E. 4. Mes la suit tenu si terre descende a un home de part son pere, qui devia sans issue, que son prochain heire de part son pere enheritera a luy cest assavoir le prochain que est del sang le pere de part layel. Et pur defaute de tiel heire, ceux que sont de sang le pere del part le mere le pere, S. laielesse doient enheriter. Et fil ny ad tiel heire de part le pere donques le seignior avera le terre par eschete. Red. But this passage is not in any edition prior to Redman's, and seems an addition to Littleton by another hand, and to be an opinion extracted from 12. E. 4. 14. pl. 12. which is indeed cited in the margin of Redman.—(5) Feme. L. and M.—Roh.—P.—Red.—(6) And therefore if the heir of the part of the father be attainted, the land shall escheat. 49. Aff. p. 4. Hal. MSS.—(7) But sometimes a man can only have immediate inheritable blood from one parent, as where his father or mother is an alien or person attainted; and this it seems suffices to enable children to inherit from the parent, who confers the inheritable blood, and also to inherit to each other. See Acc. ante 8. a. n. 2. and the following note by lord Hale on lord Coke's next passage, where he mentions, that according to ancient authors the issue of an attainted father cannot inherit to the mother. This seems not to be law. A female heritrix takes an alien to husband, and they have issue: the issue shall inherit to the mother. Post sect. 114. and fol. 33. a. for dower of wife being alien or attainted. Hal. MSS. To the same purpose is what follows, being a note on fol. 8. a. ante, where lord Coke asserts that the children of an alien cannot inherit to each other, though he allows that the children of one attainted, if born before the attainder, may. Quere of this; for it seems the blood of the mother suffices to make them inheritable one to the other, and this was the principal reason in Hobby's case. Hal. MSS. Also lord Hale, in another note on fol. 8. a. ante abridges the case of Bacon and Bacon from Co. Cha. and cites Stephens's case in the dutchy as another case of the same kind, and then there is the note following.

(Plowd. 144.)

[a] 19. R. 2. garr. 100.

Britton ca. 118. 119. Fleta lib. 6. ca. 2.

before the heire of the blood of the part of the mother shall inherit, wherein ever the line of the male of the part of the father, (that is) the posteritie of such male, be they male or female, (whoever in descents are preferred) must faile before the line of the mother shall inherit, [a] and the reason of all this is for that the blood of the part of the father is more worthie, and more neere in judgment of law, than the blood of the part of the mother.

Devant ascun del sanke del part del mere.

And it is to be observed, that the mother hath also two immediate bloods in her, (viz.) her father's blood, and her mother's blood. Now to illustrate all this by example. Robert Fairefield, sonne of John Fairefield and Jane Sandie, takes to wife Anne Boyes, daughter of John Boyes and Jane Bewpree, and hath issue William Fairefield who purchaseth lands in fee. Here William Fairefield hath foure immediate bloods in him, two of the part of his father, viz. the blood of the Fairefields, and the blood of the Sandies, and two of the part of his mother, viz. the blood of the Boyes, and the blood of the Bewprees, and so in both

cases upward *in infinitum*. Now admit that William Fairefield die without issue, first the blood of the part of his father, viz. of the Fairefields, and for want thereof the blood of the Sandies (for both these are of the part of the father) if both these faile, then the heires of the part of the mother of William Fairefield shall inherit, viz. first the blood of the Boyes, and for default thereof the blood of the Bewprees.

It is necessary to be knowne in what cases the heire of the part of mother shall inherit, and where not. If a man be seised of lands as heire of the part of his mother, and maketh a feoffment in fee, and taketh backe an estate to him and to his heires, this is a new purchase, and if he dyeth without issue, the heires of the part of the father shall first inherit. (2) If a man so seised maketh a feoffment in fee upon condition, and dye, the heire of the part of the father, which is the heire at the common law, shall enter for the condition broken, but the heire of part of the mother shall enter upon him, and enjoy the land. [m] A man so seised maketh a feoffment in fee reserving a rent to him and to his heires, this rent shall goe to the heires of the part of the father; but [n] if he had made a gift in taile, or a lease for life reserving a rent, the heire of the part of the mother shall have the reversion, and the rent also as incident thereunto shall passe with it, but the heire of the part of the mother shall not take the advantage of a condition annexed to the same, because it is not incident to the reversion, nor can passe therewith. [o] If a man had been seised of a manor as heire on the part of his mother, and before the statute of *Quia emptores terrarum*, had made a feoffment in fee of parcell to hold of him by rent and service, albeit they be newly created, yet for that they are parcell of the manor, they shall with the rest of the manor descend to the heire of the part of the mother, *quia multa transeunt cum universitate quæ per se non transeunt*. If a man hath a rent secke of the part of his mother, and the tenant of the land

9. H. 7. 24. (Plowd. 47. Post 202.)

[m] 7. H. 6. 4. 1. Co. 100. Shelley's case.

[n] 5. E. 2. tit. Avowry 207. (Hob. 31.)

[o] 5. E. 3. Avowry 207. (8. Co. 54. 3. Co. 32. b.)

Yet note, that he cannot be heir to his mother, because she is an alien. Husband denizen takes wife an alien, or wife takes husband an alien, and they have issue. It seems the issue shall inherit to the father in the first case, to the mother in the second. Ergo videtur, that if alien has issue by denizen two sons, one son shall inherit to the other, because the mother is a denizen; and so in the case of a person attainted, having issue after attainder; and this was one of the reasons of Hobby's case. Hal. MSS. This doctrine is agreeable to lord Hale's argument when he gave judgment in *Collingwood* and *Pace*, cited ante fo. 8. a. n. 2. and also confirms the observation hazarded in n. 5. fol. 8. a.

(1) All between *En mesme* and *sic vide* omitted in Red.—(2) But here lord Coke must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the second regranting the estate to him. For if in the first feoffment, the use had been expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise an use in the feoffee, and consequently the use resulted to the feoffor, in either case he is in of his *ancient use*, and not by *purchase*. Adj. acc. 3. Lev. 406. and 2. Salk. 59. and see Acc. Post 13. a. and 21. b. What shall be a *purchase*, and break the *descent*, so as to entitle the *paternal* heir to a preference over the *maternal* heir, particularly in the case of a devise to the heir, the student may inform himself by the authorities cited in Vin. Abr. *Heir*. W. 1. 2. to which add Barrey and Trevillian. Mo. 278. Hinde and Lyon. 3. Leon. 64. 70. and Dy. 124. Hainsworth and Pretty. Cro. Eliz. 833. 919. Brown and Taylor. Cro. Cha. 38. Clark and Smith, 1. Salk. 241. and 1. Lutw. 793. Smith and Trig. 8. Mod. 23. and 1. Stra. 487. Ratcliffe's case. 1. Stra. 267. Martin and Strachan. 1. Willf. part 1. p. 66. and Hurst and the earl of Winchelsea Burr. 4. pt. v. 2. p. 879. In this last case, a feme covert by force of a power appointed by will to her heir in fee, but charged the land with debts and legacies; and it was adjudged in B. R. that the heir took by *descent*, and that the appointment had no other operation than making the estate subject to the debts and legacies. One leading principle, which this and the other authorities seem clearly to establish is, that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent*, he shall take by the *latter*, which is the title most favoured by the law; and that merely charging the estate with debts or legacies will not break the *descent*. This is onely one of the many useful propositions, which might be extracted on the subject as the result of the long list of cases before cited, if this was the proper place for a discussion so nice and difficult.

terre per escheat.

(1) *En mesme le maner est, si tenements descendent a le fits de part le pier, et il enter et puis morust sans issue, cel terre descendra as heires de part le pier, et nemy as heires de part la mere. Et fil ny ad ascun heire de part le pier, donques le seignior, de que la terre est tenus, avera la terre per escheat.* Et sic vide diversitatem, lou le fits purchase terres ou tenements, en fee simple, et lou il veient eins a tiels terres ou tenements per descent de part sa mere ou de part son pier.

of whom the land is holden, shall have the land by escheate. In the same manner it is, if lands descend to the sonne, of the part of the father, and he entereth, and afterwards dies without issue, this land shall descend to the heires on the part of the father, and not to the heires on the part of the mother. And if there be no heire of the part of the father, the lord of whom the land is holden shall have the land by escheate. And so see the diversity, where the sonne purchaseth lands or tenements in fee simple, and where he cometh to them by descent on the part of his mother, or on the part of his father.

granteth a distresse to him and to his heires, and the grantee dieth, the distresse shall go with the rent to the heire of the part of the mother, as incident or appurtenant to the rent, for now is the rent fecke become a rent charge (1).

[p] A man so seised as heire on the part of his mother maketh a feoffment in fee to the use of him and his heires, the use being a thing in trust and confidence shall ensue the nature of the land (2), and shall descend to the heire on the part of the mother. [q] A man hath a seignior as heire of the part of his mother, and the tenancy doth escheat, it shall go to the heire of the part of the mother. If the heire of the part of the mother of land whereunto a warranty is annexed is impleaded and vouchee, and judgment is given against him, and for him to recover in value, and he dieth before execution [r] the heire of the part of the mother shall sue execution to have in value against the vouchee, for the effect ought to pursue the cause, and the recompence shall ensue the losse.

If a man giveth lands to a man, to have and to hold to him and his heires on the part of his mother, yet the heires of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the law, and the words (of the part of his mother) are void, as in the case that Littleton putteth in this chapter. If a man giveth lands to a man to him and his heires males, the law rejecteth this word males, because there is no such kind of inheritance, whereof you shall read more in his proper place.

A man hath issue a sonne, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heires of the wife, the sonne dieth without issue, the heires of the part of the father shall inherit, and not the heires of the part of the mother, because it vested in the sonne as a purchaser. And the rule of Littleton holdeth as well in other kind of inheritances, as in lands and tenements. [s] And therefore if there be lord, *feme mesue*, and tenant, and the mesne bind her selfe and her heires by her deed to the acquittal of the tenant, the mesne take husband, the tenant by his deed granted to the husband and his heires, that he or his heires shall not be bound to acquittal, the husband and wife have issue, and die, this issue, being bound as heire to his mother, shall not take benefit of the said grant of discharge, for that extends to the heires of the part of the father, and not to the heires of the part of the mother, and therefore the heire of the part of the mother was bound to the acquittal (3). And thus much for the better understanding of Littleton's cases concerning the heire of the part of the mother shall suffice (4).

Mes si home priest feme inheritrix, &c. Here there is another maxime, [t] that whensoever lands do descend from the part of the mother, the heires of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heires of the part of the mother shall never inherit (5). *Et sic paterna paternis, et de converso, materna maternis.* For more manifestation hereof, and of that which hereafter shall be said touching descents, see a table in the end of this chapter.

Avera la terre per escheat. [u] *Escheat* (6), *escheata*, is a word of art, and derived from the French word *eschear* (*id est*) *cadere, excidere* or *accidere*, and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentia* or *terre excadentiales* [w]. *Dominus vero capitalis loco heredis habetur quoties per defectum vel delictum extinguatur sanguis sui tenentis, loco heredis et haberi poterit nisi per modum donationis fit reversio cuiusque tenementi.* And Ockam (who wrote in the raigne of Henry the second) treating of tenures of the king, saith, *porro escheatae vulgo dicuntur quae decedentibus hiis quae de rege tenent, &c. cum non existit ratione sanguinis heres, ad fiscum relabuntur.* [x] So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis*, i. e. for default of heire, *aut per delictum tenentis*, i. e. for felony, and that is by judgment three manner of waies, *aut quia suspensus per collum, aut quia abiuravit regnum, aut quia utrogatus est.* And therefore, they which are hanged by martiall law in furore belli forfeit no lands: and so in like cases escheats by the civilians are called *caduca*.

[y] The father is seised of lands in fee holden of I. S. the son is attainted of high treason, the father dieth, the land shall escheat to I. S. *propter defectum sanguinis*, for that the father dyeth without heire. And the king cannot have the land, because the sonne never had any thing to forfeit. But the king shall have the escheate of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden (7).

[z] In an appeale of death or other felony, &c. processe is awarded against the defendant, and hanging the processe the defendant conveyeth away the land, and after is outlawed, the conveyance is good (8) and shall defeat the lord of his escheat, but if a man be indicted of felony, and hanging the processe against him, he conveyeth away the land, and after is outlawed, the conveyance shall not in that case prevent the lord of his escheate. And the reason of this diversity is manifest: for in the case of the appeale, the writ containeth no time when the

[p] 5. E. 4. 4. 1. Co. 100. Shelley's case. 27. H. 8. Dyer Buckenham's case. 32. H. 8. Gard Brooke 93. 13. H. 7. 6. (Ro. Abr. 780. Post. 23. a. 271. b. 1. Co. 127. Heb. 31. 2. Co. 58.)

[q] 16. E. 3. age 46.

[r] Pl. Com. 292. & 515. See more of this in the chapter of Warranties.

(Post. 27. a.)

[s] 38. E. 3. 12.

[t] 39. E. 3. 29. 40. E. 3. 12.

[u] Vide sect. 130. Glanvill. lib. 7. cap. 17. Bract. lib. 3. fol. 118. Fleta lib. 5. cap. 5. & lib. 3. cap. 10. Britton ca. 37. & cap. 119. F. N. B. 100. Tr. 19. E. 1. in branco Rot. 25. (3. Inst. 21. 4. Inst. 225. F. N. B. 144. b.)

[w] Fleta lib. 6. cap. 1. Ockam cap. quod non absolvitur, &c.

[x] Pl. com. Dame Hale's case.

(Post. 92. b.)

[y] Pl. Com. in Nicholl's case.

[z] 38. E. 3. f. 37. 30. H. 6. 5. Bract. l. 2. tit. de Forf. Stamford. Pl. cor. 192. and according to this diversity was it resolved in 5. E. 6. as it appeareth by my Lord Dier's Manuscript. (Post. 390. b.)

(1) Acc. 8. Co. 54. a.—(2) The better reason seems to be, that the use being the same as it was before the feoffment, it is the old use which continues. As to an use's ensueing the nature of the land, see 1. Co. 127. 2. Co. 58. and Bac. Read. on Stat. Uses, 8vo. ed. 308. in which latter book the author controverts the generality of the doctrine, which certainly ought to be understood with many restrictions, and considers at large the differences between *uses* and the *land* itself, or rather, as he expresses himself, between *uses* and *cases of possession*. Lord Bacon's Reading on the Statute of Uses is a very profound treatise on the subject so far as it goes, and shews that he had the clearest conception of one of the most abstruse parts of our law. What might we not have expected from the hands of such a master, if his vast mind had not so embraced within its compass the whole field of science, as very much to detach him from professional studies? It may be proper to observe, that all the editions of lord Bacon's Reading on Uses are printed with such extreme incorrectness, that many passages are rendered almost unintelligible, even to the most attentive reader. A work so excellent deserves a better edition.—(3) Note, it was grant and release; but ratio libri is, because the husband was not charged, except during the coverture, and by reason of that the discharge doth not extend further. Hal. MSS.—(4) 7. H. 6. 3. by Cottessmore. If lord takes tenant to wife, and dies having issue, which dies without issue, the seignory is revived, and the tenancy shall go to the heir of the part of the mother. Hal. MSS.—(5) But if the eldest son purchases land, and it descends to the youngest son, and he dies without heir of the part of the father, it shall descend to the heir on the part of the mother; because they have one and the same mother. Hal. MSS.—(6) See Wright's Ten. 115. Blackst. Law Tracts, 8vo. ed. v. 1. p. 236. and 2. Blackst. Comm. 5th ed. 241.—(7) A feoffment B attainted of treason to the use of C, the king shall have the land discharged of the use. Hal. MSS. and Pim's case, M. 27. Eliz. is cited from Moore. See Mo. 196. But note, that according to Moore, B, at the time of the conveyance to him, had only committed treason, and was not attainted till after; and it was by relation to the time of committing the offence, that the case was construed to be the same as if the conveyance had been to a person actually attainted. The doctrine in Pym's case sounds peculiarly harsh; for first the legal estate in the land was given to the queen by a *constructive relation*, and then she was deemed to hold the land discharged of the use, because the king cannot be a trustee. However, it is but justice to mention, that the case being represented to queen Elizabeth, she, much to her honour, granted the land to *esqueive use* by patent. As to the king's holding land discharged of all uses and trusts where the legal estate vests in him, and the sense in which that doctrine is to be understood, see Vin. Abr. Uses C. where most of the authorities on the subject are stated or referred to.—(8) But if the party appears on an appeal, and the plaintiff counts, and the defendant is convicted by verdict or confession, it is all one. Hal. MSS.

(W. Jo. 217. Cro. Cha. 172.)

the felony was done, and therefore the escheate can relate but to the outlawry pronounced. But the indictment containeth the time when the felony was committed, and therefore the escheate upon the outlawry shall relate to that time (1). Which cases I have added, to the end the student may conceive, that the observation of writs, indictments, proceffe, judgments, and other entries, doth conduce much to the understanding of the right reason of the law.

[a] Mirror ca. 1. sect. 5. 51. H. 3. statutum de Seac. Britton fo. 33. 34. Flet. lib. 1. cap. 36. & lib. 2. cap. 34. 35. Regist. 301. his Oath 18. E. 1. Ro. Parl. 21. F. 1. Rot. Parl. 1. 29. E. 1. stat. de Escheatoribus. 14. E. 3. c. 8. 28. E. 1. ca. 18. F. N. B. 100. c. Stamf. Praer. 81. 1. H. 8. ca. 8. 3. H. 8. ca. 2. Capitula Escheatrie in Vet. Magna carta fo. 160. 161, &c.

Of this word (*escheta*) here used by our author, commeth [a] *Escheator*, an ancient officer so called, because his office is properly to look to escheats, wardships, and other casualties belonging to the crowne. In ancient times there were but two escheators in England, the one on this side of Trent, and the other beyond Trent, at which time they had subescheators. But in the raigne of Edward the second, the offices were divided and several escheators made in every county for life, &c. and so continued untill the raigne of Edward 3. And afterwards by the statute of 14. E. 3. it is enacted by authority of parliament, that there should be as many escheators assigned, as when king Edward 3. came to the crown, and that was one in every county, and that no escheator should tarry in his office above a yeere, and by another statute to be in office but once in three yeares. The lord treasurer nameth him.

And hereof also cometh *eschetria*, which signifieth the escheatership, or the office of the escheater. But now let us heare what our author will further say unto us.

Et sic vide, &c. This kind of speech is often used by our author, and doth ever import matter of excellent observation, which you may find in the sections noted in the margin *.

* Sect. 147. 149. 243. 283. 417. 667. &c.

(2. Ro. Abr. 816.)

[b] 7. E. 4. 11. 12. Fitz N. B. 33. 9. F. 3. 26. 17. E. 2. stat. de templariis.

And it is to be well observed, that our author saith, *fil nad aucun heire, &c. la terre escheatera*. In which words is implied a diversity (as to the escheate) betweene fee simple absolute, which a natural body hath, and fee simple absolute, which a body politique or incorporate hath. [b] For if land holden of I. S. be given to an abbot and his successors: In this case if the abbot and all the convent die so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat (2). And so if land be given in fee simple to a deane and chapter, or to a maior and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have againe the land, and not the lord by escheate. And the reason, and the cause of this diversity is, for that in the case of a body politique or incorporate the fee simple is vested in their politique or incorporate capacity created by the policy of man, and therefore the law doth annex a condition in law to every such gift and grant, That if such body politique or incorporate be dissolved, that the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his naturall capacity, but in case where the donor or feoffor reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat. Also (as hath beene said) no writ of escheat lyeth but in the three cases aforesaid, and not where a body politique or incorporate is dissolved.

Sect. 5.

(Post. 237.)

NOW commeth our author to the descent betweene brethren, which he purposely omitted before. *Discent, descensus* commeth of the Latine word *descendo*, and, in the legall sense, it signifyeth, when lands do by right of blood fall unto any after the death of his ancestors: or a descent is a meanes whereby one doth derive him title to certain lands, as heire to some of his ancestors. And of this, and of that which hath been spoken doth arise another division of estates in fee simple, viz. every man that hath a lawful estate in fee simple, hath it either by descent, or by purchase.

ITEM si joint trois freres, et le mulnes frere purchase terres en fee simple, et devie sans issue, leigne frere avera la terre per discent et nemy le puisne, &c. Et auxi si joint trois freres, et le puisne purchase terres en fee simple, et devie sans issue, leigne frere avera la terre per discent et

ALSO if there be three brethren, and the middle brother purchaseth lands in fee simple, and die without issue, the elder brother shall have the land by descent, and not the younger (3), &c. And also if there be three brethren, and the youngest purchase lands in fee simple, and die without issue, the eldest brother shall nemy

(1) Nota, if one be attainted by outlawry or confession of a felony, which is precedent to the seoffment of the party attainted, the seoffee may falsify the attainder by traverse to the felony or to the time of the felony. But if he be attainted by verdict, it seems, that he cannot falsify by traverse to the felony; but he may traverse the time of the felony, for that is not material; for if he be guilty on another day, the jury ought to find him guilty. Hal. MSS. which cites 3. Inst. 230.

(2) Vid. tamen Mich. 20. Jac. C. B. Johnson and Morris, that it shall escheat. Hal. MSS. which also cites 21. E. 4. 1. and 21. H. 7. 9. See further on this subject, Godb. 211. and Mo. 283. which are with lord Coke. But the case of Johnson and Norway, in Winch. 37. which seems to be the same as that cited by lord Hale is against the donor, though it is not mentioned in Winch, that the judges finally decided the point. See also contra lord Coke, the case of Southwell and Wade, in 1. Ro. Abr. 816. A. pl. 1. and S. C. in Poph. 91.

(3) But if the land purchased by the middle brother was holden of the elder brother, who accepts homage of him, the land shall descend to the younger brother by 13. E. 1. Avowry 235. Hal. MSS.

nemy le mulnes, have the land by descent and not the middle, for that the eldest is most worthy of blood.

Leigne est plus digne de sanke. It is a maxime in law, that the next of the worthiest blood shall ever inherit, as the male and

all descendants from him before the female, and the female of the part of the father before the male or female of the part of the mother, &c. because the female of the part of the father is of the worthiest blood. [c] And therefore among the males the eldest brother and his posterity shall inherit lands in fee simple as heire before any younger brother, or any descending from him, because (as Littleton saith) he is *plus digne de sanke*. *Quod prius est dignius est,* and *qui prior est tempore potior est jure*. Si quis plures filios habuerit, jus proprietatis primo descendit ad primogenitum, eo quod inventus est primo in rerum natura. In king Alfred's time knights fees (1) descended to the eldest sonne, for that by division of them between males the defence of the realme might be weakened; but in those dayes socage fee was divided between the heires males, and therewith agreeeth Glanvill. * Cum quis hereditatem habens moriatur, &c. si plures reliquerit filios, tunc distinguitur utrum ille fuerit miles, sive per feudum militare tenens, aut liber Sockmannus, quia si miles fuerit aut per militiam tenens, tunc secundum jus regni Angliæ primogenitus filius patri succedit in totis, &c. si vero fuerit liber Sockmannus, tunc quidem dividetur hereditas inter omnes filios, &c. (2). But hereof more shall be said hereafter his proper place.

[c] Britton cap. 119. Bract. lib. 2. cap. 30. 277. 279. 3. E. 3. 26. 3. Eliz. Dyer 138. Stanford præf. 52. 58. 3. E. 1. tit. avowry. 235. 32. E. 3. discent. 80. Bra. lib. 4. 211. Fleta lib. 6. ca. 2. Glanvill lib. 7. ca. 1. Mirror cap. 1. Sect. 3.

* Glanvill lib. 7. cap. 3. & ca. 1. Vid. Pl. Com. 229. b.

Sect. 6.

ITEM est a savoir, que nul a vera terre de fee simple per discent come heire a ascun home, si non que il soit son heire dentire sanke. Car si home ad issue deux fits per divers venters, et leigne purchase terres en fee simple et morust sans issue, le puisne frere navera la terre, mes luncle leigne frere ou auter son procheine cosin ceo avera, pur ceo que le puisne frere est de demy sanke al eigne frere.

ALSO it is to be understood, that none shall have land of fee simple by descent as heire to any man, unless he be his heire of the whole blood, for if a man hath issue two sonnes by divers venters, and the elder purchase lands in fee simple, and dye without issue, the younger brother shall not have the land, but the uncle of the elder brother, or some other his next cosin shall have the same, because the younger brother is but of halfe blood to the elder (5).

NO man can be heire to a fee simple by the common law, [a] but he that hath *sanguinem duplicatum*, the whole blood, that is both of the father and of the mother, so as the halfe blood is no blood inheritable by descent, (3) because that he that is but of the halfe blood cannot be a compleat heire, for that he hath not the whole and compleat blood (4), and the law in descents in fee simple doth respect that which is compleat and perfect. And this maxime doth not only hold where lands (whereof Littleton here speaketh) are claymed or demanded as heire, [c] but also in case of appeale of death: for if one brother be slaine, the other brother of the halfe blood shall never have an appeale (albeit he shall recover nothing therein either in the realtie or personaltie) because in the eye of the law he is not heire to him. Also this rule extends to a warranty, as our author himselfe elsewhere holdeth (6).

[d] Bract. lib. 4. idem lib. 2. 10. 65. Britton ca. 119. Fleta lib. 6. ca. 1. 1. E. 3. 19. John Gifford's case. 31. E. 3. Conterpl. de voucher 88. 40. Aff. 6. 4. E. 2. Formd. 49. Vid. Ratcliff's case, 3. Co. 40. 41.

(1. Ro. Abr. 629.)

[c] 7. E. 4. 15.

Sect. 737.

Sect. 7.

ET si home ad issue fits et file

AND if a man hath issue a sonne and a

THIS is put for an example to illustrate that which hath been said,

(1) Here lord Coke writes, as taking it for granted, that feudal tenures subsisted in England before the Conquest. But this is a controverted point amongst our best writers. See Post. 64. a. where a note is given on this subject.

(2) See Robins. Gavelk. an elaborate dissertation on the origin, antiquity, and universality of partible descents. The author pursues his subject amongst the Jews, Greeks, and Romans, and afterwards amongst most of the modern nations in Europe, and then proceeds to inquire into the state of our own law of descents before the Conquest. See page 20. See also lord Hale's learned researches into the history of the law of descents in his Hist. of the C. L. c. 11. p. 206.

(3) The exclusion of the half blood by our law is variously accounted for. Sir Martin Wright considers it as a consequence of the rules established for restricting the succession to the descendants of the first feudatory, in conformity to the strict notion of feuds. See Wright's Ten. 184. where the exclusion of lineal ascent is excused on the same principle. See also Blackst. Law Tracts, v. 1. p. 213. 8vo. ed. where the feudal reason is explained more at large, though the author admits that the practice goes much further than the principle will warrant. Others there are, who insist, that the true reason, why the brothers of different venters cannot inherit to each other, is the aversion our Saxon ancestors had to second marriages, which they are said to have deemed at best but a permitted fornication. But this unfavourable idea of the *vota iterata* was not peculiar to the Saxons, or any other descendants of the ancient Germans. See Tayl. Elem. Civ. L. 294.

(4) See what is observed on lord Coke's explanation of the meaning of the term *whole blood*, in 1. Sid. 200. See too 1. Vent. 424. and 2. P. Wms. 667.

(5) But daughters by different femes, though they cannot inherit to each other, may inherit together to their father, because the descent is immediate from the father. See R. Robins. Disc. on Inher. 2d ed. p. 37. and Bro. Abr. Descent. pl. 20. and 1. Ro. Abr. 627.

(6) So brother of half-blood shall not have error on fine levied by the elder brother, though, if there had not been such fine, the land would descend to him. Hal. MSS.—Nota, if A purchases a reversion expectant on an estate for life, and dies without issue, regularly his brother

Britton cap. 119.

said, and needeth no explanation. And heerwith agreeth Britton.

per un venter, et fits daughter by one venter,
per auter venter, et and a son by another
le fits del primer ven- venter, and the son of the
ter purchase terres first venter purchase
en fee, et morust sans lands in fee and die
issue, la soer avera la without issue, the sister
terre per discent, come shall have the land by de-
heire a sa frere (1) et scent as heire to her bro-
nemy le puisne frere, ther, & not the younger
pur ceo que la soer est brother, for that the sis-
de le entire sanke a ter is the whole blood
son eigne frere. of her elder brother.

Sect. 8.

SE*isie de terres en*
fee simple. These

words exclude a seisin in fee taile, albeit he hath a fee simple expectant. [f] (2) And therefore if lands be given to a man and his wife, and to the heires of their two bodies, the remainder to the heires of the husband, and they have issue a sonne, and the wife dyeth, and he taketh another wife, and hath issue a sonne, the father dieth, the eldest son entereth, and dieth without issue, the second brother of the halfe blood shall inherit, because the eldest sonne by his entry was not actually seised of the fee simple, being expectant but onely of the estate taile (3). And the rule is, that *possessio fratris de feodo simplici facit sororem esse heredem*, and here the eldest son is not possessed of the fee simple but of the estate taile (4). And where Littleton speaketh onely of lands, [g] yet there shall be *possessio fratris* of an use (5), of a feignory, a rent, an advowson, (6) and of other hereditaments.

Et leigne fits enter.

[b] These words are materially added when the father dies seised of lands in fee simple, for if the eldest son doth not in that case enter, then without question the youngest

ET*auxi ou home*
est seisie de terres
en fee simple, et ad
issue fits et file per
un venter, et fits per
auter venter, et mo-
rust et leigne fits enter,
et morust sans issue, la
file avera les tene-
ments, et nemy le pu-
isne fits, uncore le
puisne fits est heire
a le pere, mes nemy a
son frere. Mes si
leigne fits ne entra
en la terre apres la
mort son pere, mes mo-
rust devant aucun en-
trie fait per luy, don-
ques le puisne frere poit
entrer, et avera le
terre come heire a son
pere. Mes lou leigne
fits en le case avant dit
entra apres la mort
son pere, et ad ent'
possession, donques, lo
soer avera la terre

AND also where a man is seised of lands in fee simple, and hath issue a sonne and daughter by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the land, and not the younger son, yet the younger son is heire to the father but not to his brother. But if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter and shall have the land as heire to his father: but where the elder son in the case aforesaid enters after the death of his father, and hath pos-

Quia

brother of the half blood shall not be heir to him; because though when there is a mesne seisin, he ought to make himself heir to him who is last actually seized; yet when there is not such a mesne seisin, he ought to make himself heir to him, in whom it first vests by purchase. Yet see M. 1. Car. C. B. Cro. no. 16. Hodgkinson and Wood. A having issue B a son by one venter, and C by another, devises to B and the heirs male of his body, remainder to the heirs male of the body of the devisor and to the heirs male of their bodies, remainder to the devisor's right heirs, and dies. B dies without issue. Ruled, that C shall take as heir male of the devisor, because it is quasi an entail according to Littleton sect. 30. But it seems, that the fee shall descend to him, since it is a void devise of the fee simple, and doth not vest by purchase in the eldest son, but by descent. Hal. MSS.

(1) *A sa frere*, omitted in L. and M.—and Roh.

(2) 7. H. 4. 16. Vid. 38. Aff. 8. Hal. MSS.

(3) Acc. Bro. Abr. Discent, pl. 13. 14. and 30. Scire Facias, pl. 126. and Execution 67. 1. Ro. Abr. 628. and see 1. Show. 245. and 3. Mod. 257.

(4) Yet the remainder was in the elder brother to give or forfeit. 24. E. 3. 30. Hal. MSS.

(5) See Dy. 10. b. 11. a. Finch 8vo. ed. 21. and 2. And. 146. Note, that lord Coke must be understood to mean uses before the statute for transferring uses into possession, or uses not executed by the statute; for uses within the statute are legal estates.

(6) So of a copyhold before admittance. 4. Co. 22. b. Hal. MSS. See Acc. Dy. 291. b. Finch, 8vo. ed. 21.

Quia possessio fratris de feodo simplici facit sororem esse hæredem. *Mes si sont deux freres per divers venters, et leigne est seise de terre en fee et morust sans issue, [et son uncle entra come prochain heire a luy quel auxy morust sans issue, (1)] ore le puisne frere puit aver la terre come heire al uncle, pur ceo que il est de lentier sanke a luy, coment que il soit de demy sanke a son eigne frere.*

session there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem*. But if there be 2 brothers by divers venters, and the elder is seised of land in fee, and die without issue, and his uncle enter as next heire to him, who also dies without issue, now the yonger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the halfe blood to his elder brother.

sonne shall be heire, because as it hath beene said before regularly he must make himselfe heire to him that was last actually seised (or to the purchaser), and that was to the father where the eldest sonne did not enter. And therefore Littleton addeth that the sonne is heire to the father. [i] But when the eldest sonne in this case doth enter, then cannot the yongest sonne being of the halfe blood be heire to the eldest, but the land shall descend to the sister of the whole blood. Yet in many cases albeit the sonne doth not enter into lands descended in fee simple, the sister of the whole blood shall inherit, and in some cases where the eldest sonne doth enter, yet the younger brother of the half blood shall be heire.

[i] 11. H. 4. 11. 40. E. 3. 39. 45. E. 3. 13. 40. Aff. p. 6. Ratcliffe's case 3. Co. 41.

[k] If the father maketh a lease for years, and the lessee entreth and dieth, the eldest sonne dieth during the tearme

[k] 8. E. 4. 7. b. 3. H. 7. 5. 8. Aff. p. 6. 45 E. 3. tit. Re-leases 28.

(Post 243. Mo. 125. 3. Co. 40, 41.)

before entry or receipt of rent, the younger sonne of the halfe blood shall not inherit but the sister (2); because the possession of the lessee for yeares is the possession of the eldest sonne, so as he is actually seised of the fee simple, and consequently the sister of the whole blood is to be heire (3). The same law it is if the lands be holden by knights service, and the eldest sonne is within age, and the gardian entreth into the lands. And so it is if the gardian in socage enter (4).

But in the case aforesaid, if the father make a lease for life or a gift in taile, and dyeth, and the eldest sonne dyeth in the life of tenant for life or tenant in taile, the younger brother of the halfe blood shall inherit, because the tenant for life or tenant in taile is seised of the freehold, and the eldest sonne had nothing but reversion expectant upon that freehold or estate taile, and therefore the yongest sonne shall inherit the land as heire to his father, who was last seised of the actuall freehold. And albeit a rent had beene reserved upon the lease for life, and the eldest sonne had received the rent and dyed, yet it is holden by some * that the younger brother shall inherit, because the seisin of the rent is no actuall seisin of the freehold of the land. But 35 Aff. pl. 2. seemeth to the contrary, because the rent issueth out of the land and is in lieu thereof (5), wherein the onely question is, whether such a seisin of the rent be such an actual seisin of the land in the eldest son as the sister may in a writ of right make herselfe heire of this land to her brother. But it is cleere, that [l] if there be bastard eigne, and mulier puisne, and the father maketh a lease for life or a gift in taile reserving a rent and die, and the bastard receive the rent and dye, this shall barre the mulier, for the reason of that standeth upon another maxime as shall manifestly appear in his apt place, sect. 399.

(Post. 191.)

* 7. H. 5. 34. per Halls & Logdington.

35. Aff. p. 2.

[l] 14. E. 2. Bastard 26. Vid. sect. 399. (Post. 244. a.)

Seisie des terres. [m] (6) But in this case, if the eldest sonne doth enter and get an actuall possession of the fee simple, yet if the wife of the father be indowed of the third part and the eldest sonne dyeth, the younger brother shall have the reversion of this third part notwithstanding the elder brother's entry; because that his actuall seisin which he got thereby was by the endowment defeated (7). But if the eldest sonne had made a lease for life, and the lessee had endowed the wife of the father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life, and the reversion is now expectant on a new estate for life.

[m] 7. H. 5. 2. 3. 4.

(8. Co. 35. b. Post. 191. b. 4. Co. 58. b.)

Enter. Hereupon the question groweth, whether if the father be seized of divers severall parcels of lands in one county, and after the death of the father the sonne entreth into one parcel generally, and before any actuall entry into the other dyeth, this generall entry into part shall vest in him an actual seisin in the whole, so as the sister shall inherit the whole. And this is a *quære* in 21 H. 7. 33. a (8).

21. H. 7. 33. a.

And

(1) All between the brackets omitted in Roh. edit.

(2) Adj. Acc. Mo. 125. But it is said to be otherwise, if the lease is of a copyhold, unless made by surrender. 3. Leon. 69. and 4. Leon. 38.

(3) Yet in pleading, it shall not be said seisin in demesne. Defendant avows, because I. S. was seized in his demesne of fee and granted rent; plaintiff replies, that a long time before the said I. S. leased to him for years. It is not a plea without traversing the seisin in demesne. T. 9. Car. B. R. Weedon's case. Hal. MSS.

(4) See accordingly, though the lord seize the land held in socage as guardian in chivalry. 11. Aff. 6. 34. Aff. 10. See 12. Eliz. Dy. 292. so as to copyholder or tenant at will. *Quære of tenant by sufferance.* Hal. MSS.—In Jenk. 242. it is said, that the entry of a devisee for years will make a *possessio fratris*. See Vin. Abr. Descent, K. pl. 34. See further on this subject in the case of Newman and Newman, Willf. vol. 2. p. 516.

(5) Nota, M. 24. Car. B. R. between Ames and Cooke, ruled that in such case seisin of rent doth not make *possessio fratris*. Hal. MSS.—See S. C. acc. All. 88.—S. p. adjudged acc. Trin. Term. 1657. between Piper and Masters MS. Rep. by Glyn J.

(6) See Post. 31. a.

(7) So it is, if father makes lease for life, and afterwards recovers against him by default, and dies, and the eldest son enters, against whom the lessee recovers per quod ei de forceat. 8 Aff. 6. If wife recovers dower by erroneous judgment against the elder brother and dies, the sister shall have error; and if she reverses the judgment, she shall hold against the brother. 7. H. 5. 4. Son barred by false verdict, in mortdaunceffor; the sister shall have attain and reverse the judgment; but afterwards the brother shall enter. Kelw. 119. b. Hal. MSS.

(8) Adjudged accordingly in the point P. 4. Eliz. B. R. Hal. MSS.

(Post. 252. b.)

(1. Leon. 265)

[g] 19. E. 2. quare impd. 177.
3. H. 7. 5.[b] 7. E. 3. 66. tit. bar. 293. 3.
H. 7. 5.
(Post. 29. a.)[i] 8. E. 3. 11. 49. E. 3. 12.
Ratcliffe's case. 3. Co. 41.[k] Brañon lib. 2. fo. 65. & lib.
4. fol. 279. Britton cap. 119.
Fict. li. 6. c. 1. 24. E. 3. 30.[l] Ratcliffe's case 3. Co. 42.
[m] Britton cap. 119.

(Cro. Cha. 601.)

6. H. 4. 1.

[n] 34. H. 6. fol. 34. Pl. Com.
fol. 245. 25. E. 3. ca de natis
ultra mare.
(4. Infl. 206.)

Pl. Com. ubi supra.

(7. Co. 12. b. Calvin's case.)

Pl. Com. fol. 247.
(1. Sid. 138.)

And some doe take a diversitie when an entry shall vest, or devest an estate, that there must be severall entries into the severall parcels, but where the possession is in no man; but the freehold in law is in the heire that entred, there the generall entry into one part reduceth all into his actual possession. And therefore if the lord entred into a parcel generally for a mortmain, or the feoffor for a condition broken, or the disseisee into a parcell generally, the entry shall not vest nor devest in these or like cases, but for that parcell. But when a man dies seised of divers parcels in possession, and the freehold in law is by the law cast upon the heire, and the possession in no man, there the entry into parcell generally seemeth to vest the actual possession in him in the whole. But if his entry in that case be speciall, viz. that he enter only into that parcell and into no more, there it reduceth that parcell only into actual possession.

Home seise des terres. What then is the law of a rent, advowson, or such things that lie in grant? [g] If a rent, or an advowson do descend to the eldest sonne, and he dyeth before he hath seisin of the rent, or present to the church, the rent or advowson (1) shall descend to the youngest sonne, for that he must make himselfe heire to his father, as hath beene oftentimes said before. The like law is of offices, courts, liberties, franchises, commons of inheritance, and such like. [b] And this case differeth from the case of the tenant by the courtesie, for there if the wife dieth before the rent day, or that the church become voyd, because there was no laches or default in him, nor possibility to get seisin, the law in respect of the issue begotten by him will give him an estate by the courtesie of England. But the case of the descent to the youngest sonne standeth upon another reason, viz. to make himselfe heire to him that was last actually seised, as hath beene said.

En fee simple. [i] For halfe blood is not respected in estates in taile, because that the issues doe claime in descent, *per formam doni*, and the issue in taile is ever of the whole blood to the donee (2).

[k] *Possessio fratris de feodo simplici facit sororem esse hæredem.* Hereupon foure things are to be observed, every word almost being operative, and materiall. First, that the brother must be in actual possession; for *possessio est quasi pedis positio*. Secondly, *de feodo simplici* exclude estates in taile. Thirdly, *facit sororem esse hæredem*. So as [l] *soror est hæres facta*, and therefore some act must be done to make her heire, and the younger sonne is *hæres natus* [m] if no act be done to the contrary. And albeit the words be *facit sororem esse hæredem*, yet this doth extend to the issue of the sister, &c. who shall inherit before the younger brother. Fourthly, Of dignities, whereof no other possession can be had but such as descend (as to be a duke, marquess, earle, vicount, or baron) to a man and his heires, there can be no possession of the brother to make the sister to inherit (3), but the younger brother, being heire (as Littleton saith) to the father, shall inherit the dignitie inherent to the blood, as heire to him that was first created noble.

And you shall understand that concerning descents there is a law, parcell of the lawes of England, called *jus coronæ*, and differeth in many things from the generall law concerning the subject. As for example, the king in any suit for any thing that pertaines to the crown shall not shew in certaine his coinage as a subject shall do, or as he himselfe shall do for things touching his dutchie. [n] And in the case of the king, if he hath issue a sonne and a daughter by one venter, and a sonne by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands, nor any other fee simple lands of the crowne, but the younger brother shall have them. Wherein note that neither *possessio fratris* doth hold of lands of the possessions of the crowne, nor halfe blood is no impediment to the descent of the lands of the crowne, as it fell out in experience after the decease of king Edward the sixth to the queene Mary, and from queene Mary, to queene Elizabeth, both which were of the half blood, and yet inherited not onely the lands which king Edward or queen Mary purchaseth, but the ancient lands parcell of the crowne also.

A man that is king by descent of the part of his mother, purchaseth lands to him and his heires and dies without issue, this land shall descend to the heire of the part of the mother; but in the case of a subject, the heire of the part of the father shall have them.

So king Henry the eighth purchaseth lands to him and his heires, and died having issue two daughters, the lady Mary, and the lady Elizabeth, after the decease of king Edward; the eldest daughter queen Mary did inherit only, all his lands in fee simple. For the eldest daughter, or sister of a king shall inherit all his fee simple lands. So it is if the king purchaseth lands of the custome of gavelkind, and die having issue divers sonnes, the eldest sonne shall only inherit these lands (4). And the reason of all these cases is, for that the qualitie of the person doth in these and many other like cases alters the descent, so as all the lands and possessions whereof the king is seised in *jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crowne, and therefore to whomsoever the crowne descend, those lands and possessions descend also, for the crowne and the lands whereof the king is seised in *jure coronæ*, are con-

(1) If it was an advowson in gross. But seisin of a manor is good seisin of advowson, common, &c. appendant or appurtenant. 18. H. 6. 24. Hal. MSS.

(2) 8. E. 3. 11. 12. E. 4. 19. 49. E. 3. 12. 4. E. 2. Formedon 49. Hal. MS.

(3) Accordingly adjudged in parliament H. 16. Car. Cro. n. 4. Lord Gray's case, which was a barony by writ; and there agreed, that where lord Gray being baron by writ is created earl of Kent to him and his heirs male of his body, and he has issue two sons by several venters, and the eldest has issue a daughter, the barony shall go to the daughter, and the earldom to the younger brother, and doth not draw the barony to it. But if it was a feudal title of honour, as of the earldom of Arundel or barony of Berclay, there *possessio fratris* should hold well; because the title is annexed to the land.—So of an office of dignity, and, *ea ratione*, the office of high chamberlain of England descended to the earl of Lindsey of the whole blood, and departed from the line male of the earl of Oxford; and adjudged accordingly in parliament. Hal. MSS.—See lord Gray's case at large in Coll. Proc. on Claims of Bar. 195. and the case about the office of lord chamberlain, in same book 173. and W. Jo. 96.

(4) Nota, by the common law, the king is a corporation, and purchaseth made by him after assumption of the crown vest in a politic capacity. Hence, if an usurper purchaseth lands, and the right heir resumes the crown, he shall have the purchases, et e converso, an usurper shall have the purchases made by a rightful king so long as he has the crown. So it happened in the cases of H. 4. H. 5. H. 6. E. 4. R. 3. H. 7. But nota, purchases made before accession of the crown, or descents from collateral ancestors after accession of the crown, vest

concomitantia. If the right heire of the crowne be attainted of treason, yet shall the crowne descend to him, and *eo instante* (without any other reverfall) the attainder is utterly avoided, as it fell out in the case of Henry the seventh⁽¹⁾. [o] And if the king purchase lands to him and his heires, he is seised thereof *in jure coronæ*; *à fortiori*, when he purchases land to him his heires and successors⁽²⁾.

But hereof this little taste shall suffice.

Sect. 9.

ET est ascavoir que ce parol (enheritance) nest pas tant-solement entendue, lou home ad terres ou tenements per discent denheritage, mes auxi chescun fee simple, ou taile⁽³⁾ que home ad per son purchase puit estre dit enheritance, pur ceo que ses heyres luy purront enheriter. Car en brieve de droit que home portera de terre que fuit de son purchase demesne, le brieve dirra: Quam clamat esse jus et hæreditatem suam. Et issint serra dit en divers auters briefs, queux home ou feme portea de son purchase demesne come apiert per le Regist.

AND it is to wit, that this word (*inheritance*) is not onely intended where a man hath lands or tenements by descent of inheritance, but also every fee simple or taile which a man hath by his purchase may be said an inheritance, because his heires may inherit him. For in a writ of right which a man bringeth of land that was of his owne purchase, the writ shall say, *Quam clamat esse jus et hæreditatem suam*. And so shall it be said in divers other writs which a man or woman bringeth of his owne purchase, as appeares by the register.

ET est ascavoir.

This kinde of speech is used twice in this chapter, and oftentimes by our authour in all his three bookes, and ever teacheth us some rule of law, or generall or sure leading point, as you shall perceive by reading, and observing of the same, which for the ease of the studious reader I have observed.

Quam clamat esse jus et hæreditatem suam.

[a] Here our authour declareth the right signification of this word (*inheritance*.) And true it is that in the writ of right patent, &c. *quando dominus remittit curiam suam*, the words of the writ be, *Quam clamat esse jus et hæreditatem suam*. And in the *Præcipe in capite*, in a *cui in vita*, [b] when the defendant claimeth by purchase, the writ is *quam clamat esse jus et hæreditatem suam*. And with Littleton agreeth the Register, fol. 4. & 232. and the booke in 49. E. 3. 22. against sodaine opinions 7. H. 4. 5. 10. H. 6. 9. 39. H. 6. 38. Pl. Com. Wimbeshe's case 47. And yet in 7. H. 4. 5. which is the booke of the

Pl. Com. 238. 1. H. 7. fol. 4. (Plowd. 105. 244. 245.) [o] 43. E. 3. fol. 20.

Sect. 45. 46. 57. 59. 80. 100. 146. 164. 170. 184. 229. 243. 259. 274. 280. 293. 300. 305. 419. 420. 421. 439. 632. 697. 749.

[a] Sect. 732. Bract. lib. 2. fol. 62. b. Fleta lib. 6. ca. 1. (Post. 383. b.)

[b] Regist fol. 1. 2. (F. N. Br. 193.)

Regist. fol. 4. 212. 49. E. 3. 22. 7. H. 4. 5. 10. H. 6. 9. 39. H. 6. 38. 6. E. 3. 30. Pl. Com. Wimbeshe's case, 47. & 58. b.

6. E. 3. 30

W. 2. ca. 5. 1. E. 2. tit. quare impd. 43. 35. H. 6. 54. F. N. B. 34. b. [c] 6. Co. 52. 53. Countess de Rutland's case, 8 Co. 16. 17. the Prince's case. (4. Inst. 126.)

greatest weight, Sir William Thirning chiefe justice of the common bench (as it seemeth doubting of it) went into the chancery to enquire of the chancery men the forme of the writ in that case, and they said that the forme was both the one way and the other, so as thereby the opinion of Littleton is confirmed, and the booke in 6. E. 3. fol. 30. is notable, for there in an action of waste the plaintife supposed, that the defendant did hold *de hæreditate sua*, and it is ruled, that albeit the plaintife purchased the reversion, yet the writ should serve. And there it is said, it hath beene seene, that in a *cui in vita*, the writ was, *which the demandant claimed as her right and inheritance*, when it was her purchase. And so this point wherein there might seem some contrariety in bookes is manifestly cleared. But in the statute of W. 2. cap. 5. *de hæreditate uxorum* by construction of the whole statute is taken onely for the wives inheritance by descent, and not by purchase as appeareth in 1. E. 2. tit. *Quare impd.* 43. 35. H. 6. 54. F. N. B. 34. b.

There be some that have an inheritance [c] and have it neither by descent nor properly by purchase but by creation, as when the king doth create any man a duke, a marquisse, earle, viscount, or baron to him and his heires, or to the heires males of his bodie, &c. he hath an inheritance therein by creation. A man may have an inheritance in title of nobilitie and dignitie three manner of wayes, that is to say, by creation, by descent, and by pre-

vest in a natural capacity; and therefore in the re-ademption of the crown by Edward 4. there was a special act to give to the king all the possessions of Hen. 6. But such lands are qualified and affected differently from those of other persons. They will pass by letters patent only, and without livery; and the grants of them shall not be avoided by nonage, et similitur. As to acquisitions by conquest by the king of England, they are annexed to his crown as his purchases are, as Ireland, Man, Berwick, Calais, and the New Plantations, the antient territories of Normandy, Aquitaine, Anjou. And also many other lands, which descended in England from collateral ancestors, though in their original vested in a natural capacity, yet partly by attainder, partly by long continuance united to the crown, partly by occupation, were in some manner annexed to the crown, and will go with it. Yet see Rot. Parl. 13. R. 2. n. 32. dux Lancastriæ creatus dux Aquitanie cum mero et misto imperio tenend. de rege ut rege Franciæ.—Hal. MSS.

(1) So it is, though he be an alien, as happened in the case of king James. The reason is, because the king is a corporation. Hal MSS.

(2) See this subject very fully and learnedly considered in the case of the dutchy of Lancaster, Plowd. 212. in which it was held that a lease of dutchy land was not avoidable, by reason of the nonage of Edw. 6. and in the case of Willion and Berkley, Plowd. 223. in which a remainder to the king and the heirs male of his body was held to be an estate tail within the statute *de donis*, in the same manner as if the limitation had been to a subject, and not to be a fee-simple conditional. See further 7. Mod. 78.

(3) Ou taile not in L. and M.

(32. Co. 69. ante g. b.)

6. Co. 52. 53. Countesse of Rutland's case. 8. H. 6. 10. 48. E. 3. 30. 35. H. 6. 46. Pl. com. 223.
[d] 35. H. 6. 46. 48. E. 3. 30. b. 48. Aff. p. 6. 22. Aff. p. 24. Regist. 287. 11. E. 3. breve 472. 20. E. 4. 6.

(6. Co. 52. Countess of Rutland's case.)
[e] 6. Co. 52. 53. Countess of Rutland's case. 2. H. 6. 11. 22. Aff. 24. 12. E. 3. breve 254. 8. H. 4. 19. 11. H. 4. 15. Vide Fleta lib. 6. ca. 10.
[f] 4. Co. 118. Aston's case. Tempore Mariæ Reginae. Brooke nomine de dignitate 69. 14. H. 6. 18. 2. H. 6. 11.
[g] 22. H. 6. 52.

[h] 9. Co. 97. 98. Sir George Reynel's case.

Vide Sect. 88. 94. 96. 101. 157. 234. 318. 383. 412. 420. 433. 514. 643. 644. 657. 660. 692. 702. 729.

prescription (1). By creation two manner of ordinary wayes (for I will not speake of a creation by parliament) by writ, and by letters patent. Creation by writ is the ancienter way, and here it is to be observed, that a man shall gain an inheritance by writ (2). King Richard the Second created John Beauchampe de Holte baron of Kedermister by his letters patents, bearing date the 10th of October, anno regni sui 11. before whom there was never any baron created by letters patent, but by writ. And it is to be observed, that if he be generally called by writ to the parliament, he hath a fee simple in the baronie without any words of inheritance. But if he be created by letters patent, the state of inheritance must be limited by apt words, or else the grant is void. If a man be called by writ to the parliament, and the writ is delivered unto him and he dieth before he commeth and sits in parliament, whether he was a baron or no? And it is to be answered that he was no baron, for the direction and deliverie of the writ to him maketh not him noble; for the better understanding whereof it is to be knowne that the words of the writ in that case are, *Rex &c. E. B. de D. Cbivalier salutem. Quia de advisamento et assensu concilii nostri, pro quibusdam arduis et urgentibus negotiis statum et defensionem regni nostri Anglia, &c. concernentibus, quoddam parlamentum nostrum apud civitatem Westm. a 21 Octob. proxim. futuro teneri ordinavimus, et ibid. vobiscum et cum prelati, magnatibus et proceribus dicti regni nostri colloquium habere et tractatum, vobis in fide et ligancia quibus nobis tenemini firmiter injungendo mandamus, quod consideratis dictorum negotiorum arduitate, et periculis imminentibus cessante exensatione quacunque, dictis die et loco personaliter interfutis nobiscum et cum prelati, magnatibus, et proceribus supradictis, super dictis negotiis tractatur vestrumque concilium impensur, &c.* And this writ hath no operation or effect until he sit in parliament, and thereby his blood is ennobled to him and his heires lineall, and thereupon a baron is called a peer of parliament. [d] And if issue be joined in any action, whether he be a baron, &c. or no, it shall not be tryed by jury, but by the record of parliament, which could not appeare unless he were of the parliament (3). Therefore a duke, earle, &c. of another kingdome, are not to be tryed by those names here, for that they are not peeres of our parliament (4). And albeit the creation by writ is the ancienter, yet the creation by letters patent is the surer, for he may be sufficiently created by letters patents, and made noble, albeit he never sit in parliament.

[e] And it is to be observed, that nobilitie may be granted for term of life, by act in law without any actuall creation; as if a duke take a wife, by the intermarriage she is a duchesse in law, and so of a marquess, an earle, and the rest, and in some other cases. And there is a diversitie betwene a woman that is noble by descent, and a woman that is noble by marriage. [f] For if a woman, that is noble by descent, marrie one that is under the degree of nobilitie, yet she remaineth noble still (5); but if she gaine it by marriage, she loseth it, if she marry under the degree of nobilitie, and so is the rule to be understood, *Si mulier nobilis nupserit ignobili desinit esse nobilis*. [g] But if a dutchesse by marriage marrieth a baron of the realme she remaineth a dutchesse and loseth not her name, because her husband is noble (6), *et sic de ceteris*.

And as an estate for life may be gained by marriage, so may the king create either man or woman noble for (7) life [b] but not for yeares, because then it might goe to executors or administrators (8). The true division of persons is, that everie man is either of nobilitie, that is, a lord of parliament of the upper house, or under the degree of nobilitie, amongst the commons as knights, esquires, citizens and burgeses of the lower house of parliament, commonly called the house of commons; and he that is not of the nobilitie is by intendment of law among the commons (9).

Come appiert per le register. Which booke in the statute of W. 2. ca. 24. is called *Registrum de cancellaria*, because it containeth the formes of writs at the common law that issue out of the chancery, *tangam ex officina justicie*. There is a register of originall writs, and a register of judicall writs; but when it is spoken generally of the register it is meant of the register originall. For the antiquitie and excellencie of this booke, see in my preface to the eight part of my Commentaries. This excellent booke our author voucheth divers times in these bookes, and so doth he divers other authorities in law of several kinds, but with this observation, that he citeth no authoritie, but when the case is rare or may seeme doubtfull, which appeareth in this, that he putteth no case in all his three bookes but hath warrant of good authoritie in law. For he knew well the rule, that *perspicua vera non sunt probanda*. And the like observation is made of justice Fitzherbert in his booke of *natura brevium*, that he never citeth authoritie, but when the case is rare or was doubtfull to him. The authorities which our author hath cited in his three bookes I have collected.

Sect.

(1) See 1. Bulstr. 196. where the earldom of Arundel is mentioned as an instance of an earldom by prescription. In this case many curious particulars concerning the honour of Petworth are mentioned.

(2) Baron by writ takes grant of the same barony by patent. This determines his barony by writ. Otherwise it is, if the barony by writ was suspended. 11. Co. Lord Delaware's case. Hal. MSS.—But the doctrine of extinguishing a barony by writ by acceptance of a patent-barony seems questionable; for it supposes a right to surrender the barony by writ. See in Show. Parliam. Cas. 1. Lord Purbeck's case, in which the house of lords adjudged, that the dignity of a viscount could not be surrendered by a fine.

(3) This doctrine is certainly true with respect to baronies by writ; because, as lord Coke observes, the blood of the person summoned is not ennobled, till he takes his seat in parliament. But the case of nobility by letters patent is different, for by them the creation is perfect, and the blood is ennobled without sitting; and therefore, in lord Banbury's case, the court of king's bench held, that a peerage claimed under letters patent is not triable by the record of parliament, but must be questioned by pleading *non concessit*. See the King and Knollys, 1. L. Raym. 10.

(4) Nota, as to precedence of foreign dukes, earls, &c. it differs not, though they have not voice in parliament. But a Scotch or Irish earl summoned to parliament here is as an English earl, as the earl of Angus. See the case of the dutchesse of Suffolk. Hal. MSS.—See further as to precedence in general, 4. Inst. 361. and Pryn. on 4. Inst. 323. and as to the precedence of Irish peers, see a tract by the late earl of Egmont.

(5) See 14. H. 8. 42. Dy. 79.

(6) But in some books it is said, that if a woman noble by birth marries one of inferior nobility, she shall be styled by the dignity of her second husband. Dutchesse of Suffolk's case. Ow. 82. See S. C. O. Bendl. 37.

(7) It has been supposed, that a man may be noble during the life of another. 52. H. 6. 29. by Danby.

(8) As to the degree of baronet, it is parcel of the name; and therefore capias against I. S. or I. S. knight, where he is baronet, cannot take I. S. baronet. Noy. n. 382. Sir Richard Lucy's case. Tr. 10. Car. B. R. Cro. n. 6. Sir Henry Ferrer's case. The king cannot create a dignity with a mesne between baron and baronets. 9. Jac. 12. Co. n. 51. Hal. MSS. See Noy. 87. Cro. Cha. 371. and 12. Co. 81.

(9) See 2. Inst. 29. 50.

Sect. 10.

ET de tielx choses, de queux home poit aver un manuel occupation possession ou receipt, sicome des terres tenements rents et hujusmodi, la home dirra en count countant, et en plee pledant, que un tiel fuit seise en son demesne come de fee. Mes de tiels choses, que ne gisont en tiel Manuel occupation, &c. sicome de advowson desglise et huiusmodi, la il dirra, que il fuit seise come de fee, et nemy en son demesne come de fee, et en Latin il est en lun cas, quod talis seifitus fuit, &c. in dominico suo ut de feodo, et en l'auter case, quod talis seifitus fuit, &c. ut de feodo.

And of such things, whereof a man may have a manuell occupation possession or receipt, as of lands tenements rents and such like, there a man shall say in his Count Countant and Plea Pledant, that such a one was seised in his demesne as of fee. But of such things, which do not lie in such Manuall occupation, &c. as of an Advowson of a Church and such like, there he shall say, that he was seised as of fee, and not in his Demesne as of fee. And in Latine it is in one Case, *Quod talis seifitus fuit in dominico suo ut de feodo*, and in the other Case, *Quod talis seifitus fuit, &c. ut de feodo*.

courage et cure de ceo apprendre. And for this cause this word *quia bene placitate super omnia placet*; and it is not as some have said, so called *per antiphrasin*, *quia non placet*.

Seise; *Seifitus* cometh of the French word *seisin*, i. e. *possessio*, saving that in the common law, *seised* or *seisin* is properly applyed to freehold, and possessed or possession properly to goods and chattels; although sometime the one is used instead of the other.

En son demesne come de fee, in *Dominico suo ut in feodo*. *Dominicum* is not onely that inheritance, wherein a man hath proper dominion or owner-ship, as it is distinguished from the lands which another doth hold of him in service, but that which is manually occupied, manured, and possessed, for the necessary sustentation, maintenance, and supportation of the lord and his household, and savoureth *de domo*, of the house, either *ad mensam*, for his or their bord, and sustentation, or is manually received, (as rents) for bearing and defraying of necessary charges publike or private. Of these, saith our author, he should plead, that he is seised in *dominico suo ut de feodo*, i. e. *de feodo dominicali*, seu *terra dominicali*, seu *redditu dominicali*; which is as much as to say demeyne or demaine, of the hand, i. e. manured by the hand, or received by the hand; and therefore he calleth it manuell occupation, possession or receipt (3). And in *Domesday* demeane land is called inland, as for example, *4 bovatas terræ de inland*, et *10. bovatas in servitio*.

En tiel Manuel occupation, &c. There is nothing in our author but is worthy of

IN count countant. Count (Doctr. Pla. 83.) i. e. *narratio* cometh of the French word *conte*, which in Latyne is *narratio*, and is vulgarly called a declaration (1). The original writ is according to its name *breve*, brieve and short; but the count, which the plaintife or demandant makes, is more narrative and spacious and certaine both in matter and in circumstance of time and place, to the end the defendant may be compelled to make a more direct answer; so as the writ may be compared to *logicke*, and the count to *rheticke*; and it is that which the civilians call a *libell*. And in that ancient booke of the Mirror of Justices, lib. 2. cap. des loiers, *contors* are *serjeants* skilfull in law, so named of the count as of the principal part, and in W. 2. ca. 29. he is called *serjant counter* (2).

Mirror des Justices.

W. 2. cap. 29.

En plee pledant. (Post. 303.)

Placitum. Here Littleton teacheth good pleading in this point, of which in his third booke and chapter of Confirmation, sect. 534, he thus saith, *et saches mon fuis, que est un des plus honorables laudables et profitable choses en nostre ley, de aver le science du bien pleader en actions reals et personels; et par ceo, ieo toy counsaile especialment de metter ton placitum* is derived *à placendo*, *serjant counter* (2).

Bract. lib. 4. fol. 263. Idem lib. 5. fol. 372. Britton fol. 205. 206. Fleta lib. 5. cap. 5. Stanf. Præf. 8. Pl. Com. fol. 191. Wrottesley's case.

Domesday.

(1) As to the form of a count or declaration, and all other particulars concerning it, see Com. Dig. Pleader. C. The whole of lord chief baron Comyn's work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution; but the title *Pleader* seems to have been the author's favourite one, and that in which he principally exerted himself.

(2) See further on the antiquity and dignity of serjeants at law, Blackst. Com. 5th ed. v. 1. p. 24. & v. 3. p. 26. and the books there cited, particularly Fortesc. De Laud. Leg. Ang. c. 50. Spelm. Gloss. 335. Pref. to 10. Co. 2. Inst. 214. Dugd. Orig. Jurid. and a tract by the late Mr. Serjeant Wynn, which was printed in 1765. To these add Waterh. Comment. on Fortesc. 136. 137. and 347. to 363. where the author is so full and explanatory on the same subject, that what he has collected may very well be deemed a treatise upon it. Mr. Waterhouse, though a very prolix as well as extravagant writer, one who too frequently exhausts himself, and disgusts his readers, by tedious useless and ill-timed digressions, appears to have been a man of considerable learning; and his collections, relative to the antiquities of our law, may sometimes be resorted to with great advantage, and may very much facilitate the labours of more judicious and able inquirers.

(3) Vide the diversity between count and plea in some cases. In debt for rent the plaintiff shall count, that he leased without shewing *seisin* or *seisin* in demesne. 21. H. 7. 26. So in Formedon, quod I. S. dedit. 3. E. 3. 35. 5. E. 3. 16. 3. E. 3. 59. 15. E. 4. 17. But in counting descent in writ of entry, he ought to plead *seisin*, and in pleading a gift in tail he ought to alledge *seisin* in demesne. 18. H. 6. 24. 15. E. 4. 17. Hal. MSS. See further on pleading *seisin* in demesne. Post. 17. b.

of observation. Here is the first (*Et.*) and there is no (*Et.*) in all his three bookes (there being as you shall perceive very many) but it is for two purposes. First it doth imply some other necessary matter. Secondly, that the student may together with that which our author hath said inquire what authorities there be in law that treat of that matter, which will worke three notable effects: first it will make him understand our author the better: secondly, it will exceedingly adde to the reader's invention. And lastly, it will fasten the matter more surely in his memory, for which purpose I have for his ease in the beginning set downe in these Institutes, the effect of some of the principal authorities in law as I conceive them concerning the same. In this place the (*Et.*) implyeth possession or receipt, and such other matter as appeareth by my notes in this section. As for the authorities of law, you shall find the effect of them in this section, and the like of the rest of the (*Et.*) which you shall find in the sections hereafter mentioned, omitting those (for avoyding of tediousnesse) that either are apparent, or which are explained in some other places, viz. sect. 20. 48. 102. 108. 120. 125. 136. 137. 146. 149. 154. 164. 166. 167. 168. 177. 179. 183. 184. 194. 200. 202. 210. 211. 217. 220. 226. 233. 240. 242. 244. 245. 248. 262. 264. 269. 270. 271. 279. 320. 322. 323. 325. 326. 327. 329. 330. 335. 336. 341. 347. 348. 349. 350. 352. 355. 356. 359. 364. 365. 374. 375. 377. 381. 384. 389. 393. 395. 397. 399. 401. 402. 410. 417. 428. 433. 447. 449. 461. 470. 471. 477. 483. 489. 500. 501. 522. 532. 552. 553. 556. 558. 562. 578. 591. 592. 593. 594. 603. 613. 624. 625. 630. 632. 634. 637. 638. 648. 659. 660. 661. 669. 687. 693. 700. 718. 745. 748. 749. All which I have observed and quoted here once for all for the ease of the studious reader (1).

Ut de feodo. Where (*ut*) is not by way of similitude, but to be understood positively that he is seised in fee. And so it is where one pleads a descent to one *ut filio et hæredi*, that is, to Io. S. that is sonne and heyre, *et sic de cæteris*, where (*ut*) denotat ipsam veritatem.

Sicome de advowson. Of an advowson [1] wherein a man hath as absolute ownership and propertie as he hath in lands or rents, yet he shall not pleade, that he is seised in *dominico suo ut feodo* (2) because that inheritance, favouring not *de dono*, cannot either serve for the sustentation of him and his household, nor any thing can be received for the same for defraying of charges. And therefore he cannot say, that he is seised thereof in *dominico suo de feodo*, whereby it appeareth how the common law doth detest simony and all corrupt bargaines for presentations to any benefice, but that [k] *idonea persona* for the discharge of the cure should be presented freely without expectation of any thing: nay so cautious is the common law in this point, that the pl. in a *quare impedit* should recover no damages for the losse of his presentation untill the statute of W. 2. cap. 5. (3) And that is the reason that gardian in socage [l] shall not present to an advowson, because he can take nothing for it, and by consequent he cannot account for it. And by the law he can meddle with nothing that he cannot account for. [m]. And in a writ of right of advowson, the patron shall not alledge the explees or taking of the profits in himselfe but in his incumbent. And hereby the old bookes shall be the better understood, viz. Bracton, lib. 4. tract. 3. cap. nu. 5. *Est autem dominicum quod quis habet ad mensam, et proprie, sicut sunt Boordlands Anglice.* And Fleta lib. 5. ca. 5. *Est autem dominicum propria terra ad mensam assignata. Dominicum etiam dicitur ad differentiam ejus quod tenetur in servitio.* But of an advowson and such like he shall plead, that he is seised *de advocacione ut de feodo et jure* (4).

Advowson. *Advocatio*, signifying an advowing or taking into protection, is as much as *jus patronatus*. Sir William Herle in 7. E. 3. fol. 4. faith, that it is not long past, that a man did know what an advowson was, but, when a man would grant an advowson he granted, *ecclesiam* the church, and thereby the advowson passed, vide 45. E. 3. 5. But surely the word is of greater antiquity, for in the register there is an originall writ *de recto advocacionis*, and in the originall writ of assise *de darreine presentment* the patron is called *advocatus*. [n] Vide W. 2. ca. 5. And so doth [o] Bracton call him. *Advocatus autem dici poterit ille, ad quem pertinet jus advocacionis alicujus, ut ad ecclesiam presentet nomine proprio et non alieno.* And [p] Fleta lib. 5. cap. 14. agreeth herewith almost *totidem verbis*: *advocatus est ad quem pertinet jus advocacionis alterius ecclesie, ut ad ecclesiam nomine proprio non alieno possit presentare.* And [q] Britton cap. 92. The patron is called *avow*, and the patrons are called *advocati*, for that they be either founders or maintainers or benefactors of the church, either by building dotation or encreasing of it, in which respect they were also called *patroni*, and the advowson *jus patronatus*.

And it is to be understood that there is a great [r] diversity. *inter advocacionem medietatis ecclesie, Et. et medietatem advocacionis ecclesie* (5), and of their severall remedies for the same. For the advowson of the moiety is, when there be severall patrons and two severall incumbents in one church, the one of the one moiety thereof, and the other of the other moiety, and one part

Britton 205. 206. optime. Fleta lib. 6. cap. 5. Idem lib. 3. cap. 15.

[1] 7. E. 3. 63. 24. E. 3. 74. 34. H. 6. 34. 19. E. 3. quar. imp. 154. Mirror cap. 2. lect. 17.

(Doctr. Plac. 287. Post 89. 388.)

[4] 6. Co. 51. Boswel's case.

[1] 8. E. 2. Presentment al Egle life 10. 7. E. 3. 39. 27. E. 3. 89. 29. E. 3. 5. 31. E. 3. Eftopel 240. (Post. 89. 344. b.) [m] 7. E. 3. 63. Bracton 263. 372. Fleta lib. 5. cap. 5.

7 E. 3. 4. 45. E. 3. 2.

[n] W. 2. ca. 5. [o] Bract. lib. 4. fo. 240. [p] Fleta lib. 5. cap. 14.

[q] Britton cap. 92. [r] 33. H. 6. 11. b. per Prifot. 14. H. 6. 15. per Newton. 31. E. 1. droit 68. 69. F. N. B. 31. b. 10. Co. 135. 136 R. Smithe's case. 45. E. 3. Fines 41. 45. E. 3. 12. 17. E. 3. 78. 17. E. 2. Dower 163. (4. Co. 75. 5. Co. 102. 2. Inst. 375.)

(1) See in fol. 22. a. the note in respect to lord Coke's observation on Littleton's use of *nota*, *Et.* and like expressions. (2) And yet in 34. H. 6. 34 one pleads, that the king was seised in his demesne as of fee of an advowson in gros.—See also 26. E. 3. 64. b. where in a writ of right of advowson by an abbot against the countess of Ormond, the plaintiff counts, that one R. was seised in his demesne as of fee and right, and it was held good. If a church be impropriate, the impropriator may plead seisin in his demesne as of fee. Plowd. 503.—(3) *Advowson assens.* *Recovery in value for advowson shall be 12d. for every mark* [the church is worth by the year.] 8. E. 2. *Recovery in value.* 11. Hal. MSS. The words between the brackets are added from Fitzh. Abr. As to an advowson's being assens and valuable, see Post. 374. b. and the note there given on the subject.—(4) *Office de balliva parci vel hundredi not demesne, yet the esplees shall be laid.* 7. E. 3. 63. 8. E. 3. 55. *Corody not demesne.* 17. E. 2. *Nuper obiit* 12. *Tithes whether demesne.* Dy. 85. *One grants a rent-charge, the grantee brings annuity, and declares of a grant virtute cujus fuit seistus in dominico suo ut de feodo.* By some this is electing to have it as a rent-charge, 3. E. 6. Dy. 65. But ruled contra, and the pleading good in substance. M. 43. 44. *Eliz. B. R. Case of Dean of Rochester.* Noy n. 162. M. 11. *Car. B. R. Cro. n. 24. Sprint and Hickes* 2. Bullf. 148. Hal. MSS. The dean of Rochester's case is in Noy. 37. 2. And. 106. & Ow. 73.—A man intituled to a road pleads seisin of it in *dominico suo ut de feodo et in jure.* 3. H. 6. 7. In *nativo habendo* esplees alledged, and yet the count for the villein only *de feodo et jure.* 39. H. 6. 32.—Where a reversion depends on an estate for years, there pleading either seisin in demesne as of fee, or seisin as of fee, will be good; but if the reversion be on an estate of freehold, only seisin in demesne can be pleaded. Plowd. 191. a. See accord. Dy. 101. in Culpepper's case. It is said, that a reversion or remainder belonging to the king's tenant in capite formerly intituled the king to wardship, though the statute 17. E. 2. de prerogativa regis cap. 1. speaks of lands of which the tenant dies seised in *dominico suo ut de feodo.* Stanf. Prærog. 8. a. Plowd. 11. See further as to pleading seisin in demesne ante 17. a. n. 3. Standf. Prærog. 8. a. 14. a. Doctrin. Plac. 287. & Com. Dig. Pleader. C. 35.—(5) But note, that this diversity doth not hold in the case of a rectory; for in Holland's case, 40. Co. 75. the pleading was *ad medietatem rectorie*, whereas it should have been *ad rectoriam medietatis*, and yet it was taken by the court to be the same in effect.

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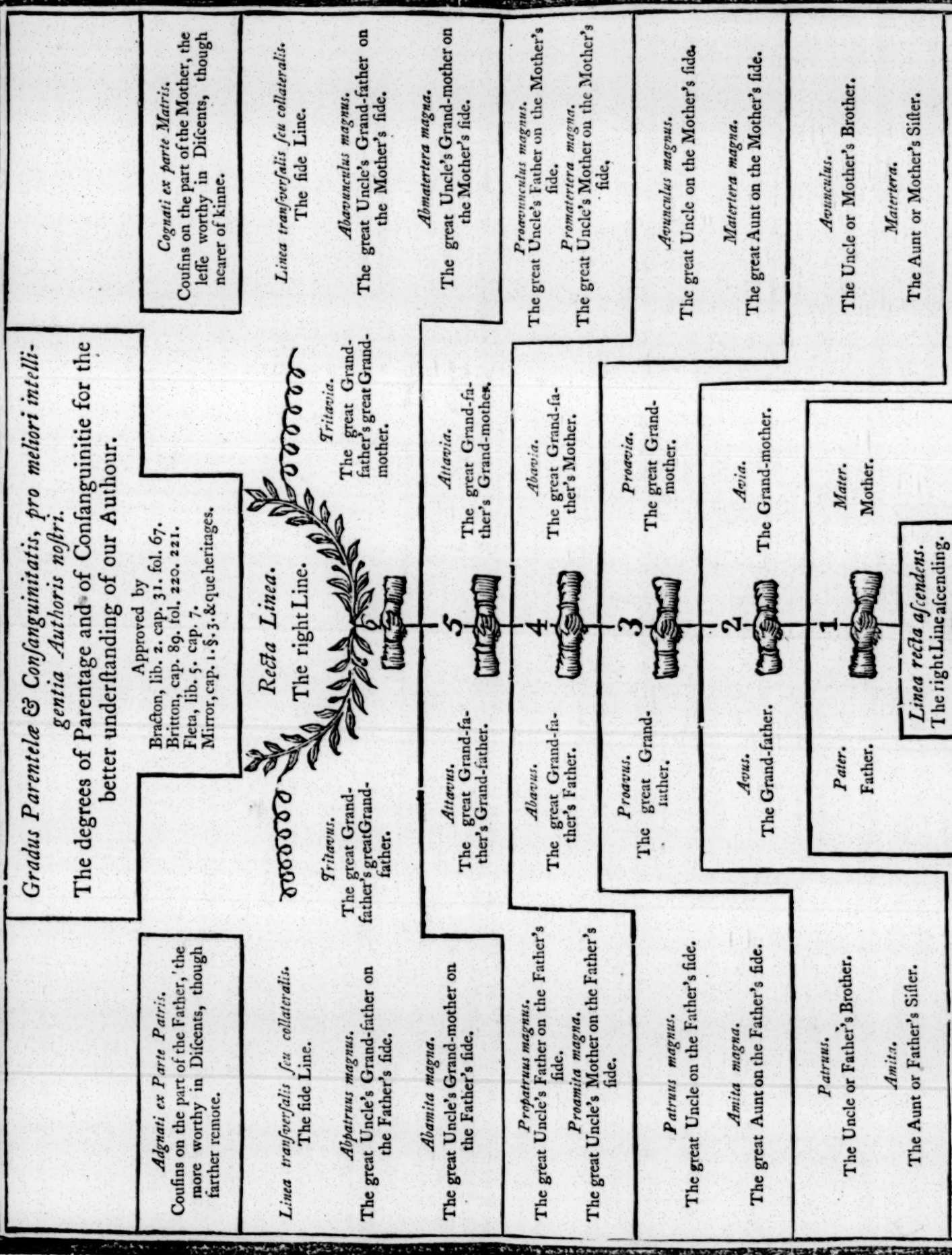
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*Cognati quasi fratres
nati ex parte matris.*

*Avunculus, quasi
frater minor.*

*Materna quasi
frater altera.*

*Abnatus quasi a
fratre cognatus.*

*Avus ab Avia quia
patre antiquior.*

*Patruus quasi loco
patris.*

*Amita quasi a me
tertia.*

*Amita quasi a me
tertia.*
*Frater quasi frater
alter.*
*Soror quasi soror
etiam diversa.*
*Semi germani
fratres quasi ex
eodem patre & se-
cundum matris ibi
nati.*
Filius.
Filia.
*utroque; quidam;
i. ab amore
parentum.*

Amita.
The Aunt or Father's Sister.
Patrunculus à Patruo.
Sonnees or Daughters, Cou-
sin Germans on the Fa-
ther's side.
Amitini ab Amita.
Sonnees or Daughters, Cou-
sin Germans on the Fa-
ther's side.

*Linea transversalis,
seu collateralis.*
The side Line.

Propo-
Linea recta
The right
Line

Linea recta ascendens.
The right Line ascending.

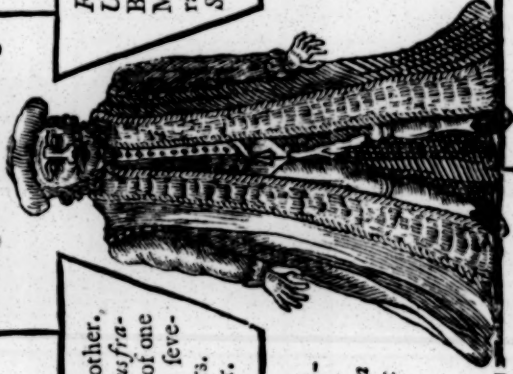
*Frater, a Brother,
Uterinus Frater,*
Brother of one
Mother and feve-
rall Fathers.
Soror, Sister.

*Linea transversalis,
seu collateralis.*
The side Line.

Avunculini ab Avunculo.
Sonnees or Daughters, Cou-
sin Germans on the Mo-
ther's side.
Materterini à matertera.
Sonnees or Daughters, Cou-
sin Germans on the Mo-
ther's side.

Matertera.
The Aunt or Mother's Sister.

*Matertera quasi
ex eodem utero
fratres ex sepe a-
libus patribus.*



Filius.
Sonne.

Filia.
Daughter.

Nepos linealis.
The lineall Nephew.

Nephis linealis.
The lineall Niece.

Eorum. Of
these. *Nepos*
collat. The
collateral Ne-
phew. *Nephis*
collat. The
collateral
Niece.

Pronepos linealis.
The lineall Nephew's or Niece's
Son.

Pronephis linealis.
The lineall Nephew's or Niece's
Daughter.

Abnepos linealis.
The grand Sonne of the lineall Nephew
or Niece.

Abnephis linealis.
The grand Daughter of the lineall Ne-
phew or Niece.

Eorundem.
Of these.
Pronepos collat.
The collateral
Nephew's Son
Pronephis collat.
The collateral
Nephew's
Daughter.
*Et sic in
infinitum.*

Trinepos linealis.
The great grand Sonne of the lineall Nephew
or Niece. *Et sic in infinitum.*

Trinephis linealis.
The great grand Daughter of the lineall Nephew
or Niece. *Et sic in infinitum.*

Place this next before Folio 18. b.

part as well of the church as of the towne allotted to the one, and the other part thereof to the other; and in that case each patron if he be disturbed shall have a *quare impedit, quod permittat ipsum presentare idoneam personam ad medietatem ecclesie* (1).

But if there be two coparceners, and they do agree to present by turne, each of them in truth hath but a moiety of the church, but for that there is but one incumbent, if either of them be disturbed, the shall have a *quare impedit, &c. presentare idoneam personam ad ecclesiam*; for that there is but one church and one incumbent, and so of the like (2). But in [7] the said case of two coparceners one of them shall have a writ of right of writ of advowson *de medietate advocacionis*; for in truth she hath but a right to a moiety; but in the other case, where there be two patrons and two incumbents in one church, each of them shall have a writ of right of advowson *de advocacione medietatis*.

And as there may (as hath beene said) be two severall parsons in one church, so there may be two that may make but one parson in a church. [1] Britton saith, *si quis ex glise soit done a divers persons per un sole avowe, nul ne se pura pleadre per assise de juris utrum ne nul estre implede sans lautre, &c.* And therewith agreeth Fleta. [u] *Item licet aliqua ecclesia divisa fuerit inter duos, si bene sua habeant communia si se separata, dum tamen unicum habeant advocatum nullus eorum sine alio agere poterit vel implacitari.* And Fitzh. saith, that two prebendaries may be one parson of a church, who shall joyne in a *juris utrum*, so as one rectory may be annexed to two severall prebends, and both of them make but one parson. But where one is parson of the one moiety of a church and another of the other moiety, as hath been said, there one of them shall have a *juris utrum* against the other, and in the writ shall name him *persona medietatis ecclesie, &c.* But for avoyding of suspicion of curiositie if we should proceed any further herein, we will attend what Littleton will further teach us.

(10. Co. 135. F. N. B. 33.)

[1] Britton for 235. 31. E. 1. droit 68. 69. F. N. B. 31. b. & 33. a. 5. H. 7. 8. 17. E. 3. 3. 75. 76. 7. E. 3. 327. 8. E. 3. 425. 22. Aff. p. 33. 14. H. 4. 10. 33. E. 3. quar. imp. 196.

[1] Britton fo. 235.

[u] Fleta lib. 5. ca. 19.

F. N. B. 49. o.

F. N. B. 49. p.

Sect. II.

E*T nota, que home ne poit aver plus ample ou plus griender estate denheritance, (3) que fee simple.* **A**ND note that a man cannot have a more large or greater estate of inheritance than fee simple.

THIS doth extend as well to fee simples conditional and qualified, as to fee simples pure and absolute. For our author speaketh here of the amplenesse and greatness of the estate, and not of the perdurableness of the same. And he, that hath a

fee simple conditionall or qualified, hath as ample and great an estate, as he that hath a fee simple absolute, so as the diversity appeareth betweene the quantity and quality of the estate.

From this state in fee simple, estates in taile, and all other particular estates are derived, and therefore worthily our author beginneth his first booke with tenant in fee simple, for *a principalioribus seu dignioribus est inchoandum.*

Ne poit aver plus ample ou griender estate, &c. For this cause two [a] fee simples absolute cannot be of one, and the selfe-same land. If the king make a gift in taile, and the donee is attainted of treason, in this case the king hath not two fee simples in him, *viz.* the ancient reversion in fee, and a fee simple determinable upon the dying without issue of tenant in taile, but both of them are consolidated and conjoined together (4). And so it is, if such a tenant in taile doth convey the land to the king his heires and successors, the king hath but one estate in fee simple united in him, and the king's grant of one estate is good, and so was it adjudged in the court of Common Pleas. And yet in several persons by act in law, a reversion may be in fee simple in one, and a fee simple determinable in another by matter *ex post facto*; as if a gift in taile be made to a villeine, and the lord enter, the lord hath a fee simple qualified, and the donor a reversion in fee (5). But if the lord infee the donor, now both fee simples are united, and he hath but one fee simple in him. But one fee simple cannot depend upon another by the grant of the partie, as if lands be given to A (6), so long as B hath heires of his body the remainder over in fee, the remainder is voyde (7).

[a] Pl. Com. 349. and 248. 19. H. 8. Dier 4. 29. H. 8. Dier. 33. 16. Eliz. Dier 330. 2 Marie Dier 107. Aulten's case. Pa. 38. Eliz. rot. 108. in Quar. Imp. betweene the Queene Pl. and the Bishop of Lincoln, Hussy and others Deff. 15. E. 4. 6. 8.

(Plowd. 559. Dy. 4. & 12. Cro. Jam. 590. Finch. 8vo. ed. 113. 1. Ro. Abr. 827. Dy. 156. b.)

Sect. I 2.

I*TEM purchase est appel la possession des terres ou* **A**LSO purchase is called the possession of lands or tene-

Purchase in Latin is either *acquisitum* of the verbe *acquirere*, for so I find it in the original register 243. *In terris vel tenementis, quæ viri*

(1) Accordingly in Smith's case 10. Co. 135. b. it was agreed, that *quare impedit presentare ad medietatem ecclesie*, shall only be when there are two severall patrons and two severall incumbents of distinct parts of the same church; but in that case the court implied as much, because the count alledged a *seisin de advocacione medietatis*. In Windsor's case Cro. Eliz. 686. where the count was of the *advowson of two parts*, the court held the declaration to be bad; but then it was, because by other parts of the declaration it appeared, that the church was entire, and that there was but one incumbent, and consequently that the plaintiff's title was to *two parts of the advowson*, and not to an *advowson of two parts*.—(2) See further on this subject Doder Advowf. 21. 2. Leon. 36. Dy. 78. b. & 299. W. Jo. 446. & Wils. vol. 2. page 225. & 231.—(3) *On inheritance*, L and M. Roh. P. and Red. (4) See acc. Cro. Eliz. 519. Hob. 323. & W. Jo. 6.—*The king shall be said to be in, in point of reverter, and shall avoid leases by tenant in tail.* Plowd. 552. Tr. 2. Car. Rot. 730. and adjudged H. 3. Car. Hutt. n. and Crook n. 4. Sir Thomas Holt's case. A, tenant for life, remainder to B his son and heir apparent in tail, remainder to A's right heires. A grants rent-charge to C, and his heires, A and B levy fine to the use of A and his heires, A enfeoffs D and dies, having issue B and ruled, that D shall hold charged, for by the fine he has a fee consolidated in him; which quære. For M. 10. Jac. B. R. Bulstr. n. 35. in Errington's case. A and B his wife tenants in tail special, remainder to the right heires of A, have issue a son and a daughter; the son by indenture makes lease for 40 years to commence after the mother's death, the father being dead; the son dies without issue; the daughter levies a fine to I. S. the mother dies; and although this lease is partly derived out of the fee simple, and by the fine I. S. had a consolidated fee, yet, because the daughter was not liable to the lease, consequently the consue shall not be liable to the lease so long as the tail continues. Vid M. 6. Jac. B. R. n. 22. Nedham's case. Tenant in tail, remainder to the king, is attainted of treason. The king shall not be in, in point of remainder, but as long as the tail continues shall be in under tenant in tail, and subject to his charges, and so it differs from Walsingham's case, where the king had the reversion. Parudine's case. Hal. MSS.—See Sir Thomas Holt's case in Hutt. 96. and Cro. Cha. 103. and Errington's case in 2. Bulstr. 42. As to Nedham's case and Parudine's case, I take them to be the same, and the reader will find it reported by the name of Poole and Nedham Yelv. 149.—(5) See Acc. Post. 117. a.—(6) The words *and his heires* seem wanting here.—(7) Acc. 10. Co. 97. b. See an observation on this doctrine by lord ch. justice Vaughan, who seems to question it, Vaugh. 269. 270.

Lib. 1.

Cap. 2.

Of Fee simple.

Sect. 13.

Bracton lib. 2. fol. 65.
[6] Glanvill. lib. 7. cap. 1. Britt.
c. 33. fo. 84. & 121.
(1. Ro. Abr. 827.)

vir et mulieres conjunctim ac-
quisiverunt, &c. Bracton calleth
it *perquisitum*; and by [6] Glan-
vill it is called *quæstus* or *per-*
quisitum.

A purchase is always in-
tended by title, and most pro-
perly by some kinde of con-
veyance either for money or
some other consideration, or
freely of gift; for that is in
law also a purchase (1). But a
descent, because it commeth

tenements que home
ad per son fait, ou per
agreement, a quel
possession il ne avient
per title de discent de
nul de ses ancesfers,
ou de ses cousins
mes per son fait de-
mesne.

ments that a man hath
by his deed or agree-
ment, unto which pos-
session be commeth
not by title of descent
from any of his ances-
tors, or of his cou-
sins but by his owne
deed.

¶1. Com. Wimbisley's case 47.
b. 1. H. 5. cap. 5.

(Cro. Jam. 366. Post. 27. 2. 3.
Inft. 202.)

[c] 9. H. 4. 24.

Mich. 10. Ja. Obiter in Com.
banc. in Pym's case.

[d] B. Catlaneus fol. 13. Conc.
29. 30. E. 3. 2. & 3. 39. E. 3. 6.
9. 10. 1. H. 5. tit. Executors
108. tit. Descent Br. 43. 9. E. 4.
15. Madam Wiche's case.

[e] Vide 28. H. 8. 24.
(12. Co. 104.)

Int. adjudicata coram rege Tr. 41.
E. 3. lib. 2. fo. 104. in Theaur.
Sect. 241. 242. &c.

meerely by act of law, is not said to be a purchase; and accordingly the makers of the act of parliament in 1. H. 5. ca. 5. speaketh of them that have lands or tenements by purchase or descent of inheritance. And so it is of an escheate or the like, because the inheritance is cast upon, or a title vested in the lord by act in law, and not by his own deed or agreement, as our author here saith (2). Like law of the state of tenant by the courtesie, tenant in dower or the like. But such as attaine to lands by meere injury and wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more then robbery, burglarie, py-racy or the like can justly be termed purchase (3).

If a nobleman, knight, esquire, &c. be buried in a church, and have his coat armor and pennions with his armes, and such other ensignes of honour as belong to his degree or order, set up in the church, or if a gravestone or tombe be laid or made, &c. for a monument of him, [c] in this case albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heire, and his heires in the honour and memory of whose ancestors they were set up (4). And so it was holden, Mich. 10. Ja. and herewith agreeth the lawes [d] in other coun-tries. Note this kind of inheritance. And some hold that the wife or executors, that first set them up, may have an action in that case against those that deface them in their time (5). And note, that in some places chattels as heir-loomes, (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heire (6), and the heire in that case may have an action for them at the common law, and shall not sue for them in the ecclesiasticall court; but the heire-loome is due by custome and not by the common law (7). And the [e] ancient jewels of the crowne are heire-loomes, and shall descend to the next successor, and are not devisable by testament. An heire-loome is called *principalium* or *hereditarium*.

Consuetudo hundredi de Stretford in Com' Oxon' est, quod hæredes tenentorum infra hundredum prædictum existentium post mortem antecessorum suorum habebunt, &c. principalium, Anglice an heire-loome, viz. De quodam genere catallorum, utensilium, &c. optimum plaustrum, optimam carucam, op-timum ciphum, &c.

Our author hath not spoken of parceners in this chapter, for that he hath particular chap-ters of the same.

Gradus Parentela, &c.

CHAP. 2. Sect. 13.

TENANT *en fee*
taile. Tallium, or feo-
dum talliatum, is derived of
the French word tailler scin-
dere; for so Littleton him-
selfe in this chapter, sect. 18.
saith.

Le Statute de W. 2.

This statute was made in
13. E. 1. and is called West. 2.
because the parliament was
holden at Westminster, and

TENANT *in*
fee taile est per
force de le statute of the
de West. 2. cap. 1. 2. cap. 1.
car devant le dit the said statute, all
statute, tous en- inheritances were fee
heritances fuerent simple; for all the
fee simple; car gifts which be spe-
tous les dones que cified in that sta-
sont specifiques deins tute were fee simple
mesme

TENANT *in fee*
taile is by force
of the statute of W.
de West. 2. cap. 1. 2. cap. 1.
car devant le dit the said statute, all
statute, tous en- inheritances were fee
heritances fuerent simple; for all the
fee simple; car gifts which be spe-
tous les dones que cified in that sta-
sont specifiques deins tute were fee simple
mesme

(2. Inft. 331.)
Mirror cap. 2. sect. 15. & cap.
1. sect. 5.
(Post. 22. a.)

(1) In Plowd. 11. Saunders *arguendo* says, that one may have land by purchase three ways, by bargain or gift for money, by gift without any recompense, and by way of remainder.—(2) The abbot of Fountains of the order of Cistercians before the council of Lateran makes a feoffment, and the land escheats to him after the council of Lateran. It seems, that he shall not be charged with tithes, because it is not a purchase. Quare. M. 7. Jac. B. R. Dickson and Waller Hal. MSS. It was decreed by the general council of Lateran in 1215, that the privilege of exemption from tithes, enjoyed by the Cistercians and other religious orders, should not extend to lands purchased after that council. *Ne occasione privilegiorum suorum ecclesia ulterius prægraventur, decernimus, ut de ali-enis terris et a modo acquirendis, &c. decimas persolvant, &c.* Gibl. Cod. 1st ed. v. 2. p. 700. 701. This explains the case cited by Lord Hale.—An escheat in appearance participates of the nature both of a purchase and a descent; of the former, because some act by the lord is requisite to perfect his title, and the actual possession of the land cannot be gained till he enters or brings his writ of escheat; of the latter, because it follows the nature of the feignory, and is inheritable by the same persons; but strictly speaking an escheat is a title neither by purchase nor descent. It should be considered, that though the lord must do some act to put himself into the actual possession; yet his title to take possession commences immediately on the want of a tenant, and this title is vested in him without waiting for his own deed or agreement, and as much by mere act of law as the title of an heir is in the case of a descent; and therefore both titles are equally excluded from being purchases. On the other hand, escheat is not a title by descent; for the lord takes in his capacity of lord of the feignory of which the land escheated was holden, and not as heir or by right of blood. Nor is it any objection to this way of considering the title by escheat, that the land escheated will be inheritable in the lord as land by purchase, where he has the feignory by purchase, and as land by descent where he has the feignory by descent; for the reason of this is, not that the escheat is either a purchase or descent, but because the escheat follows the feignory, from which the right to it is derived, as an accessory to its principal. According to this view of the subject, instead of distributing all the several titles to land under purchase and descent, it would be more accurate to say, that the title to land is either by purchase, to which the act or agreement of the party is essential, or by mere act of law, and under the latter to consider first descent, and then escheat, and such other titles not being by descent, as yet like them accrue by mere act of law. See on this subject Blackst. Comment. ed. 5. v. 2. p. 241. and 201.—(3) See Acc. ante 3 b.—(4) See Cro. Jam. 367. 2. Bulstr. 151. See too the several books cited in Vin. Abr. Descent E.—(5) See Acc. 12. Co. 104. where it is said, that afterwards the heir of the person, in honour of whom the tomb is erected, shall have the action.—(6) Heir-looms by custom cannot be alienated by devise. See Post 185. b. and 1. Vern. 273.—(7) However, personal property may be devised or limited in strict settlement to one for life, with remainder to sons and

*mesme le statute fuer-
ont fee simple condition-
al al common ley, come
appiert per le reherfal
de mesme le statute. Et
ore per cel statute te-
nant en le taile est en
deux maners, cest asca-
voir, tenant en taile
generall, et tenant en
taile special.*

conditional at the com-
mon law, as appear-
eth by the rehearfall
of the same statute.
And now by this sta-
tute, tenant in taile
is in two manners,
that is to say, te-
nant in taile generall,
and tenant in taile spe-
ciall.

hath the name of the second,
because another parliament
was formerly holden at
Westminster in the third year
of the same king's raigne,
which was called Westmin-
ster the first. And albeit ma-
nie parliaments were after
holden at Westminster be-
sides these, yet were they two
onely, *propter excellentiam*,
called the statutes of West-
minster. And the act intend-
ed by Littleton is W. 2. ca. 1.
upon which statute our au-
thor in the Inner Temple did

(2. Inst. 337.)

learnedly read, whose reading I have. Of king Ed. 1. and of this statute, Sir William Herle, chiefe justice of the court of Common Pleas, in 5. E. 3. 14. saith, that king E. 1. was the wisest king that ever was: and the cause of the making of this statute was to pre-
serve the inheritance in the blood of them to whom the gift was made. And in 9. E. 3. 22. he saith, that they were sage men that made this statute (1). See more of this in the chapter of Warranties, sect. 746.

5. E. 3. 14.

Of this estate taile it is said, [a] *Modus legem dat donationi, et tenenda est etiam conventio, quia modus et conventio vincunt legem: ut si alicui cum uxore fiat donatio, habendum et tenendum sibi et heredibus quos inter eos legitime procreabunt, ecce quod donator vult tales heredes in hereditate paterna et materna succedant, aliis heredibus eorum remotioribus penitus exclusis: et quod voluntas donatoris observari debet, manifeste apparet per hanc statuta. Quia autem dudum regi durum videbatur, &c.*

9. E. 3. 22.

[a] Fleta lib. 3. cap. 9. Bract. lib. 2. cap. 5. &c. Brit. ca. 24. & 36.

Devant le dit statute [b] tous inheritances fueront fee simple. Here fee simple is taken in his large sense, including as well conditionall or qualified, as absolute, to distinguish them from estates in taile since the said statute. Before which statute of *donis conditionalibus*, if land had beene given to a man, and to the heires males of his body, the having of an issue female had beene no performance of the condition; but if he had issue male, and dyed, and the issue male had inherited, yet he had not had a fee simple absolute, [c] for if he had died without issue male, the donor should have entred as in his reverter. By having of issue, the condition was performed for three purposes; First, to alien: Secondly, to forfeit: Thirdly, to charge with rent, common, or the like. But the course of descent was not altered by having issue (2): for if the donee had issue and died, and the land had descended to his issue [d] yet if that issue had dyed (without any alienation made) without issue, his collateral heire should not have inherited, because he was not within the forme of the gift, *viz.* heire of the body of the donee. [f] Lands were given before the statute in frank-marriage, and the donees had issue and died, and after the issue died without issue; it was adjudged, that his collateral issue shall not inherit, but the donor shall re-enter. So note, that the heire in taile had no fee simple absolute at the common law, though there were divers descents (3).

[b] Vid. sect. 18. Brit. ca. 36. fol. 93. Pl. Com. 235. 562. Shelley's case, 1. Co. 103. (2. Inst. 333. 7. Co. 38.)

[c] 44. E. 3. 3. 30. E. 1. Formdon 66. 7. E. 3. 6. 7. 7. H. 4. 31. 12. H. 4. 2.

[d] 18. E. 3. 46. 18. Aff. p. 5. 12. E. 4. 3.

[f] 4. H. 3. Formdon 34. 18. Aff. 5. 12. E. 4. 3. Pl. Com. 247. b. 18. E. 2. tit. Formdon 58. 59.

If lands had beene given to a man and to his heires males of his bodie, and he had issue two sonnes, and the eldest had issue a daughter, the daughter was not inheritable to the fee simple, but the younger sonne *per formam Doni*. And so if land had beene given at the common law to a man and the heires females of his body, and he had issue a sonne and a daughter, and died, the daughter should have inherited this fee simple at the common law (4); for the statute of *donis conditionalibus* createth no estate taile, but of such an estate as was fee simple at the common law and is descendable in such forme as it was at the common law. If the donee in taile had issue before the statute, and the issue had died without issue, the alienation of the donee at the common law, having no issue at that time, had not barred the donor.

[g] If donee in taile at the common law had aliened before any issue had, and after had issue, this alienation had barred the issue, because he claimed a fee simple; yet if that issue had died without issue, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien to barre the possibilitie of the donor. [h] But if some tenant in taile had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute, yet the issue might have had a *formdon in descender* (5); for the alienation was not lawful: but otherwise it is, if it had beene by fine. And these things, though they seem ancient, are necessarie notwithstanding to be knowne, as well for the knowledge of the common law, as for annuities and such like inheritances, as cannot be intailed within the said statute, and therefore remaine at the common law. [i] If the king before the statute of *Donis*

(1. Ro. Abr. 840.)

[g] 30. E. 1. Formdon 5. Temps E. 1. ibidem 62. 19. E. 2. Formdon 61. Pl. Com. 246.

[h] 4. E. 2. Formdon 50.

(1. Ro. Abr. 837.)

[i] 6. E. 3. 56. Jo. of Eltham's case.

con-

daughters in tail, so as to be transmissible like heir-looms; but the goods will be the absolute property of the first tenant in tail, and be conformable to all the other rules concerning executory devises, and cannot render the property unalienable longer than lives in being, and 21 years after. For cases of heir-looms by devise and settlement, see Gower and Grosvenor, Barnad. Ch. Rep. 54. Wyth and Blackman, 1. Vef. 196. Duke of Bridgewater and Egerton, 2. Vef. 121. Boon and Cornforth, 2. Vef. 277. and Trafford, 3. Atk. 347.—See further on the subject of heir-looms, Blackst. Com. 5th ed. v. 2. p. 427. and Vin. Abr. Heir-loom.—(1) However Lord Coke in other places finds great fault with the statute *de donis*. See Post. 19. b.—(2) Where the gift was special to one of the heirs of his or her body by a particular person, the course of descent was in some degree changed by the having issue; for after issue had, by construction of law the land became descendible to all the heirs of the donee's body, whether they were the donee's issue by the person named in the gift or by any other person, and also liable to the curtesy or dower of a second husband or wife. See Acc. Pain's case, 8. Co. 35. b. and Berkley's case, Plowd. 247. and the next note. Lord Coke infers, that this was the common law from that part of the statute *de donis*, or of Westminster the second, which enacts, that *from thenceforth neither the second husband nor the issue of a second marriage shall have any thing in the case of such a conditional gift. Nec habeat de cetero secundus vir huiusmodi mulieris aliquid in tenemento sic dato per conditionem post mortem uxoris sue per legem Angliae, nec exitus de secundo viro et muliere successionem hereditariam*. That at common law the having of issue thus enlarged the course of descent, where the gift was of an *express* conditional fee to a man and woman and the heirs of their two bodies, all the authorities agree; but it is said, that the issue of a second marriage could not inherit where the gift was in *frank-marriage*, which was an *implied* conditional fee to the donees and the issue between them, and yet at the same time we are told, that in this latter case the second husband might have curtesy. See 2. Inst. 336. It will be difficult to give a reason why a gift to husband and wife and the issue between them should be so distinguished from a gift in *frank-marriage*, or why the husband should have curtesy, where the issue by him could not inherit. See the next note, where Lord Hale seems to doubt this doctrine.—(3) If gift be to husband and wife and the heirs of their bodies, the issue by the second marriage inherits. 8. Rep. Paine's case. It seems, that a gift in *frank marriage* goes to the heirs between the donees only; but a gift to husband and wife, and to the heirs of their bodies, goes to the heir of the body of the survivor for want of issue between them. Vid. tamen. Plowd. Comment. 251.—Hal. MSS.—Lord Hale must be here understood to speak of gifts at common law.—See the preceding note.—(4) In 1. Ro. Abr. 841. it is said, that if land had been given to one and his heirs males of his body, and afterwards he had issue a male and a female, and afterwards the male died, the female should have inherited the land. 18. E. 3. 46. 18. Aff. 58. are cited as authorities to prove this to have been the common law in respect to fees conditional; but Lord Coke's doctrine here is *contra*, and serjeant Rolle refers to it as being so; and in respect to estates in tail male it has been long settled, that a female cannot inherit by conveying her descent through a male. See Post. 25. a. and b.—(5) In another book Lord Coke says, that

[4] 45. Aff. p. 6.

[7] Pl. Com. 246. b.
(Post. 392. 370. b.)

10. Co. 38. in Post. case.

Doct. and Stud. lib. 2. ca. 55.

(Plowd. 555. 2. Ro. Abr. 780.)
[r] 24. H. 8. tit. feoffments al
uses 4. 27. H. 8. fo.[f] Pach. 14. Jac. in the King's
bench.

Vid. sect. 1.

(Ante 6. a.)

conditionalibus had made a gift to a man, and to the heires of his bodie begotten, the donee *post prolem suscitatum* might have aliened as well as in the case of a common person. [4] But if the donee had no issue, and before the statute had aliened with warrantie, and died, and the warrantie had descended upon the king, this should not have bound the king of his reversion without assents: but otherwise it was in the case of a common person (1) [7] Of the other side, if lands had beene given to the king and to the heires of his bodie, he could not before issue have aliened in fee, but onely to have barred his issue as a common person might have done, but not to have barred the reversion, for that should have beene a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater, than the donor gave unto him, and it is a maxime in law, that the king can do no wrong. When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats forfeitures wardships and other profits of their seignories: and for these and other like cases, by the wisdom of the common law all estates of inheritance were fee simple, and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daillie experience teacheth us (2). But fee more of this matter in the aforesaid chapter of warrantie, sect. 746.

Common ley. See for explication hereof, sect. 170.

Come appeirt per le rehersall de mesme le statute. Here, by the authoritie of our author, the rehearsall or preamble of a statute is to be taken for truth; for it cannot be thought, that a statute that is made by authoritie of the whole realme, as well of the king, as of the lords spirituall and temporall, and of all the commons, will recite a thing against the truth.

Et ore per cel statute tenant en taile est en 2. manners, s. tenant en tayle generall, et tenant en tayle especiall.

This division of an estate taile is perfect and sound, for the *membra dividenda*, viz. generall and speciall are converted properly with the thing defined, and they are proved by many authorities of law, and approved of all learned men, and so are all the divisions through all his three bookes, which the studious and diligent reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

By this statute the land is as it were appropriated to the tenant in taile, and to the heires of his body; and therefore [r] if an estate be made, either before or since the statute of 27. H. 8. cap. 10. to a man and the heires of his bodie, either to the use of another and his heires, or to the use of himselfe and his heires, this limitation of use is utterly voyde. For before the said statute of 27. H. 8. he could not have executed the estate to the use, and so was it adjudged [f] in an *electione firmæ* between John Cowper plaintife, and Thomas Franklin, &c. defendant (3).

Sect. 14, 15.

TERRES, *Terra*, in his generall and legall signification, (as hath been said before) includeth not onely all kinde of grounds, as meadow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground.

Tenements, *tenementa*. This is the only word which the said statute of W. 2. that created estates taile, useth; and it includeth, not only all corporate inheritances, which are or may be holden, but also all inheritances issuing out of any of

*T*enant en taile generall est, *lou terres ou tenements sont dones a un home et a ses heires de son corps engendres. En ceo case est dit generall taile, pur ceoque quelcunque feme, que tiel tenant espousa, (sil avoit plusors femes, et per chescune de eux il ad issue) uncore chescun de les issues*

*T*enant in taile, generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife, (if he hath many wives; and by every of them hath issue) yet everie one of these issues by

that a *formedon in descender* lay not at common law. See 2 Inst. 33. But this seeming contradiction may perhaps be reconciled, by observing, that in the latter book Lord Coke is commenting on that part of the statute *de donis*, which gives a *formedon in descender*, notwithstanding alienation by the donees, where the gift was to husband and wife, and to the issue between them, or in frank marriage. In such a case the alienation by the donees certainly bound the issue at common law, and consequently before the statute they could not have a *formedon in descender*. But in the case here put by Lord Coke the wife only was the donee, and her alienation was merely by deed, which during coverture was insufficient to bind either her or her issue. However, it is proper to mention, that according to some authorities the writ of *mortdancestor* was the proper remedy for the issue at common law, and that the only case, in which the issue could have a *formedon in descender* before the statute, was, where by reason of some special circumstances he could not have an assise of *mortdancestor*. To illustrate this the following case has been given. A man hath issue a son by one wife, she dies, and he marries again, and land is given to him and his second wife and the heires of their bodies, and they have a son, and afterwards they both die, and then a stranger abates. Here it is said, that the son by the second wife could not have *mortdancestor*, because one point of that writ is to enquire who is next heir to the father, and the son by the first wife is the heir to the father; and therefore, that *formedon in descender* lay at common law for this special case, because otherwise the son by the second wife would have been without remedy for the freehold. See Plowd. 239.—(1) But Lord Coke in another book says, that though such alienation bound the issue, yet it did not bar the king's possibility of reverter, as it would that of common persons. See the earl of Cornwall's case cited Post 370. b. and in Holt's case 9. Co. 132. b.—(2) Lord Coke in many other places is very strong in his representation of the inconveniences produced by the statute *de donis*. See Post. 370. b. and Mildmay's case 6. Co. 40. a.—(3) But in Godbolt's report of Franklin and Cooper, it is said to have been resolved, that tenant in tail might stand seized to an use expressed, but that an use could not be averred. Lord Bacon also gives it as his opinion, that an estate tail may be to uses since the statute for executing uses, and controverts the reasons for doubting it before. Bac. Law Tracts, 8vo ed. 347. See a great number of authorities on this subject in Vin. Abr. Uses C.

per possibilitie poit enheriter les tenements per force del done; pur ceo que chescun tiel issue est de sa corps engendre.

possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

EN mesme le maner est, lou terres outenements sont dones a un feme, et a ses heires de sa corps issuant. Coment que el avoit divers barons, uncore l'issue, que el poit aver per chescun baron, poit enheriter come issue en le taile per force de tiel done; et pur ceo tielx dones sont appelles generall tailles.

IN the same manner it is, where lands and tenements are given to a woman, and to the heires of her bodie, albeit that she hath divers husbands, yet the issue, which she may have by every husband may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailles.

those inheritances, or concerning, or annexed to, or exercisable within the same; though they lie not in tenure, therefore all these without question may be intailed. As [1] rents, estovers, commons or other profits whatsoever granted out of land; or uses, offices, dignities which concerne lands or certaine places, may be entailed within the said statute; because all these favour of the realtie. But if the grant be of an inheritance mere personal, or to be exercised about chattels, and is not issuing out of land, nor concerning any land, or some certaine place, such inheritances cannot be intailed, because they favour nothing of the realtie: But examples will illustrate and make this learning cleere.

The writ of assise [u] was *De libero tenemento*, and made his plaint of the office of the fourth part of the serjeant of the common place, and the writ adjudged good, and seeing that a man hath a free-

[1] 7. E. 3. 363. 18. E. 3. 27. 7. H. 6. 8. 32. H. 6. 28. 5. E. 4. 3. 1. H. 7. 28. 4. H. 7. 9. 1. H. 5. 1. H. 8. fol. 3. Nevil's case 7. Co. 33. 34. Pl. Com. in Manxell's case fol. 2. & 3. (7. Co. 33. 11. Co. 1. 1. Ro. Abr. 837-8. 10. Co. 87.)

[u] 7. Aff. p. 12. 7. E. 6. 1. (Fitzh. N. B. 178. f.)

hold, *liberum tenementum* in it, by consequent it may be intailed.

The office of the keeping of the church of our lady of Lincolne was intailed, and a form-don there brought upon that gift of the office by the issue in taile. The [x] office of the marshall of England intailed (1). The [y] office of one of the chamberlains of the exchequer intailed. 1. H. 7. 28. The office of a forresterishp intailed. 4. H. 7. 10. 9. E. 4. 56. b. Charters intailed (2). 19. H. 8. 3. Use intailed. Nomination to a benefice intailed.

18 E. 3. 27. [x] 5. E. 4. 3. 10. E. 4. 14. [y] 11. E. 4. 1. 1. H. 7. 28. 4. H. 7. 10. 9. E. 4. 526. 19. H. 8. 3. 1. H. 5. 1.

Also a name of dignitie may be intailed within the statute, [a] as dukes, marquesses, earles, viscounts, barons; because they be named of some countie, mannor, towne, or place (3). If the issue in taile [b] in a *form-don* in the *descender* be barred by a false verdict, his release is no barre to his issue, albeit the action is at the common law.

[a] 7. Co. 33. 34. Nevil's case. 28. H. 6. Lord Veieye's case. (6. Co. 7. b. Post 392. b. 1. Sid. 261.)

The like law is of a writ of error, 3. Eliz. Dyer 188. If a gift in taile be made with warrantie, the donee releases the warrantie, this shall not bind the issue in taile; for to all these cases and the like the said statute doth extend.

[b] 14. Aff. 2. 3. Eliz. Dyer 188.

But if I grant to a man, and to the heires of his body, to be keeper of my hounds, or master of my horse, or to be my falconer, or such like with a fee therefore, yet these cannot be intailed within the said statute, for that they be not issuing out of tenements, nor annexed to, or exercisable within, or concerning lands or tenements of freehold or inheritance, but concerning chattels, and favour nothing of the realtie. And so it is, if I by my deed for me and my heires grant an annuities to a man, and the heires of his body; for that this only chargeth my person, and concerneth no land, nor savoureth of the realtie (4). In all these cases he hath a fee conditionall, as they were before the statute, and the grantee by his grant or release may barre his heire, as he might have done at the common law, for that in these cases he is not restrained by the said statute (5).

Pl. Com. in Manxell's case. (10. Co. 58. 1. Ro. Abr. 837.)

Et a ses heires de son corps engendres. In gifts in taile these words (*heires*) are as necessary, as in feoffments and grants; for seeing every estate taile was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without these words (*heires*), and that an estate in fee taile is but a cut or restrained fee, it followeth, that in gifts in a man's life time no estate can be created without these words (*heires*), unlesse it be in case of frankmarriage, as hereafter shall be shewed. And where Littleton saith (*heires*) yet (*heire*) in the singular number in a speciall case

(1) See in W. Jo. 96 and Collins's Claims of Bar. 183. an account of the original grant and intail of the office of *earl marshal*, by Crew chief justice in his argument of the case about the office of *great chamberlain* of England. In this last case the right, to the great chamberlain's office was contested between an *heir male* claiming under an intail 9. Eliz. by one of the *Vere* family, who was then seized of the office in fee, and the *heir general* claiming under the limitations of the original grant from the crown. Crew chief justice spoke in the house of lords for the *heir male*; but a majority of the other judges, amongst whom was Doderidge, gave their opinion for the *heir general*, upon the principle, that this high office, like a title of honour, was inherent in the blood of the first grantee, and incapable of alienation.—(2) *But if the tail be barred by collateral warrantie, detinue will lie for the charters.* Hal. MSS.—See 9. E. 4. 52. b.—(3) *There are many titles of dignity without any place.* Hal. MSS.—In the King and Knollys 1. L. Raym. 13. lord chief justice Holt says, that naming a place is not essential to the creation of a dignity, and mentions the earldom of *Rivers* as an instance. But it has been held, that if the king grants a dignity to one and the heirs male of his body, without naming any place, the grantee shall have a fee conditional, and not an estate tail, as he would have if a place had been mentioned. See 12. Co. 81. where this was adjudged in the case of a baronet. However, though dignities and titles of honour having relation to some place are intailable by the crown as tenements within the statute *de donis*, yet neither the donee nor his issue can bar the intail by fine, recovery, or any other means, as may be done in the case of other intailable things. See Lord Purbeck's case, Show. Parl. Caf. 1. and Collins's Claims of Bar. 293. in which it was adjudged, that the surrender of a dignity to the crown by fine was void.—Note, that in Lord Purbeck's case his counsel distinguished between ancient honours, as being feodary and officary and having relation to a place, from *modern dignities* as being merely titular and personal, notwithstanding the formality of naming a place in the creation; and from thence infer, that the latter are not within the statute *de donis*.—(4) See the case of the earl of Stafford and Buckley, 2. Vef. 170. in which lord chief justice Hardwicke held, that an annuity in fee, granted by the crown out of the 4½ per cent. duties payable for exports and imports at Barbadoes, was merely a personal inheritance, and not intailable within the statute *de donis*. Accordingly to a manuscript note of the same case, lord Hardwicke, in giving his opinion, said, that an annuity out of the revenue of the *post office* or *excise* lavours no more of the realty than money.—(5) Two things seem essential to an intail within the statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie*, nor *terms for years*, are intailable any more than *personal chattels*; because as the latter, not being either interests in things *real* or of *inheritance*, want *both* requisites, so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled, as to answer the purposes of an intail, and be rendered unalienable almost for as long a time, as if they were intailable in the strict sense of the word. Thus estates *pur autre vie* may be devised or limited in strict settlement by way of *remainder* like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue

Lib. I. Cap. 2. Of Fee taile. Sect. 16.

39. Aff. p. 20. 20. H. 6. 35. 5.
H. 4. 7. b. 14. H. 4. 15.
(Post. 385. b. 1. Ro. Abr. 849.
8. Co. 57. 1. Co. 103. b. Ante
9 b.)

(Cro. Eliz. 121. Ow. 64. S. C.
Mo. 103.)
Vid. Shelley's case. 1. Co.

(1. Ro. Abr. 837.)

(7. Co. 41.)
[c] 3. E. 3. tit. Breve. 743. 3. E.
3. tit. Estates.

[d] 12. H. 4. 2.

[e] 37. H. 6. 15.

[f] 5. H. 5. 6. (7. Co. 41.)

[g] 12. H. 4. 2. per Horton.

(Post. 27. a. 26. b. 220. a.)

13. E. 2. tit. Bre. 836.

24. E. 3. 28.

(7. Co. 41. Ow. 153.)

[a] 5. H. 7. 10. 11. E. 3. Form-
don 30. Pl. Com. 35.

[b] 10. Co. 120. Chudley's case.
40. Aff. pl. 15. 34. Aff. Pl. 1.
Fleta lib. 5. c. 34.

(Plowd. 35. Post. 25. b. F. N.
B. 205. b. Post. 204. a. 1. Ro.
Abr. 419.)

case may create an estate taile, as it appeareth by 39. Aff. p. 20. hereafter mentioned (1). And yet if a man give lands to A, *et hæredibus de corpore suo*, the remainder to B, *in forma prædicta*, this is a good estate taile to B, for that *in forma prædicta* do include the other. If a man letteth lands to A for life, the remainder to B in taile, the remainder to C *in forma prædicta*, this remainder is void for the incertantie. But if the remainder had beene, the remainder to C *in eadem forma*, this had beene a good estate taile, for *idem semper proximo antecedenti refertur*. If a man give lands or tenements to a man *et femini suo* or *exilibus vel prolibus de corpore suo*, to a man and to his seed, or to the issues or children of his body, he hath but an estate for life; for albeit that the statute provideth, that *voluntas donatoris secundum formam in charta doni sui manifestè expressam de cætero observetur*, yet that will and intent must agree with the rules of law. And of this opinion was our author himselfe, as it appeared in his learned reading a-forementioned upon this statute, where he holdeth, if a man giveth land to a man *et exilibus de corpore suo legitime procreatis*, or *femini suo*, he hath but an estate for life, for that there want-eth words of inheritance (2).

De son corps. These words are not so strictly required but that they may be expressed by words that amount to as much: for the example that the statute of W. 2. putteth hath not these words (*de corpore*), but these words (*hæredibus*) viz. *Cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsius viro et muliere procreatis*. If lands be given [c] to B, *et hæredibus quos idem B de prima uxore sua legitime procrearet*, this is a good estate in especiall taile (albeit he hath no wife at that time) without these words (*de corpore*). So it is [d] if lands be given to a man, and to his heires which he shall beget of his wife, [e] or to a man *et hæredibus de carne sua*, or to a [f] man *et hæredibus de se*. In all these cases these be good estates in taile, and yet these words *de corpore* are omitted.

It is holden [g] by some opinion, that if there be grandfather father and sonne, and lands are given to the grandfather, and to his heires begotten by the father, the father dyeth, the grandfather dyeth, the sonne is in as heire to the grandfather begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed. But certaine it is, that in some cases one shall have the land *per formam doni* that is not issue of the body of the donee, which see section 30.

Engendres. This word may in many cases be omitted or expressed by the like, and yet the estate in taile is good: as, *hæredibus de carne, hæredibus de se, hæredibus quos sibi contigerit*, &c. as is aforesaid, and where the word of Littleton is, *engendred*, or begotten, *procreatis*, yet if the word be *procreandis* or *quos procreaverit*, the estate in taile is good; and as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before (3).

Sect. 16.

A Un home & sa feme. [a] Then put the case that lands be given to a man and a woman unmarried, and the heires of their two bodies: for the apparent possibilitie to marry, they have an estate taile in them presently. [b] So it is where lands be given to the husband of A, and to the wife of B, and the heires of their bodies, they have presently an estate in taile, in respect of the possibilitie. If a feme sole do encoiffe a married man *causa matrimonii prælocuti*, it is good for the possibilitie. But put the case that the premises and the *habendum* be in other manner than Littleton hath put, and let us see

Tenant en taile specialle est, lout terres ou tenements sont dones a un home et a sa feme, et a les heires de leur deux corps engendres. En tiel case nul poet inheriter per force de ledit done, fors que ceux que sont engendres perenter eux deux. Et est appelle speciall taile, pur ceo que si la feme devy, et il prent auter feme, et ad issue, l'issue del se-

Tenant in taile speciall is, where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendred between them two. And it is called especiall taile, because if the wife die, and he taketh another wife, and have issue, the is-

issue and all remainders over by *alienation* of the estate *pur autre vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*; but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur autre vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different, for in them no remainders can be limited; but they may be intailed by *executory devise* or by deed of *trust*, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and 21 years after, and perhaps in the case of a posthumous child a few months more; a limitation of time, not arbitrarily prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the entail by fine or recovery for a longer space. It is also proper to observe, that in the case of terms of years and personal chattels, the *vesting* of an interest, which in realty would be an estate tail, bars the issue and all the subsequent limitations, as effectually as fine and recovery in the case of estates intailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*; and further, that if the executory limitations of personality are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personality, it is at length settled, that every species of property is in *substance* equally capable of being settled in the way of entail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed almost as nearly within the same limits, as the difference of property will allow. As to the entail of estates *pur autre vie*, see 2. Vern. 184. 225. 3. P. Wms. 262. 1. Atk. 524. 2. Atk. 259. 376. 3. Atk. 464. and 2. Vef. 681. As to the entail of terms for years and personal chattels, see Manning's case, 8. Co. 94. Lampert's case, 10. Co. 46. b. Child and Bailey, W. Jo. 15. Duke of Norfolk's case, 3. Cha. Caf. 1. a case in Carth. 267. and one in 1. P. Wms. 1. See also Fearn's Essay on Conting. Rem. and Exec. Dev. 2d ed. p. 122. to the end. Mr. Fearn's work is so very instructive on the dry and obscure subject of remainders and executory devises, that it cannot be too much recommended to the attention of the diligent student.—Note, it was resolved in the 40. Eliz. that the statute *de donis* doth not extend to the Isle of Man, because the statute is *general*, and the Isle of Man is not *specially* named. See 4. Inst. 284. 2. And. 215. and 2. Vef. 350. See also ante 9. a. where the following note by lord Hale in respect to the case of the Isle of Man, there mentioned by lord Coke to have been adjudged in 40. Eliz. should have been introduced; though as it partly relates to the statute *de donis*, it may come in here without any impropriety. Nota, William earl of Salisbury got Man from the Scots, and granted it to William Scroop. Hen. 4. claiming it by conquest from him, granted it comiti Northumbrie, and on his attainder granted it to Sir John Stanley and his heirs; and in this case ruled, 1. That Man is not parcel of England. 2. That it is bound by statutes of England where specially named, otherwise not. Therefore the statutes *de donis*, of uses, of wills, not in force there; and it descends to the coheirs of Ferdinando, and not to his brother William earl of Derby. Hal. MSS.—As to the entail of copyholds, see Post 60. a.—(1) See this case Post. 22. a.—(2) But devise to one *et hæredibus legitime procreatis* is tail. H. 43. El. C. B. rot. 1408. Moor case 711. but contra by act executed 7. Rep. 41. b.—Dormer's case. If lands be limited by deed to the use of I. S. and *hæredum masculorum suorum legitime procreatorum*, remainder over, it is a fee simple; but if it be *hæredum masculorum de se*, or in English, the heirs of him lawfully begotten, especially where there is a remainder over, it is tail, 7. Rep. 41. Bedeli's case. Dormer's case H. 38. Eliz. B. R. rot 739 Hal. MSS.—(3) 10. E. 3. 19. Adjudged accordingly. Hal. MSS. But it is held, that, where the words were in *posterum procreandis*, sons born before

cond feme ne ferra jammes inheritable per force de tiel done, ne auxy liffue del second baron, si le prime baron devie.

due of the second wife shall not inherit by force of this gift, nor also the issue of the second husband, if the first husband die.

said) *via versa*, if lands be given to a man and to his heires in the premises, *habendum* to him and to the heires of his bodie, that he hath an estate taile, and a fee simple expectant. But vid. lib. 8. fo. 154. b. otherwise resolved, *ut patet ibi* (2). [d] If lands be given to B and his heires, to have and to hold to B and his heires, if B have heires of his bodie, and if he die without heires of his bodie that it shall revert to the donor, this is adjudged an estate taile, and the reversion in the donor. [e] For *voluntas donatoris in charta donisui manifeste expressa observetur*; and therefore in the case next precedent, if these or the like words be added (and if he die without heires of his bodie, that the lands shall revert to the donor) that then the *habendum* shall by authoritie of divers bookes be construed upon the whole deed, to be a limitation or a declaration, what heires are meant in the premises, to inherit, and in that case the reversion is in the donor (3).

[f] If a man make a charter of feoffment of an acre of land to A and his heires, and another deed of the same acre to A and the heires of his bodie, and deliver seisin according to the forme and effect of both deeds, in this case he cannot take a fee simple onely, as some hold, for that liverie was made according to the deed in taile, as well as to the charter in fee, neither can the livery enure onely to the deed of estate taile with a fee simple expectant, for that liverie was made as well upon the deed in fee simple, as the deed in taile. Therefore others hold, that in that case it shall enure by moities, that is, to have an estate taile in the one moitie, with the fee simple expectant, and a fee simple in the other moitie: and so the liverie shall worke immediately upon both deeds (4).

what the law is in these cases. [c] (1) As if a man in the premises give lands to another and the heires of his bodie, *habendum* to him and his heires for ever; it hath beene holden that in this case he hath an estate taile, and a fee simple expectant. And so (it is

[c] 21. H. 6. 7. (Perk. Sect. 18. 170. 2. Sid. 78. 8. Co. 56. b. 8. Co. 154. Plowd. 147. 2. Ro. Abr. 680.)

[d] 30. Aff. p. 47. 35. Aff. p. 14. 37. Aff. 15. 5. H. 5. 6. (2. Ro. Abr. 68. Cro. Jam. 595. 290. 427. 448.)

[e] W. 2. ca. 22.

[f] 2. H. 6. 25. 45. E. 3. 20. (Vid. 5. Co. 25. where two fines are levied.)

Sect. 17.

EN mesme le maner est, lou tenements sont dones per un home a un autre ove un feme, que est la file ou cousin al donour en frankmariage, le quel done, ad un enheritance per ceux parolx (frankmariage) a ceo annexe, coment que ne soit expressement dit, ou reherce en le done, cestasavoir, que les donees averont les tenements a eux et a leur heires perenter eux deux engendres. Et ceo est dit especial taile; pur ceo que l'issue del se-

IN the same manner it is, where tenements are given by one man to another, with a wife (which is the daughter or cousin to the giver) in frankmariage (5), the which gift hath an enheritance by these words (frankmariage) annexed unto it, although it be not expressly said or rehearsed in the gift (that is to say) that the donees shall have the tenements to them and to their heires betweene them two begotten. And this is called especial taile, because

A Un home ove un feme. Albeit the gift is made of the land to the man with his daughter, &c. yet is the gift good to them both in speciall taile, and therefore that of Stephen de la More in [g] 5. E. 3. is very remarkable, where the case was, that Robert gave the reversion of lands which Agnes his wife did hold for her life to Stephen de la More, *habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*, and it is adjudged that it is a good estate taile. Wherein three things are to be observed, first that Joane the daughter took with her husband an estate in especiall taile, albeit the were named but under a *cum*, viz. *cum Johanna*, &c. (7). 2. That *cum* doth come after the *habendum*, for that it is but all one sentence. 3. That these words, *in liberum maritagium*, doe create an estate of inheritance in especiall taile as Littleton

Vid. Sect. 19. 20. (2. Ro. Abr. 67.)

5. E. 3. 17. [g] This case is vouched in Pl. Com. 158. to be in 4. E. 3. which being not found (6) in that year it is there so left without any further reference, but you shall find it as above said in 5. E. 3. 17.

before shall be excluded on account of the peculiar force of in *posterum*. Adj. M. 26. Eliz. B. R. 3. Leon. 87.—(1) Where the estate in the premises shall be corrected by the *habendum*, if there happen to be a clause of warranty, 2. E. 2. Feoffments 94. Dedi Adamæ de B unam carucat. cum C filia mea in liberum maritagium, habendum Adamæ et hæredibus suis faciendi. forinsecum servitium; and warranty to Adam et hæredibus suis in perpetuum. After the death of Adam and his wife, their issue bring mortdancelor; and ruled, that it doth not lie, but formedon, because tail, 10. E. 3. 25. Sciatis me dedisse Edmundo et Aliciæ filiarum mearum et hæredibus suis in liberum maritagium, habendum et tenendum dictis E et A et hæredibus suis in liberum maritagium. If the gift be before the statute de donis, it is only frankmariage; if after the statute, it is tail with fee expectant. Vid. 10. H. 6. 16.—19. H. 6. 74. Gift to A, and if he dies without heir of his body reverter to the donor, it is not tail; but if it was by devise, it is tail. Hal. MSS.—(2) The resolution in 8. Co. 54. b. is, that here the words *heirs of the body* in the *habendum* qualify the word *heirs* in the premises, and therefore that there shall be an estate tail without any fee expectant. See acc. Mo. 26. In the case in Cro. Jam. 476. and 2. Ro. Rep. 19. 23. such words were held adjudged to pass tail and fee expectant. But the case was attended with circumstances particularly shewing an intention to pass both; for there was a reservation of tenure to the lord paramount, which could not be if only an estate tail passed to the donee and the reversion had remained in the donor, for then the tenure must have been of the donor. Also there was a warranty to the grantee and his heirs. However, the court intimated, that their opinion would have been the same, if these special circumstances had not occurred. See further as to the operation of the *habendum* in explaining and qualifying the premises Post 183. and the note on lord Coke's doctrine against abridging the latter by the former, Post. 199. a. See also Vin. Abr. Grants I. K. L. M. and N.—(3) In a note in 1. P. Wms. 57. lord keeper Wright puts the case of a gift by deed to one and his heirs, and if he die without issue, remainder over, and holds, that the latter words restrain the former, and convert the fee into a tail.—(4) 7. E. 3. 64. Land given to husband and wife, and the heirs of the body of husband, and if the husband and wife die without heirs between them lawfully begotten, remainder over. It is only a tail general in the husband. Dy. 171. Devise to A and the heirs male of his body, and if he die without heirs of his body, remainder over, it is only tail male.—Vid. M. 9. Jac. inter Walslop and Derby. Devise to A in fee, and afterwards by the same will devise of the same land to B in fee, they are joint-tenants. Vid. 13. R. 2. brief 645. Land given to the father and the heirs of his body, remainder to his son in tail. It seems, the son has election to claim by descent or purchase. (It seems the remainder is void, because included in the first estate.) Hal. MSS.—(5) Before or after marriage. Dy. 147. Hal. MSS.—See acc. Post 21. b. and 176. a.—(6) The case is 4. E. 3. 4. Hal. MSS. (7) Dedi et concessi Johanni White in liberum maritagium Johannæ filiarum mearum habendum dicto

tleton faith, le donee ad un cond feme ne poit in- the issue of the second
inheritance per reason de ceux beriter, &c. wife may not inherit.

W. 2. ca. 1. 19. F. 3. tit. Taile. 1.

(1. Ro. Abr. 840.)

[6] 6. E. 3. 33. Fitz. N. B. 172.
7. E. 4. 12. 15. E. 2. Cui in
vita; sect. 24.

[1] 4. E. 3. 31. E. 1. taile. 30.
Bracton. lib. 2. cap. 7.

[k] 22. R. 2. tit. Discent 50.
Fitz. N. B. 212. 9. H. 6. 35. b.
W. 2. ca. 1. acc.

[1] Temps H. 8. Br. frankmar.
11. 13. E. 1. formdon 63. Vid.
32. E. 1. taile. 25. 2. E. 2. Feoff-
ment & faitz 9. 17. E. 3. 5. a.
45. E. 3. 20 (1. Ro. Abr. 840.)
[m] 20. E. 2. aid. 174. 31. E. 3.
Gard. 216.

[n] Bract. lib. 2. cap. 7. 32. E.
1. taile. 31. 13. H. 4. 74. 4. H.
6. 17. 26. Aff. 66. 31. E. 3.
gar. 29.

26. Aff. p. 66. per Wilbye.

[o] Bract. lib. 2. ca. 34. & 39.
& lib. 2. ca. 7. nu. 3. & 4.
Glanvil. lib. 7. ca. 1. & ca. 18.

Fleta lib. 3. ca. 1.

30. E. 1. tit. Formdon. 66. ad-
judg. acc.
(2. Inst. 336.)

31. E. 3. tit. Gard. 116. Mirr.
cap. 2. sect. 15. acc.

9. H. 3. Dower. 202.

annex, coment que ne soit expressement dit, &c. But this had need of some interpretation, for if lands be given by these words (in frankmarriage), according to the rules of law, then do these words create an estate of inheritance in speciall taile: for the consideration of marriage is in that case more favoured in law, than any other consideration. But though the gift be in these words, yet if it be not consonant to the rules of law in other things requisite thereunto, there they create but an estate for life. And therefore to speak once for all, four things be incident to a frankmarriage. First, that it be given for consideration of marriage either to a man with a woman, or, as some have held, to a woman with a man. For in [b] 6. E. 3. 33. in Peirs de Saltmarsh his case, a man gave land to his sonne in frankmarriage, and Fitz. N. B. 172. taketh the law so also, and 7. E. 4. 12. per Moyle against a new opinion in temps H. 8. Br. tit. Frankmarriage the former bookes being not remembered. Secondly, that the woman or man, that is the cause of the gift [i] be of the blood of the donor; but it may be made as well after marriage as before, and it may be made with a widow, &c. Thirdly, if the gift be made of such a thing as lyeth in tenure, that the donees hold of the donor at the time of the estate in frankmarriage made. A rent service [k] may be given in frankmarriage, because it may be holden. And so may a rent charge or rent secke as Fitz N. B. holdeth, and it appeareth in our bookes that a common was granted in frankmarriage. (1) Fourthly, that the donees shall hold freely of the donor till the fourth degree be past. And therefore if land be given to a woman, with a sonne of the donor in frankmarriage, there passeth an inheritance; but if the donee that is the cause of the gift be not of the blood of the donor, then there passeth but an estate for life if livery be made. Also if [l] lands be given to a man with a woman of the blood of the donor in liberum maritagium, the remainder in fee either to a stranger or to the donees, they have no estate taile, because there is no tenure of the donor (2); but if [m] in that case, the remainder had beene limited to another in taile reserving the reversion in fee to the donor, there the said words (in liberum maritagium) create an inheritance, because the donees hold of the donor. And this is the cause that it is holden, that a man cannot devise land in frankmarriage because the donee cannot hold of the donor. And cesty que use before the statute of 27. H. 8. could not have made a gift in frankmarriage because the reversion was in the feoffees. [n] And if the donor doth give lands in liberum maritagium reserving a rent, this reservation shall take no effect till the fourth degree be past, but the frankmarriage is good, for if the reservation should be good, then could not the donees have an estate taile for want of words of the heires of their bodyes. (3).

En Frankmarriage. *Liberum maritagium*, free marriage; *maritagium* is taken for fee taile, and divideth *maritagium* into *liberum et servitio obligatum*: and herewith agreeth Bracton [o] lib. 2. cap. 34. and 39. *Maritagium est aut liberum aut servitio obligatum*, and lib. 2. ca. 7. nu. 3. & 4. *liberum maritagium dicitur, ubi donator vult quod terra sic data quiescit sit et libera ab omni seculari servitio*. And so, before Bracton, said Glanvil. lib. 7. ca. 18. *Maritagium autem aliud nominatur liberum aliud servitio obnoxium; liberum dicitur maritagium, quando aliquis liber homo aliquam partem terræ suæ dat cum aliqua muliere in maritagium, ita quod ab omni servitio terra illa sit quiescit &c.* And after both of them Fleta that followeth them both, lib. 3. cap. 1. faith, *est autem quoddam maritagium liberum ab omni servitio solutum donatori vel ejus hæredi, &c.* Et est similiter *maritagium servitio obligatum et oneratum, &c.* And these words (in *liberum maritagium*) are such words of art, and so necessarily required, as they cannot be expressed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter in *connubio soluto ab omni servitio, &c.* Yet there passeth in this case but an estate for life, for seeing that these words (in *liberum maritagium*) create an estate of inheritance against the generall rule of law, the law requireth that they should be legally pursued. But then it may be demanded if a man had given lands at the common law, in *libero maritaggio*, whether had the donees a fee simple without these words (heires) for that it appeareth by that which hath beene said before, that all gifts in taile were fee simple at the common law, and that the statute of W. 2. did not create any estate in fee taile, but out of an estate in fee simple. To this it is answered, that these words (in *liberum maritagium*) did create an estate in fee simple at the common law: and it is holden in 31. E. 3. gard. 116. *Per ceux parolx in frankmarriage les donees averont les terres a eux et a leur heires par-enter eux engeudres, et ceo est dit especial taile.* But yet betweene donees in frankmarriage and other donees in speciall taile there may be many notable diversities. If the king give land to a man and a woman, and the heires of their two bodies, and the woman die without issue, yet shall the man be tenant in taile *apres possibilitie*. But if the king give land to a man with a woman of his kindred in a frankmarriage, and the woman dyeth without issue, the man in the king's case shall not hold it for his life, because the woman was the cause of the gift; but other-
wife

dicto Johanni cum hæredibus suis in perpetuum de capitali domino feodi; and warranty to him and his heires. Ruled, that it is neither tail, nor frank-marriage, but fee simple only in the husband, and nothing in the wife. M. 23. and 24. El. C. B. Webb and Porter. Vid. contra 32. E. 1. tail 25. but 45. E. 3. 20. agrees. Hal. MSS.—See acc. the same case in Ow. 26. and Godb. 18. The same case is cited in Mo. 643. pl. 888.

(1) 14. E. 2. Aiel 1. Reversion granted by two in frank-marriage. Vid. 4. E. 3. 4. 26. E. 3. tail 27. Hal. MSS.

(2) But see the contrary of this Pasch. 40. Eliz. C. B. lord Barclay's case n. 11. and all the books here cited prove, that it is at least an estate tail, although no tenure, and it is accordingly adjudged 17. E. 3. 65. Vid. H. 43. El. B. R. rot. 140. between lord Barclay and the countess of Warwick. Hal. MSS.—See S. C. in Mo. 643. Cro. Eliz. 635. and 1. Ro. Abr. 750. but the point of frankmarriage is not reported in the two latter books.

(3) 13. H. 4. Mesne 74. 30. E. 3. 24. Gift in frankmarriage salvo forinfeco servitio good, and the donee shall hold in chivalry.—Hal. MSS.

wife it is in the case of a common person, if lands be given to a man and a woman in especiall taile and they are divorced *causa præcontractus*, both shall hold the lands for their lives; but in [p] case of frankmariage if they be so divorced, the woman shall enjoy the whole land, because she was the cause of the gift (1). If lands holden in focage [q] be given in especiall taile and the donees die the issue being within the age of 14 yeares, [r] the next of kinne of the part of the father or of the part of the mother which can hap the custody shall have it, but in case of frankmariage the heire of the part of the mother shall have it, because as it hath been said she was the cause of the gift.

7. H. 4. 16.

[p] 13. E. 3. tit. Aff. 19. E. 3. Aff. 83. 12. Aff. 22. 19. Aff. 2. 8. E. 3. Aff. 45. (F. N. B. 204.)
[q] Pl. Com. Carril's case.
[r] 17. H. 3. tit. Gard. 146 E. 3. 79.

. 27.

Sect. 18.

ET nota, quod hoc verbum (Talliare) idem est quod ad quandam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare. Et per ceo que est limitet mis en certaine, quel issue inheriteraper force de tiels dones, et come longement l'enheritance endurera, il est appelle en Latin, feodum talliatum, i.e. hæreditas in quandam certitudinem limitata. Car si tenant in general taile morust sans issue, le donor ou ses heirs poient entrer come en leur reversion.

this limitation (*hæredi*) in the singular number the donees had not had a fee simple at the common law. Vide *registrum judiciale*, fo. 6. a gift made to a man *et hæredi masculino de corpore suo* (4).

AND note that this word (*Talliare*) is the same as, to set to some certaintie, or to limit to some certaine inheritance. And for that it is limited and put in certaine, what issue shall inherite by force of such gifts, and how long the inheritance shall indure, it is called in Latine, *feodum talliatum. i. e. hæreditas in quandam certitudinem limitata*. For if tenant in generall taile dieth without issue, the donor or his heires may enter as in their reversion (3).

ET nota. This, in our author throughout his three bookes, betokens some notable point of instruction worthy of more speciall observation, which is often [f] used by him as you may perceive by the sections noted in the margin (2).

Feodum talliatum i. e. hæreditas in quandam certitudinem limitata.

Here our author doth interpret what *feodum talliatum* is. Of all the estates taile most coercted or restrained, that I finde in our bookes, is the estate taile in 39. Aff. Pl. 20. where lands were given to a man and to his wife and to one heire of their bodies lawfully begotten, and to one heire of the body of that heire only, this case being adjudged in the point is an exception (some say) out of the generall rule put before by Littleton. sect 13. that all estates tailles were fee simple at the common law; for (say they) by not had a fee simple at the

[f] Sect. 18. 37. 42. 43. 49. 50. 64. 72. 89. 90. 104. 108. 114. 116. 147. 158. 161. 168. 170. 183. 254. 279. 346. 387. 452. 467. 618. 619. 637. 642. 670. 682. 684. 711. 717. 719. 738.

West. 2. cap. 3. Pl. Com. 251.

39. Aff. pl. 20.
(1. Co. 66. 104. Ante 8. b. 1; Ro. Abr. 838.)

Sect. 13.

Vid. Pl. Com. fo. 29. b.

Regist. Judic. fo. 6.

Sect 19.

EN mesme le maner est del tenant en special taile, &c. Car en chescun done en le taile sauns plus ouster dire, le reversion del fee simple est en le donor. Et les donees et

IN the same manner it is of the tenant in especiall taile, &c. For in every gift in taile without more saying, the reversion of the fee simple is in the donor. And the donees and

EN chescun done en taile sans plus ouster dire, le reversion del fee simple est en le donor.

This is wrought by the construction of the statute of W. 2. cap. 1. which hath turned the fee simple of the donee into a particular estate of inheritance, and the possibility of the donor to a reversion in him expectant upon the estate taile, fo

(2. Inst. 331. 333.)

(1) Kelw. 104. b. Accord. Hal. MSS. See also acc. Perk. sect. 238.

(2) Lord Coke seems to lay too much stress on Littleton's use of *nota*, &c. and other words of a like kind. In the edition by Lettoun and Machlinia &c. is frequently omitted, and *item* is very often put where the other editions have *nota*, and *vice versa*. This shews, how very uncertain it is, whether any peculiar force ought to be attributed to such words. Indeed where they really come from Littleton himself, they must in general be too slight a foundation for any considerable inference.

(3) The issue in tail attained in vita patris; after the death of the father the donor cannot enter, but the issue, if pardoned may enter, and hold as special occupant subject to the charges of the father, 29. Aff. 61.—Hal. MSS.

(4) In the case of Richards and lady Bergavenny 2. Vern. 325. the court held a limitation to lady Bergavenny and such heir of her body as should be living at her death, with a remainder over, to be an estate tail. But see further on this subject ante fol. 8. b. n. 4. where several authorities are referred to in order to enable the student to find in what case *heir* in the singular number ought to be construed *nomen collectivum*.

[r] 12. E. 4. 23. 5. H. 7. 14.
West. 2. ca. 13. Pl. Com. 247.
248. 251. 562. 2. E. 2. tit. ref.
ce 147. 33. H. 6. 27. 39. E. 3.
18. 45. E. 3. 20.

(Post. 142. b. Plowd. 157. 162.
196. 197. Cro. Cha. 400.)

so as there be two inheritances of one land, yet this was doubted in our bookes [r] and there resolved according to Littleton. But I see no cause wherefore that point should be drawne in question, for at the same session of parliament (in which the statute *de donis conditionalibus* was made) viz. ca. 3. it is expressly said, *vel per donum in quo reservatur reversionis*, so as by the judgement of the same parliament a reversion was settled in the donor.

Le reversion del fee simple est en le donor.

A reversion is (2) where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of Litt. Tenant in fee simple, maketh gift in taile, so it is of a lease for life, or for years. If a man extend lands by force of a statute merchant, staple, recognizance or elegit, he leaveth a reversion in the donor.

[a] 27. H. 8. ca. 10. (Cro. Cha. 24. 1. Ro. Abr. 625. 1. Co. 104. b. 2. Co. 91. 2. Ro. Abr. 417. 1. Leon. 182.)

[A] 38. E. 3. 26. 27. E. 3. age 118. 24. E. 3. 36. 40. E. 3.

[c] Tr. 31. Eliz. inter Fenwicke & Mitford, 32. H. 8. gard. 93. 28. H. 8. Dier. 8. 9. 10. &c. Buckenham's case. 5. Marie. Dier. 163. (1. Ro. Abr. 828. Mo. 284.)

[d] 1. H. 5. 8. 4. H. 6. 20. 9. Eliz. Dier. Bromley's case.

[e] Dier. 5. Marie 156. Groswold's case adjudge. Bendlowes Serjant in his report agreeth. (Hob. 30. 33. 1. Mod. 237. 1. 1. Ro. Rep. 240.)

[f] 20. Eliz. Dier.

leur issues ferront al leur issues ferront al donor et a ses heires autielx services, come le donor fait a son seignior prochein a luy paramount, forsprise les donees in frankmarriage, les queux tiendront quietment de chescun manner de service, sinon que soit per fealtie tanque le quart degree soit passe, et apres ceo que le quart degree soit passe lissue en le cinque degree, et issint ouster lautres des issues apres luy, tiendront del done on ses heires come ils teignent ouster, come il en avant dit.

their issue shall do to the donor, and to his heires the like services, as the donor doth to his lord next paramount, except the donees in frankmarriage who shall hold quietly from all manner of service (unless it be for fealtie) untill the fourth degree is past, and after the fourth degree is past the issue in the fifth degree, and so forth the other issues after him, shall hold of the donor or of his heires as they hold over, as before is said.

But since Littleton wrote, the description must be more large upon the statute of [a] 27. H. 8. for at this day, if a man seised of lands in fee make a feoffment in fee, (and depart with his whole estate) and limit the use to his daughter for life, and after her decease, to the use of his sonne, in taile, and after to the use of the right heires of the feoffor: in this case, albeit he departed with the whole fee simple by the feoffment, and limited no use to himselfe, yet hath he a reversion (2); [b] for whosoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasers. And here in this case when the limitation is to his right heires, and right heire he cannot have during his life (for *non est habes viventis*) the law doth create an use in him during his life, untill the future use commeth in esse, and consequently the right heires cannot be purchasers, and no diversitie when the law creates the estate for life, and when the party. And all this was adjudged betwene [c] Fenwicke and Mitford in the King's Bench, and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him, because the use of the fee continued ever in him (3); and the statute doth execute the possession to the use in the same plight, qualitie, and degree, as the use was limited.

[d] If a man make a gift in taile, or a lease for life, the remainder to his owne right heires, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore it is truly said, that *habes est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and his heires, all his heires are so totally in him, as he may give the lands to whom he will.

[e] So it is if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heires male of his owne body, this is a void remainder; for the donor cannot make his owne right heire a purchaser of an estate taile without departing of the whole fee simple out of him (4): as if a man make a feoffment in fee to the use of himselfe for life, and then to the use of the heires males of his body, this is a good estate taile executed in himselfe, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that is apparent, for a limitation of use to himselfe had without question beene good.

[f] If a man make a feoffment in fee to the use of himselfe in taile, and after to the use of the feoffee in fee, the feoffee hath no reversion, but in nature of a remainder, albeit the feoffor have the estate taile executed in him by the statute, and the feoffee is in by the common law, which is worthy of observation.

To

(1) By what words a reversion will pass, see Vin. Abr. *Reversion*. G. and Com. Dig. *Estates* B. 12.

(2) Vid. 3. & 4. P. & M. Dy. 134. contra. Hal. MSS. But see the case cited by lord Hale in the next note, and also ante 12. b. and note 2. there.

(3) Casus Com. Bedford M. 34 35 Eliz. Poph. n. 8. *Feoffment to the use of the feoffor for 40 years, remainder to B in tail, remainder to the right heirs of the feoffor. It is the old reversion, and the feoffor may devise it; for the use returned to the feoffor for want of consideration to retain it in the feoffee till the death of the feoffor.* Hal. MSS.—See the earl of Bedford's case in Poph. 3. Vid. 27. E. 3. 8. 4. H. 6. 20. 42. Aff. 2. 9. E. 3. 14. 10. E. 3. 48. *Lands granted by A by fine for the life of A, remainder to A's right heirs. It is a reversion in A, and he may grant it.* Hal. MSS. Dy. 237 *Fine to husband, as that which he and his wife have of his gift, with render to the donor for life, remainder to the right heirs of the husband. It is a void remainder, and the wife survivor shall have it for life.* Hal. MSS.

(4) *Where heir shall be purchaser* Vid. fol. 9. b. 11. H. 6. 13. *Devise to B for life, remainder to C in tail, remainder to the next heir of the devisor and the heirs of his body, it is a purchase in the heir. Quære there if it had been heirs.*—Archer's case, 1. Rep. 66. b. *Devise or conveyance to A for life, remainder to his next heir male, and to the heirs male of the body of such heir male, it is a purchase in the heir, because in the singular number, and the limitation is applied to it.*—Vid. 1. Rep. 104. *Shellie's case. Use limited for life to A, remainder to the heirs male of the body of A and the heirs male of the body of such heirs male. It is a limitation, and A has a tail executed. But if the ancestor takes estate for years, remainder limited to the heirs male of his body, it doth not vest in the ancestor.* Accord. hic fol. 13. *Hodgkinson's case.* Hal. MSS.—See Hodgkinson's case from lord Hale's MSS. at the end of n. 6. ante 14. a.

To conclude this point, [g] whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use, as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two acres, the one holden by knights service by prioritie, and the other by knights service holden by posterioritie, and maketh a feoffment in fee of both acres to the use of himselfe and his heires, the old use continued in him, and the prioritie and posterioritie remaine. So it is of lands of part of the mother, the use shall goe to the heire of the part of the mother, which could not be, if it were not the old use, but a thing newly created. The like law of lands of the custome of Borough-english, Gavelkind, &c. (1.)

[g] 13. H. 7. 6. 28. H. 8. Dicr 12.
(3. Co. 81. b. Cro. Jam. 201.
Post. 271. b.)

5. E. 4. 7. 1. Co. 76. 84. 85.
100. &c. Chudley. 2. Co. 46.
57. 58. 77. 78. 4. Co. 22. 6. Co.
34. 43.

Les donees, et leur issues ferront al donor et a ses heires autiels services, come le donor fait a son seignior procheine a luy paramount. The reason of this

is, that when by construction of the said statute there was a reversion settled in the donor, for that the donee had an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over (2): as if the tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over, and before the statute of W. 2. the donee had holden of the donor as of his person, and now of him as of his reversion: but if a man make a lease for life, or years, and reserve nothing, he shall have fealtie only and no rent, though the lessor hold over by rent, &c. And this, that Littleton saith, is regularly true, if the donor maketh no speciall reservation, for then the speciall reservation excludes the tenure which the law would create. As if tenant by knights service maketh a gift in taile reserving fealtie and rent, the donee shall hold in socage, by fealtie and rent, and not by knights service (3.) But if a man hold land of the king in grand serjantie, and maketh a gift in taile generally, in this case the donee shall not hold of the donor by grand serjantie, because no man can hold by grand serjantie, but of the king only, as hereafter shall be said, and therefore seeing grand serjantie doth include knights service, he shall in that case hold of the donor by knights service. If a man seised of land in the right of his wife holden by knights service giveth the same lands in taile generally, the donee shall not hold of him by knights service, because his wife held the land, and he had nothing but in her right. And in that case the baron hath gained a new reversion by wrong, and therefore such a donee shall doe fealtie only (4).

(Post. 143. a.)

(2. Ro. Abr. 501.)

A, seised of two acres of land, holdeth the one of B by knights service, and twelve pence rent, and the other of C in socage and one pennie rent, and makes a gift in taile of both acres without any expresse reservation of any tenure. In this case the donor hath but one reversion. And yet he shall make several avowries, because there be severall tenures created by law in respect of the severall tenures over: and the avowrie is made in respect of the tenures.

(Doctr. Plac. 53.)

Lord, mesne and tenant, the tenant holdeth by four pence, and the mesne by twelve pence, the tenant makes a gift in taile without reserving any thing, by reason whereof he holdeth by foure pence, in respect of the tenure over. Afterwards the reversion escheats, now shall the donee hold by twelve pence, for the mesnaltie which was four pence is extinct, and the law reserved the tenure upon the gift in taile, in respect of the mesnaltie, and when the mesnaltie is extinct, the former rent between the donor and donee is extinct also, and then by the same reason that the donee shall take advantage, if the donor by release or confirmation had holden by lesser services, by the same reason he shall be prejudiced, when he holdeth by greater services (5).

(2. Ro. Abr. 501.)

49. E. 310.

Forsprise les donees en Frankmarriage. It is to be understood, that although the land be given in *liberum maritagium*, in free marriage generally, yet first the law doth make a limitation of this word (free) viz. till the fourth degree be past, for the reason that our author here yeeldeth (6). And 2. albeit it be free marriage, yet the donees and their issues untill the fourth degree be past shall do fealtie, for that is incident to everie tenure (except frankealmoigne) and cannot be separated from it, and therefore the donees and their issues shall hold it as freely till the fourth degree be past as the donor can make it. See more of this in the chapter of Frankalmoigne.

Bracton. lib. 2. fol. 21. Britton
cap. 119. Fleta lib. 3. cap. 11. &
lib. 6. cap. 2. Vide sect. 17. 20.
(Ante. 21. b. Post 178. a.)

Sect. 20.

ET les degrees en frankmarriage, ferront accompts en tiel maner, sc. de AND the degrees in frankmarriage shall be accounted in this manner, viz. from

WHERE Littleton saith [a] that the donees in frankmarriage shall hold by fealtie only untill the fourth degree

[a] Vide sect. 17. 19. 138. 268.
269. 271. 733.

(1) See further on this subject the several books cited ante 12. b. in n. 2. to which add Prec. in Cha. 222. 319. and Plowd. 545. and note f. in the English translation of Plowden. It may be an useful hint to observe, that the English edition of Mr. Plowden's Commentaries, which most deservedly bear as high a character as any book of reports ever published in our law, has a great number of additional references and some notes; and that both of these are generally very pertinent, and shew great industry and judgment in the editor.

(2) And therefore gift in tail saving the reversion tenend' de capitalibus dominis feodi per servitia debita is void, and the donee shall hold of the donor, as he holds over, 6. E. 3. 28. 45. E. 3. 27. 2. E. 4. 5. 4. H. 6. 10. Champenon's case. Vide 27. H. 8. 18.—Hal. MSS.

(3) But if tenant by chivalry makes gift in tail rendering rent only, the tenure shall be chivalry, but the rent accumulative. Vid. hic 52. Dy. 52. Keilw. 125.—Hal. MSS.

(4) Quere of this case for the new reversion is held in chivalry. Vid. 4. Hen. 6. 21. by Balh. B holds of A in chivalry, and gives in tail to C, who makes lease to R for life and dies. The issue of C shall be in ward to A, not to B the donor.—Hal. MSS.

(5) Vid. Keilw. 125. 129.—Hal. MSS.

(6) And therefore after the fourth degree the issue shall have formdon and count of a gift in frankmarriage; but the warranty and acquittal are gone. 12. H. 4. 9. Vid. 10. E. 3. 25. 4. E. 3. 5. Attornment by donee in frankmarriage.—Hal. MSS.

[b] Glanvill. lib. 7. cap. 18. Bract lib. 2. fol. 21. Britton. cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2.

[c] Vide 10. E. 3. tit. Avowry. 157. 31. E. 3. cessavit. 22. 31. E. 3. gard. 116. 21. H. 7. 30.

1. Rule.

2. (Plovd. 444.)

3. (Vid. Stat. 32. H. 8. cap. 38. of marriages, 2. Infl. 683. 25. H. 3. cap. 22.)

degree be past, and then the issue in the fifth degree shall hold of the donor as the donor holdeth over, [b] vide Bracton ubi supra, ita quod ille cui terra sic data fuit, nullum inde faciat servitium usque ad tertium heredem et usque quartum gradum, ita quod tertius haeres sic inclusus. And here-with also agreeth Fleta ubi supra. And the [c] learning of degrees set out in the civil and canon law (wherein I find some difference) is worth the knowledge, to the end that Littleton and the law in this case may the better be understood, which I will divide into certaine rules, whereof the first is, that a person added to a person in the line of consanguinitie maketh a degree. And it is to be understood, that a line is threefold, viz. the line ascending, descending, and collateral. And first for example, of the ascending line, take the sonne and add the father, and it is one degree ascending, add the grandfather to the father, and it is a second degree ascending.

So as how many persons there be, take away one, and you have the number of degrees. If there be foure persons it is the third degree, if five the fourth, for one must exceed, and then you have the degree. Likewise by the descending, take the father, and add the sonne, and it is one degree, then take the sonne and add the grandchild, and it is the second degree, and so likewise further. Wherein observe that the father, son and grandchild, albeit there are three persons, yet they make but two degrees, because (as it hath been said) one must exceed for making a degree.

It is to be noted, that in every line the person must be reckoned from whom the computation is made. And there is no difference between the canon and civil law in the ascending and descending line (2), for those whom the civilians do reckon in the second degree, the canonists do reckon in the first (3), and those whom they place in the fourth, these place

le donor a les donees en frankmarriage, le primer degree, pur ceo que la feme que est une des donees covient estre file, soer, ou autre cousin a le donor. Et de les donees tanque a lour issue il serra accompt le second degree, et de lour issue tanque a son issue, le tierce degree, et issint ouster, &c. Et la cause est, pur ceo que apres chescun tiel done les issues queux veignent de le donor, et les issues queux veignent de les donees apres le quart degree passe de ambideux parties en tiel forme destre accompt, poyent enter eux per la ley de saint esglise entermarie. Et que le donee en frankmarriage serra dit le prime degree de les quart degrees, home poit veier en un plee sur un breve de Droit de Garde P. 31. E. 3. Lou le Pl. counta, que son tresaiel fuit seisie de certe terre, &c. et ceo tenust dun autre per service de chivaler, &c. que dona la terre a un Rafe Holland ovesque sa soer en frankmarriage, &c.

the donor to the donees in frankmarriage the first degree, because the wife, that is one of the donees, ought to be daughter, sister or other cosen to the donor, and from the donees unto their issue shall be accounted the second degree, and from their issue unto their issue the third degree, and so forth. And the reason is, because that after every such gift, the issues of the donor, and the issues of the donees after, the fourth degrees past of both parties in such forme to be accounted, may by the law of the holy church entermarie (1). And that the donee in frankmarriage shall be said to be the first degree of the foure degrees, a man may see in a plea upon a writ of right of ward, P. 31. E. 3. where the Pl. pleadeth that his great grandfather was seised of certaine lands, &c. and held the same of another by knight service, &c. who gave the land to one Rafe Holland with his sister in frankmarriage, &c.

(1) Nota by the intent of Littleton in some cases before the fourth degree passes from the donor there may be intermarriage, and yet the land shall be holden quit till it be passed. A gives land in frankmarriage with the daughter of his sister, the issue of A and the donee may intermarry after the fourth degree, yet the fourth degree shall not be passed quoad the tenure. Vid. pag. sequent. A gives to the daughter of N in frankmarriage, C and the issue of N may intermarry, because they are in quinto gradu consanguinitatis, yet this is only the first degree quoad the privilege of tenure. Hal. MSS. There is something apparently wanting in the state of lord Hale's latter case; for it is not expressed who C is, and how C and the issue of N are related in the fifth degree. But this accidental omission may be easily supplied, and the doctrine will be equally intelligible by only supposing the consanguinity to be as lord Hale's case requires.

(2) The words but in the collateral line there is seem necessary to the sense of this passage; and though not to be found in any edition of lord Coke's Commentary, were probably omitted by mistake.

(3) A G and A are in the fourth degree per utramque legem, N and K are in the fourth degree by the canon law, but in the eighth degree by the civil law. N and C are in the fourth degree by the canon, in the fifth by the civil law. C . . . B . . . D Vide pro computatione graduum consanguinitatis juxta utramque legem caus. 35. quest. 5. pars 2. in Decret. Juxta jura canonica—I. Ascendentium et descendentium quot sunt personæ, de quibus queritur, computatis intermediis, primâ demptâ, tot sunt gradus inter eas. II. Pro collateralibus. Collateralium in linea æquali quoto gradu quis distat à stirpe communi, toto distat inter se vel sibi attinent. Collateralium in linea inæquali quoto gradu remotior distat a communi stirpe, toto inter se distat.—Juxta jus civile—I. In linea recta ascendentium et descendentium quot sunt personæ, de quibus queritur, computatis intermediis, unâ demptâ, tot sunt gradus inter eas. II. Collateralium. 1. In linea æquali, quoto gradu quis distat

in the second. Therefore if we will know in what degree two of kindred do stand according to the civill law, we must begin our reckoning from one, by ascending to the person from whom both are branched, and then by descending to the other to whom we do count, and it will appeare in what degree they are. For example, in brothers and sisters sonnes, take one of them and ascend to his father, there is one degree from the father to the grandfather, that is the second degree, then descend from the grandfather to his sonne, that is the third degree, then from his sonne to his sonne, that is the fourth. But by the cannon law there is another computation, for the canonists do ever begin from the stocke, namely from the person of whom they do descend; of whose distance the question is. For example, if the question be, in what degree the sonnes of two brothers stand by the canon law, we must begin from the grandfather and descend to one sonne, that is one degree; then descend to his sonne, that is another degree, then descend againe from the grandfather to his other sonne, that is one degree, then descend to his sonne, that is a second degree, so in what degree either of them are distant from the common stocke, in the same degree they are distant betweene themselves: and if they be not equally distant, then we must observe another rule. In what degree the most remote is distant from the common stocke, in the same degree they are distant betweene themselves, and so the most remote maketh the degree. And albeit the donee be a cousin in the third or fourth degree from the donor, yet in this computation it maketh the first degree: *gradus dicitur a gradiendo, quia gradiendo ascenditur et descenditur*. And thus much of the civile and cannon law is necessarie to the knowledge of the common law in this point (1): and herewith agreeth our author in the words following.

(Plowd. 444.)

Les issues queux veignent de le donor, et les issues queux veignent de les donees apres le 4. degree passe dambideux parties in tiel forme deste account poient enter eux per le Ley de Saint Esglise entermarrier.

(De Saint Esglise). [d] So as hereby it appeareth, that the computation of the degrees in this case, must be according to the cannon law. But it is necessarie to be knowne concerning marriages betweene persons of kindred one to another, that it is enacted [c] by the statute of 32. H. 8. that no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the Leviticall degrees (2).

[d] Brit. ca. 119. Accord. Flet. lib. 3. ca. 11. & lib. 6. c. 2.
[c] 32. H. 8. ca. 38.

The case vouched by Littleton in 31. E. 3. you shall finde abridged by Fitz. tit. gard. 116. And albeit this year of 31. E. 3. was never in print till Fitzherbert did abridge it and publish it in print anno 11. H. 8. and goeth under the name of broken yeares, yet here it appeareth by our author, that the same is of authoritie in law, as hereafter also in other places shall be observed.

Sect. 21.

ET tous ceux tailes avantdits, **A**ND all these entailed aforesaid be specified in the said statute of W. 2. Also there be divers other estates in taile, though they be not by expresse words specified in the said statute, but they are taken by the equitie of the same statute. As if lands be given to a man, and to his heires males of his bodie begotten; in this case his issue male shall

ET tous ceux tailes avantdits sont specifies en le dit statute de Westminster 2. And so it appeareth by the said statute *Auxy sont divers autres estates en le taile, &c.* And herewith agreeth Carbonel's case, 33. Edw. 3. titulo taile 5.

That the cases of the statute are set down but for examples of estates taile, general and speciall, and not to exclude other estates taile. 3. E. 3. 32. 18. Aff. p. 5. 18. E. 3. 46. 1. Mar. Dyer 46. Pl. Com. Seignior Barkley's case, fo. 251. For, *Exempla illustrant non restringunt legem*.

3. E. 3. 32. 18. E. 3. 46.
18. Aff. p. 5. 1. Mar. Di. 46.
Pl. Com. 251.

Equitie

distant à communi stipite, toto duplicato distant inter se, vel sibi attinent; nam quælibet persona facit gradum. 2. In lineâ inæquali, quot sunt personæ, stipite dempto, tot sunt gradus.—Nota in contrahibus matrimonialibus computatio canonica est recepta, et hoc per decretalem Innocentis tertii in concilio generali.—Hal. MSS.

(1) See further as to consanguinity and the manner of computing its degrees by the civil and canon law, Blackst. Law Tracts 8vo ed. v. 1. p. 14. and 173. and the annotations in the edit. of the *Corp. Jur. Canon.* by the *Pithæi* on that part of Gratian's *Decretum* cited by lord Hale, and Inst. lib. 3. tit. 6. et Dig. 38. tit. 10. and the commentators on those titles.

(2) The following passages from the canon law are in Hal. MSS.—Extrav. de consang. et affin. c. 9. Vir qui à stipite quarto gradu mulieri, quæ ex alio latere distat quinto, licite copulatur.—Nota antiquitus usque ad septimam generationem nullus de sua cognatione ducat uxorem. Decret. 2. Causa 52. quæst. 2. can. 11. Sed in concilio generali sub Innocentio 3º prohibitio copulæ conjugalis quartum consanguinitatis et affinitatis non excedat, viz. in collateralibus, sed in directe ascendentibus prohibetur contractus matrimonialis in infinitum Extrav. de consanguinitat. &c. can. 8.—See further as to the prohibition of marriages for affinity or consanguinity in Tayl. Elem. Civ. L. 314. Inst. lib. 1. tit. 10 Dig. lib. 23. tit. 2. Cod. lib. 5. tit. 4. Nov. 74. Gibb. Cod. Jur. Ecclesiast. Anglican. 1st ed. v. 1. p. 494. Burn. Eccles. L. tit. Marriage. Vin. Abr. Marriage F.

(5. Co. 99. 3. Co. 31.)

Equitie is a construction made by the judges, that cases out of the letter of a stat. yet being within the same mischief, or cause of the making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the law-maker could not possibly set downe all cases in expresse terms, *equitas est convenientia rerum quæ cuncta coequiparat, et quæ in paribus rationibus paria jura et judicia desiderat.* And againe, *equitas est perfecta quadam ratio quæ jns scriptum interpretatur et emendat, nulla scriptura comprehensa, sed solum in vera ratione consistens. Equitas est quasi æqualitas. Bonus judex secundum æquum et bonum judicat, et æquitatem stricto juri præfert. Et jns respicit æquitatem* (1).

Braft. lib. 4. fol. 186.

[f] 18. Aff. p. 5. 18. E. 3. 46. 33. E. 3. tit. Taile 5. 3. E. 3. 32. Pl. Com. Seignior Barkley's case. 1. Mar. Dy. 46. V. sect. 24.

Sicome terres sont done a un home et a les [f] heires males de son corps engendres, en tiel case son issue male inheritera lissue female ne unques inheritera, &c. This shall be explained afterward, sect. 24 (2).

Sect. 22. & 23.

THESE two sections, or any thing therein, do need no explanation, in respect they shall be also explained hereafter in the next section, saving onely these words (*queux doivent inheriter*) are verie observable, for they implice a diversity betweene a descent and a purchase. For when a man giveth lands to a man and the heires females of his body, and dyeth having issue a son and a daughter, the daughter shall inherit; for the will of the donor (the statute working with it) shall be observed. But in case [g] of a purchase it is otherwise: for if A. have issue a sonne and a daughter, and a lease for life be made, the remainder to the heires females of the bodie of A. A dieth, the heire female can take nothing, because she is not heire (3); for she must be both heire and heire female, which she is not, because the brother is heire, and therefore the will of the giver cannot be observed, because here is no gift, and therefore the statute cannot worke thereupon. And so it is if a man hath a sonne and a daughter, and dieth, and lands be given to the daughter, and the heires females of the bodie of her father, the daughter shall take

(Post. 164. 1. Co. 103. 104.)

(Hob. 31.)

[g] 9. H. 6. 24. 11. H. 6. 13. 14. 37. H. 8. Br. tit. Done 42. tit. nofine 1. & 40. Dyer 23. El. 374 Shelley's case 1. Co.

(Post. 26. b.)

IN mesme le manner est, si terres ou tenements soient dones a un home et a ses heires females de son corps engendres, en tiel case son issue female luy inheritera per force et form de le dit done, et nemy issue male, pur ceo que en tiels cases de dones faits en le taile, queux doivent inheriter, et queux nemi la volunt del donor serra observe.

IN the same manner it is, if lands or tenements be given to a man, and to his heires females of his bodie begotten; in this case his issue female shall inherit by force and forme of the said gift, and not his issue male. For in such cases of gifts in taile, the will of the donor ought to be observed, who ought to inherit, and who not.

ET en le case que terres ou tenements sont dones a un home, et a ses heires males de son corps issuant, et il ad issue deux fits, et devy, et leign fits entra come heire male, et ad issue file et devy son frere avera la terre, et nemi la file, pur

AND in case where lands or tenements be given to a man, and to the heires males of his bodie, and he hath issue two sonnes, and dieth, and the eldest son enter as heire male, & hath issue a daughter, and dieth, his brother shall have the land, &

CEO

(1) As to construing statutes by equity, see Plowd. 9. 10. 17. 18. 36. 46. 53. 57. 59. 81. 88. 109. 124. 177. 204. 244. 363. 364. 366. 371. 464. 466. See also Vin. Abr. Statutes E. 6. Hatt. Treat. on Stat. Ash. Expolit. of Stat. by Eq. and Com. Dig. Parliament R. 10.

(2) And see such special heir is in by descent, and shall have his age, 24. E. 3. 60.—Hal. MSS.

(3) A hath issue a son and a daughter. The daughter marries B, and has issue two daughters. A devises to his son; but if he die without issue my land shall go to my right heirs of my name and posterity, and dies. The son dies without issue. Ruled, that the land shall not go to the uncle, for though of his name, he is not heir, for the issue of the daughter is heir. H. 11. Jac. C. B. Counder and Clerke Mo. 863. and Hob. 29. Hal. MSS.—See the same case in 1 Brownl. 129.—This case of Counder and Clerke is apparently cited by lord Hale in confirmation of lord Coke's position as to the necessity of being heir as well as female, in order to take by purchase under a limitation to the heir female; and it is observable, that there is not one word in lord Hale's note intimating the least disapprobation of the doctrine. However, it so happens, that in more modern times the propriety of this doctrine has been questioned by very respectable persons, who have treated it as equally unsupported by reason and authorities of law. But perhaps this censure of lord Coke may have been too hasty; and it may be doubted, whether there is a passage in all his works, more capable of standing the severest test of modern criticism. Therefore the remainder of this note shall be employed in the defence of lord Coke's doctrine, and in explaining the qualifications with which it ought to be understood; and for this purpose it shall be formally examined, first as a reasonable rule of construction, and secondly by the authorities and determined cases.

ceo que le frere est heire male. Mes auterment serra en autres tailes, queux sont specifies en le dit statute.

not the daughter, for that the brother is heiremale. But otherwise it is in the other entailes, which are specified in the sayd statute.

nothing but an estate for life; because there is no such person, she being not heire. But where a gift is made to a man, and to the heires female of his bodie, there the donee being the first taker is capable by purchase, and the heire female by descent (1), *secundum formam doni*: and therefore Littleton purposely added these words, *queux doivent inheriter*.

Sect. 24.

AUxy si terres soient donees a un home, et a les heires males de son corps ingendres, et il ad issue file, quel ad issue fits et devy, et puis apres le donee devy, en cest case le fits de la file ne inheritera pas per force de le taile, pur ceo que quecunque, que serra inheriter per force dun done en le taile fait as heirs males, covient conveyer son discent tout per les heires males. Mes en tiel case le donor poet entrer, pur ceo que le donee est mort sans issue male, en la ley, entant que le issue del file ne poet conveyer a luy mesme le discent per Heyre male.

ALSO if lands be given to a man and to the heires males of his body, and he hath issue a daughter, who hath issue a sonne, and dieth, and after the donee die; in this case, the son of the daughter shall not inherit by force of the entaile; because whosoever shall inherit by force of a gift in taile made to the heires males, ought to convey his descent wholly by the heires males. Also in this case the donor may enter, for that the donee is dead without issue male in the law, insomuch as the issue of the daughter cannot convey to himselfe the descent by an heire male.

QUECUNQUE serra enheriter per force dun done en taile,

Ec. Vide Tr. [b] 28. H. 6. tit. Devise 18. (which is not in the booke at large, but written *verbatim* out of Statham): If a man devise lands to a man, and to the heires males of his body, and (2) hath issue a daughter, which hath issue a sonne, this sonne shall be inheritable, and notwithstanding in a gift in taile the law is otherwise, and that by the opinion of all the judges in the Exchequer Chamber. But I hold this case to be ill reported, unless you will referre the opinion of the judges to the gift in taile last mentioned. For first, albeit a devise may create an inheritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law. Secondly, there is no intent of the devisor appearing, that the sonne of the daughter should, against the rule of law, inherit, and the statute provideth, that *voluntas donatoris, Ec. observetur*. And I have heard this case often denied to be law, both in the King's Bench, and in the Common Pleas, vide

Vide sect. 719.

[b] 1. H. 6. 24. 11. H. 6. 13. 14. 28. H. 6. tit. Devise 18. Statham tit. Devise. Pl. Com. in Scholast. case 414. b. 20. H. 6. 43. 37. H. 8. Br. tit. Done & Rem. 61. tit. nosine 1. & 40. (Hob. 33. Post, 377.)

(1. Ro. Abr. 341.)

Pl. Comment 414. b. And so it is [i] *mutatis mutandis*, when a gift in taile is made to a man, and to his heires females of his body, and he hath issue a sonne, who hath issue a daughter, this daughter shall never inherit, because she must convey by descent from females. And for the reason hereof see a notable case in 15. E. 2. tit. Corone 385. where it is adjudged (as before it had beene) that the sonne of a female should have an appeale of the death of a cofine, and yet the daughter her selfe should never have had it. But there it is agreed, that the sonne of a female [k] in a *libertate probanda*, should be no witness or prooffe against the issue of the male. And the reason of this diversity is very observable: for by the common law the female might

[i] 11. H. 6. 13.

15. E. 2. tit. Cor. 386. (Ante 6. b.)

[k] Mirror c. 2. sect. 7. Vid. Glanvil. lib. 14. cap. 3.

(1) It is very unusual to create an estate in tail female, and I have seen an argument, in which it has been attempted to prove, that the law of England will not allow of a descent through females only, even in the case of estates tail; but other authors as well as Littleton and Coke mention such descents, nor did I ever hear any authority cited to support the contrary doctrine. See Plowd. Quær. 87. and 133.—(2) The word *he*, to describe the deviser, is wanting. See acc. Stath. Abr.

When land is given to the *heirs female of the body* of one, either not having any preceding estate, or not having a preceding estate of *freehold*, the words cannot be construed as giving an inheritable quality to an estate already vested and limiting the course of descent, but necessarily must operate on the first taker as a *descriptio personæ* and *name of purchase*; and lord Coke's doctrine means nothing more, than that those claiming under such a description should *fully* answer to it, and consequently that such as have only *half* of the description should be excluded. Now it is to be considered, that the description consists of *two* parts, one requiring that the donee should be *heir*, the other that the donee should be *female*; and if being *heir* without being *female* will not give a title, why on the other hand should being *female*, without being also *heir*, be sufficient? It is not a solid objection to lord Coke to say, that his construction is strict, literal, and founded on a rigid adherence to the proper and technical sense of words; because it is reasonable to presume in favour of the established sense of all words, unless there are other words or some special circumstances to shew a *different* sense in the mind of the person using them, and lord Coke apparently intends to put a case, in which *neither* occur. But it has been observed, that where *heirs female of the body* are words of *limitation*, a female may take by descent as *special heir*, though not *heir general*; and it is asked, why should not the same person be equally capable of taking by *purchase*? This objection is plausible, but not unanswerable. Where *heirs female of the body* are words of *limitation*, they are necessarily used to regulate the *succession* in a *special* manner, which object of the donor cannot be attained without a continual exclusion of *heirs general* when they happen to be males; and this establishment of a *new* kind of heirship is a ground for presuming that the donor by *heirs* means, not those who are so by the *general* law of descent, but those who are so according to the *special* course of descent he professes to introduce. But where *heirs female* are only words of *purchase*, they are used to describe who shall take the estate at *one* particular time and in *one* instance, and establishing a *new* course of succession is not the object in view; and it not being so, the ground of presumption, which governs the former case, is wanting. But it may be insisted, that, in the case put by lord Coke, *heirs female of the body* have a *double* effect, and after operating as words of *purchase*, operate a *second* time as words of *limitation*, and being allowed to point at an *heir special* in their latter application, ought to have the same construction in the former; for in *such* a case it would be strange to suppose, that *heirs female* were used in two different senses. This is refining on the objection made to lord Coke's doctrine, and placing it in a stronger light than it hitherto appears to have been urged. But even in this shape the objection would not prove any thing absurd in lord Coke's *general doctrine*, and would only shew that he had chosen an improper example for its illustration, and that he should have stated a case in which *heirs female* can only operate as words of *purchase*, as where a gift is made to the *heirs female*.

(2. Inst. 68.)

Vid. Seignior de la Ware's case,
11. Co. fol. 11.

17. E. 4. 1.

20. H. 6. 43.

(Post. 377.)

[1] Stanford, 58. b. 15. E. 2.
tit. Coron. 384.

(Hob. 31.)

11. H. 6. 13.

9. H. 6. 25.

might have had an appeale as heire to any of her ancestors, as well as the male. But by the statute of Magna Charta, cap. 34. *Nullus capiatur aut imprisonetur propter appellam femine de morte alterius quam viri sui*, which restraineth not the sonne of the female. And there Scrope saith, *per tout le serjeant d'Angleterre*, that is, by all the judges of the coife in England, it was awarded, that the issue of the female should have an appeale for the death of his cousin. But in a *libertate probanda*, the issue of the blood female shall not be received to prove villenage in the issue of the blood male, for the mother was disabled by the common law, and the mother might be a neise *de en et trene*, that is, of the water and whippe of three cord, (meaning such a bondwoman as is used to servile workes and correction) and enfranchised by her husband. All which appeareth in the said booke. And it is holden in 17. E. 4. 1. that if a man be flaine which hath no heire of the part of his father, that his uncle of the part of his mother shall have the appeale, and yet he must of necessity make his conveyance by a woman, vid. 20. H. 6. fo. 33. the question suddenly demanded and debated, and no consideration or mention had of the said former judgments and authorities; there it is compared to a gift in taile to a man and to his heires males of his body, that the heire male of the daughter shall not inherit which hath no affinity to it, and yet the authority of the booke is great, for it is by the assent of all the justices of the one bench and the other in the Exchequer Chamber, and therefore I leave the learned and judicious reader to his owne judgment. [1] Vide Stanford 58. b. 15. E. 2. 384. If a man give lands to a man and to the heires males of his body begotten, remainder to him and to his heires females on his body begotten, the donee hath issue a sonne who hath issue a daughter, who hath issue a son, this sonne is not inheritable to either of both these estates taile, because, as Littleton saith, the male must make his conveyance only by males, and so must the females by females. But in this case the land shall revert to the donor. And therefore the safest way, when a man will entaile his lands to the heires males and females of his bodie, is to limit the first estate to him and the heires males of his body, the remainder to him and to the heires of his body, and then all his issues whatsoever are inheritable. But if A hath issue a sonne and a daughter and dieth, and the sonne hath issue a daughter and dieth, and a lease for life is made, the remainder to the heires females of the body of A; in this case the daughter of A shall not take *causa qua supra*. But albeit the daughter of the son maketh her conveyance by a male, she shall take an estate taile by purchase, for she is heire and a female; but if the lands be devised to one for life, the remainder to the next heire male of B in taile, and B hath issue two daughters, and each of them hath issue a sonne, and the father and daughters die, some say this remainder is void for the uncertainty, some say that the eldest shall take it because he is worthiest, and others say that both of them shall take for that they both make but one heire (1). If lands be given to a man and to his heires males or females of his body he hath an estate in generall taile in him.

Sect. 25.

A Un home, et a sa feme. But

what if tenements be given to a man, and to a woman being not his wife, and to the heires males of their two bodies. They have also an estate taile, albeit they be not married at that time (2). And so it is, if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heires of their two bodies: they have presently an estate taile, [m] for the possibility that they may marry. But if

EN mesme le man-
ner est, lou te-
nements sont done a
un home et a sa feme,
et a les heires males
de leur deux corps
engendres, &c.

IN the same manner
it is, where lands
are given to a man
and his wife, and to
the heires males of
their two bodies be-
gotten, &c.

11. E. 3. Formdon. 20.

(Ante 20. b.)

[m] 15. H. 7. 10. 1. Co. Dilon
and Frein's case 40. Aff. p. 13.[n] 24. E. 3. 29. 42
(Dy. 330.)[o] 7. H. 4. 16. 16. E. 3. 73.
Littleton fol. 66. 15. Eliz. Dier,
326.

[p] 44. E. 3. tit. Taile. 13.

(1) Vid. hic fol. 10. b. Harpur's case. Hal. MSS.—(2) If husband and wife are divorced a vinculo, they are only tenants for life; for the law doth not presume, that they will marry again. 7. H. 4. 16. 3. H. 6. 43. Hal. MSS.—(3) As to the doctrine of not allowing a possibility on a possibility, see post. 184.—(4) Here it cannot be tail for the uncertainty which of them he will marry first. But if a gift was to A and B a feme sole and to the heirs of their bodies, remainder to A and C a feme sole and to the heirs of their bodies, it is tail.—Hal. MSS.

Sect.

female of the body of A and their heirs, or the heirs of their bodies. So much for the propriety of lord Coke's doctrine independently of authorities; but if it is compared with them, it will appear still more defensible, and by them it is even applied to the same sort of case as is stated by him. The necessity of being *actually* heir in the strict sense of the word, to take by purchase under that description, appears by authorities of three kinds.—The first order of cases consists of those, by which it has been settled, that if land is given to A for life, with remainder to the heirs or heirs of the body of B, and A dies before B, or B is attainted of felony and afterwards dies before A, the remainder becomes void. In the former case it is so, because B being living at the determination of the particular estate, no person can then answer to the description of his heir, for *non est heres viventis*. In the latter case it is so, because B's attainder, by corrupting his blood, prevents his having an heir. Now in both these cases there is as much reason for departing from the rigid sense of the word *heirs*, and presuming in favour of an heir apparent in the first case, and of such person as would be heir if there was not an attainer in the second, as there is for presuming in favour of an heir special in the case of a gift to the heirs female; and yet the doctrine is so fixed by authorities, that the judges of modern times have not yet deviated from it even in the case of *last wills*, except when induced to adopt a less strict construction by some additional words strongly expressive of using *heirs* in a special sense, as where land is devised to the heir male of A now living. See Post 378. Hussey's Case, Bro. Abr. Done 61. the case of James and Richardson Pollexf. 457. that of Burchett and Durdant 2 Ventr. 311. Darbison and Beaumont in Vin. Abr. Devise U. b. pl. 5. but more accurately in 1. P. Wms. 229. and Fortesc. Rep. 18. and that of Frogmorton and Wharrey, Wilf. vol. 2. part 3. page 125. and 144. See further Vin. Abr. Remainder I.—Another series of authorities, conformable to lord Coke's doctrine, consists of cases, in which it has been agreed, that where *heir* is a word of purchase, the heir at common law shall take *Gavelkind* or *Borough English* land, unless the *customary* heir is expressly mentioned, though if used as a word of limitation, the customary heir shall take without being named. See Bro. Abr. Discent 59. See also ante 10. a. and n. 4. there and the case of Starkey and Starkey Trin. 19. G. 2. in the Exch. 5. N. Abr. 404. This rule in respect to customary land is a very cogent argument for lord Coke in point of authority; for the property, which is the subject of the gift, furnishes a very colourable pretence for preferring the customary heir, and the peculiar descent of the land by force of the custom in the person who thus takes by purchase is precisely the same sort of argument for the customary heir, as those who differ from lord Coke draw from the special descent by force of the gift where *heirs female of the body* are words of limitation. On a nice comparison it will be found, that the analogy between the gift of the customary land to *heirs*, and the gift of common law land to *heirs female of the body*, is almost perfect; for in both cases the words operate first as words of purchase and then

Sect. 26. 27.

26. 27. These two Sections need no explanation at all.

ITEM si tenements soient dones a un home & a sa feme, & a les heires del corps del home engendres, en ceo case le baron ad estate en le taile generall, et la feme forsque estate pur terme de vie.

ALSO if tenements be given to a man and to his wife, and to the heires of the bodie of the man, in this case the husband hath an estate in generall taile, and the wife but an estate for terme of life.

ITEM si terres soient dones a le baron & sa feme, & a les heires le baron, queux il engendra de corps sa feme, en ceo case le baron ad estate en le taile speciall, & la feme forsque pur terme de vie.

ALSO if lands be given to the husband and wife, and to the heires of the husband which he shall beget on the body of his wife, in this case the husband hath an estate in especiall taile, and the wife but an estate for life.

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ET si le done soit fait al baron & a sa feme, & a les heires la feme de sa corps per le baron engendres, donque la feme ad estate en especial taile, & le baron forsque pur terme de vie (1). Mes si terres sont dones a le baron & a la feme, & a les heires que la baron engendra de corps la feme, en ceo case ambideux ont estate en la taile, pur ceo que cest parol (heires) nest limit a lun plus que a l'auter (2).

AND if the gift be made to the husband and to his wife, and to the heires of the body of the wife by the husband begotten, there the wife hath an estate in speciall taile, and the husband but for terme of life. But if lands be given to the husband & the wife, & to the heires which the husband shall beget on the body of the wife, in this case both of them have an estate taile; because this word (heires) is not limited to the one more then to the other.

HEires. This word (heires)

is *nomen operativum*. To which of the donees it is limited, it createth the estate taile; but if it incline no more to the one than to the other, then both doe take, as here Littleton putteth the case. And therewith accordeth the case of [7] 3 E. 3. where it appeareth, *Quod Robertus de S. dedit Johanni de Riparijs et Matilde uxori ejus, et hæredibus quos idem Johannes de corpore ipsius Matildæ procrearet, &c.* and this adjudged to be an estate in especiall taile in them both, because the estate is equally tailed to the heires of the baron as to the heires of the wife. If lands be given to the husband and the wife, and to the heires of the body of the survivour, the gift is good, and the survivour shall have an estate in taile generall, but the estate taile vesteth not till there be a survivour. And hereby it appeareth [r] that a gift made to

19. Hen. 6. 75. a. Regist. 2391
17. E. 2. tit. Taile 23.
3. E. 3. 32. 4. E. 3. 43.
5. E. 3. 29. b. & 34. a.
21 E. 3. 43. 12 H. 4. 1.

[7] 3. E. 3. 32. 21. E. 3. 43.
19. H. 6. 75. per Hody.

Regist. 2391

(1 Sid. 83.)

[r] 20 E. 3. Briefe 377.

a man and to the heires of his body, is as good as to his heires of his body.

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(1) In pleading seisin of such an estate in husband and wife, it shall be alledged, that they were seized together and to the heirs of the body of the wife in her right; and not that they were seized of the freehold or fee tail. Per Fitzherbert, 27. H. 8. 21. b.—
(2) Et ils ont en cell case tiel estate, sicome terre furent donez a eux & a les heires de leur deux corps engendrez. L. and M.—
(3) Vid. Hob. case 113. page 84. Gift to husband and wife for their lives, and after their decease to the heirs of the body of the husband procreant super corpus of the wife, is tail only in the husband, and the wife hath only for life; and it is the same with hæredibus of the husband de corpore of the husband on the wife procreant. Skete and Oxenbridge. So Tr. 6. Jac. B. R. Repps and Bonham. Land limited to husband and wife for their lives, and after their decease hæredibus of the body of the wife by the husband to be begotten; it is tail only in the wife. But it was agreed, that, if it had been to the heirs which the husband should beget on the body of the wife, or to the heirs of the body of the wife and of the body of the husband to be begotten, it had been tail in both.—S. R. 2. tail 32. Gift to the husband and wife and to the heirs of their bodies issuing, and if the wife obierit sine hæredibus, yet tail in both. 12. E. 3. Variance 77. 9. E. 3. 64. ibid. 93. Land given to husband and wife and to the heirs of the body of the husband, and if husband and wife obierit sine hæredibus inter eos procreatis, remainder over; yet it is tail general in the husband only.—Land given to the husband and wife and to the heirs of the husband of the body of his wife to be begotten; it is only tail in the husband. Hic sect. 29. Yet if gift be to the husband and wife and to the heirs of the body of the wife by the husband to be begotten, the tail is only in the wife. His heirs appropriate in the first case, of the body in the second case.—Hal. MSS. But where the gift is to the wife only, and to the heirs of the body of the husband, then the tail is not in either, of which lord Hale gives the following case as an instance.—Nota P. 1651. Sir Leventhorpe Franck's case. Land given to the wife for life, remainder to the heirs of the body of the husband on the body of the wife to be begotten. Ruled, that it is not tail executed omnino in the wife, but a contingent remainder in the heir of the husband's body, it being limited to the heirs of the husband's body; and that as the wife died in the life of her husband, the remainder was void. Hal. MSS.—The same case is reported by the name of Gossage and Tayler in Styl. 315. but there the remainder is differently expressed; for it is not to the heirs of the bodies of both in direct terms, but it is to the use of the heirs to be begotten upon the body of Susanna by Leventhorpe her husband; which most probably were the words of the remainder; for Glyn's argument in favour of the wife's having an estate tail appears to have been founded on the remainder's not pointing expressly to the heirs of either.—After Sir Leventhorpe Franck's case, lord Hale puts a *quære*, and then adds—V. 3. E. 3. Formedon 8. Land given to I. S. et uxori suæ quam postea desponsaverit et hæredibus de corporibus eorum; the wife takes nothing because not known at the time; but it is a tail in the husband. Yet nota, hæredibus de corporibus; if the wife had taken an estate, it had been a tail in both. Hal. MSS. According to this case the tail is in the husband, though the wife takes no estate and the tail is expressly to the heirs of the bodies of both. But this is more than was contended for by the counsel for the wife's estate tail in Gossage and Tayler, who admitted the contrary to have been settled by the case in Dy. 99. pl. 64. and by Lane and Pannell, which is in 1. Ro. Rep. 238. 317. and 438. See also contra post sect. 352. and the case of Frogmorton on the demise of Robinson against Wharrey in Will. vol. 2. page 125. and 144. where on a surrender of copyhold lands to A, whom the surrenderer intended to marry, and to the heirs of their two bodies, it was adjudged, that the wife took for life with a contingent remainder to the heirs of the bodies of her and her husband.

then as words of limitation; and as in the latter case the heir female by purchase must be the heir at common law, and the heir by descent must, by a special heir, according to the course of descent prescribed by the donor, so in the former case the heir by purchase is the heir at common law, and the heir by descent is the heir special according to the custom.—But the authorities of the

third

Sect. 29.

20. H. 6. 36.
[1] 1. Co. fol. 140. b.
Chudleigh's case adjuge.
(7. Co. 41.)

THIS is evident by that which hath been said, and needeth no explanation. But it hath been said, [1] that if a man give land to another and to his heires of the body of such a woman lawfully begotten, that this is no estate taile for the uncertainty by whom the heires shall be begotten; for that the brother of the donee or other cousin may have issue by the woman, which may be heire to the donee, and estates in taile must be certaine. Therefore our author to make it plaine in all his cases added to these words (his heires) which he shall ingender. But that opinion is, since our author wrote, over-ruled, and that estate adjudged to be an estate taile, and begotten shall be necessarily intended begotten by the donee (1).

ITEM si terre soit done a un home et a ses heires, que il engendra de corps sa feme, en ceo case le baron ad estate en especial taile, et la feme nad riens.

ALso if land be given to a man and to his heires, which he shall beget on the body of his wife, in this case the husband hath an estate in especial taile, and the wife hath nothing.

Sect. 30.

(Ante 20. b.)

SI home ad issue fits et devie, &c.

John de Mandevile by his wife Roberge had issue Robert and Mawde. Michael de Morevill gave certaine lands to Roberge and to the heires of John Mandevile her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee taile vested in Robert (heires of the body of his father being a good name of purchase), and that when he dyed without issue, Mawde the daughter was tenant in taile as heire of the body of her father per formam doni (2), and the formodon which she brought supposed,

Quod post mortem prefata Robergie et Roberti filii et heredis ipsius Johannis Mandeville et heredis ipsius Johannis de prefata Robergia per prefatum Johannem procreat, prefat Matilda filia prefati Johannis de prefata Robergia per prefatum Johannem procreata sorori et heredi prefati Roberti descendere debet per formam donationis prefati. And yet in truth the land did not descend unto her from Robert (3), but because she could have no other writ, it was adjudged to be good. In which case it is to be observed, that albeit Robert being heire tooke an estate taile by purchase, and the daughter was no heire of his body at the time of the gift, yet she recovered the land per formam doni, by the name of heire of the body of her father, which notwithstanding her brother was and he was capable at the time of the gift; and therefore when the gift was made she tooke nothing, but in expectancy, when she became heire per formam doni. But where a man by deede gave lands to Emme late wife of John Master, habendum et tenendum prefati Emme et hereditibus Johannis Master de corpore ejusdem Emme procreat, in that case the sonne and heire of John Master begotten on the body of Emme took no estate with Emme in the lands; because he was named after the habendum (4).

If a man hath issue two daughters, and dieth seised of two acres of land in fee simple, and the one coparcener giveth her part to her sister, and to the heires of the body of her father, in this case the donee hath an estate taile in the moiety of the donor's part, for the donee is not entire heire but the donor is heire with the donee, and she cannot give to the heires of her owne body, and the donee hath the other moiety of her sister's part for life. If a man hath issue a sonne and a daughter, and dieth, and land is given to the daughter and to the heires females

of

(1) So gift to A and the heirs which her husband shall beget of her body is tail in the wife; and yet it is not said her heirs nor heirs of her body. 41. E. 3. 24. Hal. MSS.—(2) Nota, in Littleton's case the son takes by purchase, and in Mandevile's case he takes by purchase jointly with the mother. But if the gift had been to Roberge and to the heirs of her body by the husband begotten, or to the heirs of her body and of the body of the husband begotten, it seems tail only in the wife. Quære and vid. 12. H. 4. 102. by Thirninge, Litt. sect. 352. and 1. Rep. Shellie's case. 104. Hal. MSS.—(3) And therefore though Maud had been of the half blood, he should have taken. Hic Hodgkinson's case cited fol. 14. sect. 6. M. 30. 31. Eliz. B. R. Morris and Maule W. Vid. H. 31. W. n. 23. Hal. MSS.—See ante fol. 14. a. n. 6.—(4) Where one named after the habendum shall take.—H. 13. Jac. Brookes and Brookes. In customary grant by copy, one not named in the premises, being named in the habendum, may take a present estate. Venit I. S. et cepit de domino habendum to him and his wife is good.—In frank-marriage a wife shall take, though named only in the habendum. Hic sect. 17. 4. E. 3. 4. 5. E. 3. 17. Brief 703.—So it seems in render by fine to B habendum to B and C his wife. 8. E. 3. 31. 24. E. 3. 58.—So by a deed by way of remainder, a stranger to the deed, though not named in the premises, shall take. Hic fol. 183. sect. 283. 8. E. 3. 50. But otherwise regularly one shall not take a present interest jointly with another, unless he be party to the deed and named in the premises. 8. B. 2. Feofments hic fol. 378. sect. 721. 3. H. 6. 18. 27. 16. E. 2. Ass. 371. Trin. 16. Jac. rot. 1089. Greenwood and Tyler. Hob. 314. But if by deed indented or poll A grants the manor of S habendum to B et hereditibus, it is good though he was not named in the premises. Hal. MSS.—See the case of Brookes and Brookes cited by lord Hale in Cro. Jam. 434. and 2. Ro. Abr. 66. 67. and Vin. Abr. Grant K. a. in which two last books there are many other cases relative to the same subject. See further ante 7. a. where lord Coke writes, that if A gives land to hold to B and his heirs it is good, though he is not named in the premises, to which lord Hale adds—But gift in the premises to A habendum to A and B is void as to B. M. 25. Eliz. Ow. Vid. ante 6. a. Plowd. Comment. 156. Throgmorton's case. Hal. MSS. See also ante where lord Coke describes the office of the habendum, on which lord Hale gives the following annotation.—It is not necessary to repeat the thing granted, it being sufficient that it is named in the premises. H. 44. Eliz. B. R. Hill and Giles adjudged. One not named in the premises shall not take by the habendum, unless first, in case of frankmarriage, hic sect. 17. Secondly, in case of grant by copy. T. 15. Jac. B. R. Brooke's case. Cro. Jam. 434. Thirdly, in case of a remainder. Lease to husband and wife habendum to the husband for 10 years; the wife takes nothing. T. 31. El. Mo. So lease of the site of a rectory and all tithes appertaining to it habendum the site cum pertinen' for 20 years the tithes pass only at will. H. 28. El. Mo. 222. Cary's case. Grant to A and B, habendum to A for years, remainder to B for years, is good; but lease of two acres to A and B, habendum one acre to A for years, the other to B for years, is bad. T. 4. Eliz. Vid. Hob. 172. Hal. MSS.—See contra to this last case. Mo. 26. by Brown arguendo. For other instances of differences between the premises and habendum, particularly where the former has been joint and the latter several, see Mo. 43. 247. 880.

third kind are those, which occur in respect to gifts to heirs male or female, and therefore apply more closely. Of these the earliest is John Faringdon's case. 9. H. 6. 23. and 11. H. 6. 12. in which one question was, whether a great grandson could take by purchase.

of the body of the father, she taketh but an estate for life; because she is not heire female to take by purchase as before hath been said.

Et a les heires de corps le pier. These words (*les heires*) are observable; for if they were (*ses heires*) it cleerly altereth the case. And therefore, if lands be given to the sonne and to his heires of the body of his father, the sonne cannot take as heire of the body of his father, because the grant is to him and to his heires, &c. and consequently he hath a fee simple⁽¹⁾. But if there be grandfather, father and sonne, and the father dieth, and lands be given to the sonne, and to the heires of the body of the grandfather, this is a good estate taile in the sonne; so as Littleton did put his case of the father but for an example⁽²⁾.

(Ante 20. b. Post 220. a.)

Et mults auters estates en le taile y sont, &c. This needeth no explanation.

Sect 31.

MES si home done terres ou tenements a un auter, a aver et tener a luy et a ses heires males, ou a ses heires females, il, a que tiel done est fait, ad fee-simple, pur ceo que n'est my limit per le done de quel corps l'issue male ou female issira, et issint ne poit en aucun maner estre prise per lequitie del dit estatute, et pur ceo il ad fee simple.

BUT if a man give lands or tenements to another, to have and to hold to him and to his heires males, or to his heires females, he, to whom such a gift is made, hath a fee simple; because it is not limited by the gift, of what bodie the issue male or female shall be, and so it cannot in any wise be taken by the equity of the said statute, and therefore he hath a fee simple.

TERRES ou tenements. This rule extendeth but to lands or tenements, and not to the inheritance that noblemen and gentlemen have in their armories or armes. For where the nobleman or gentleman hath a fee simple in his armories or armes, yet is the same descendible to the heires males lineall or collaterall. For albeit a female be heire at the common law, yet the shield, armories and armes descend unto them that are able to beare them (farre exceeding the nature of Gavelkind, but with several differences.) And all the females of that family in respect that they be of the same blood, may in a losenge or under a curtaine manifest of what family they

(Ante 13. b. P. 63. b.)

be by expressing the armories and armes belonging to that family, and the husband of them may impale them or quarter them with their owne as the case shall require. And for distinction and better explanation hereof. If the king by his letters patents giveth lands or tenements to a man, and to his heires males, the grant is void; for that the king is deceived in his grant, in as much as there can be no such inheritance of lands or tenements as the king intended to grant. But if the king for reward of service granteth armories or armes to a man and to his heires males without saying (of the body), this is good, and as hath been said, they shall descend accordingly⁽³⁾.

13. H. 8. tit. Patents. Br. 104.
(1. Co. 43. b. 26. b. Mo. 424.
Cro. Eliz. 478.)

If a man by his last will devise lands or tenements to a man and to his heires males, this by construction of law is an estate taile, the law supplying these words (of his bodie)⁽⁴⁾. *Vide* the Prince's [1] case, where it appeareth that an act of parliament may limit an inheritance of lands or tenements, otherwise then common law would doe, and create a new estate of inheritance, and many authorities in law there cited worthy of note and observation. *Rot. Parliam. anno 1. E. 4. nu. 26. (5)*. The [u] duchie of Lancaster is intailed to king Edward the Fourth and his heires kings of England. And king Henry the sixth did by his letters patents grant, *Johanni filio Johannis Talbot, quod ipse et haeredes sui Domini manerij de Kingston Lisle in comitatu Berk. ex nunc Domini et Barones de Lisle Nobiles et Proceres regni habebantur, teneantur, et reputentur, &c.* By this he had a fee simple qualified in the dignity⁽⁶⁾. 2. *H. 5. fol. 1.* A grant was made to a man, and to his heires tenants of the manor of Dale⁽⁷⁾. A man seised of lands in Gavelkind, gives or devises the same to a man and to his eldest heires. He cannot hereby alter the customary inheritance, but as in the case of our author,

27. H. 8. 27.

[1] 8. Co. 1. The Prince's case.
21. E. 3. 4. 22. E. 3. 3. 24. E. 3. 53. 9. H. 6. 25. 9. E. 4. 15.
1. Marie Dier. 94. (7. Co. 41)
[2] Per literas patentes auctoritate parliamenti.

(3. Co. 20. 21.)

(1) Yet gift to A and his heirs of the body of B his wife, who is dead, is tail. 12. H. 4. 1. Rationem diversitatis quære, for the second son is his heir of the body of the father. Hal. MSS.—(2) Vid. Dy. 24. 247. 274. 157. 394. for the form of the writ. Hal. MSS.—(3) See further as to the descent of Arms p. 140. b. See also on the subject of Arms in general, Dugd. Ant. Usage in bearing of Arms and several pieces in Hearn. Antiq. Disc. 2d ed. vol. 1.—(4) Dy. 116. Hal. MSS. See further lord Offulton's case. 3. Salk. 336. and 11. Mod. 189. See S. C. cited 2. P. Wms. 2. and in Vin. Abr. Devise U. b. pl. 2. in Marg.—(5) In the case on the title to the earldom of Oxford decided in parliament 1. Cha. 1. the judges held, that a limitation of the earldom to Awbrey de Vere and his heires males, being by act of parliament, was sufficient to raise a fee simple descendible to males only. See W. Jo. 100.—(6) Lord Hale adds the following instances of special limitations. King Henry the Third dedit manerium de Penreth et Sourby Alexandro regi Scotie et haeredibus suis regibus Scotie; and Alexander having daughters, of which one was married to the earl of Hunt. died, not having any heir king of Scotland, et ea de causa King E. 1. recovered seisin, and the co-heirs of Alexander were excluded. Lib. parl. E. 1. 134. 308. The hospital of Saint Katharine was founded by queen Eleanor, wife of Hen. 3. reserving the patronage sibi et reginis Anglie pro tempore existentibus et eo titulo regina Philippa uxor E. 3. habet patronatum. Claus. 7. E. 3. parte 2. m. 2. Hal. MSS.—(7) See further as to a qualified fee ante 1. b. and the books cited in n. 5. there.

purchase under a remainder devised to the testator's next heir male and the heirs male of his body, the great grandson's mother, who was the testator's heir general, being alive when the estates precedent to the remainder determined. The case was argued twice, but there is an adjournment in the Year Book, and what was the opinion of the court is not any where mentioned; but there is reason for supposing, that it was against the remainder; for in 20. H. 6. 44. Newton, then a judge, though he had before argued as counsel for the remainder in Farringdon's case, lays it down as clear law, that if land is given to A for life, remainder to the right heirs male of the body of B, to hold to them and their heirs for ever, the son of a daughter of B, being his heir, may take notwithstanding he makes out his description through a female; and Fortescue, chief justice, assents to the position. This construction of heirs male of the body as words of purchase, being attended to, will be found almost necessarily to be a clear authority with lord Coke; for it shews, that as words of purchase they describe males being also heirs general, whereas as words of limitation it is agreed they have a different import, and signify such males as shall be heirs special according to the particular course of descent marked out by the donor, though they do not happen to be heirs general; which distinction is the whole amount of lord Coke's doctrine. But the next authority, which is in Bro. Abr. Done. 61. applies more directly. There lord Brooke, after mentioning the difference taken by Ellerker in Farringdon's case between descent and purchase, adds in confirmation of it, that by Hare, master of the Rolls, an antient apprentice, there is a difference between a gift in possession to a man and his heirs female, &c. and a gift to a stranger the remainder to the heirs females of another, for there heirs in deed must be when the remainder falls, and otherwise the remainder is void for ever. The same doctrine is in Plowd.

Lib. I. Cap. 3. Of Tenant in taile, &c. Sect. 32.

Mich. 26. & 27. Eliz. in Com. Banco. Leonard Lovelace's case.

thor, *Ut res magis valeat*, the law rejecteth (Males) so in this case the law rejecteth this adjective (eldest). And so it is if lands be given to a man, and to the eldest heires females of his body, yet all the daughters shall inherit as it hath been resolved.

[x] 18. Aff. p. 5. 18. E. 3. 46. 6. (Not so in the king's case.) 9. H. 6. 23. 25. 8 Co. fol. 1. The Prince's case. Ancient tenures, fol. 3.

Et issint ne poet estre prise per lequitie del dit statuti, &c. For it is a certaine rule in law, that in every estate in taile within the said statute, it must be limited either by expresse words or by words equipollent of what body the heire inheritable shall issue. And it was [x] adjudged in parliament, that where lands were given to a man, and to his heires males, that this was a fee simple, and that as well the heires females as heires males should inherit, for the grant of a subject shall be taken most strongly against himselfe.

Et pur ceo il ad fee simple. Littleton's reason being shortly collected is this. Whosoever hath an estate of inheritance, hath either a fee simple or a fee taile; but where lands be given to a man and his heires males, he hath no estate taile, and therefore he hath a fee simple.

What actions tenant in taile may have and cannot have, vide Sect. 595. What great alterations have been made since Littleton wrote concerning not only leases to be made by tenant in taile, but barres also of the estate taile itselfe by force of certaine acts of parliament made since Littleton's time, you shall read Sect. 56. and 708. (1).

CHAP. 3. Sect. 32.

Tenant in taile apres possibilitie diffue extinct.

(Dr. & Stud. b. 2. c. 1.)

(4. Co. 63. 1. Ro. Abr. 296.)

[a] Temps E. 1. wast. 125. 59. E. 3. 16. 31. E. 3. aid. 35. 42. E. 3. 22. 43. E. 3. 1. 45. E. 3. 22. 28. E. 3. 96. 46. E. 3. 13. 27. 2. H. 4. 17. 7. H. 4. 10. 11. H. 4. 10. 21. H. 6. 56. 10. H. 6. 1. 26. H. 6. aid 77. 3. E. 4. 11. 13. E. 2. Entre Conge. 56. Fitz. N. B. 203. Lewes Bowle's case, 11. Co. fol. 8.

(Cre. Eliz. 671.)

LITTLETON having spoken of estates of inheritance, viz. fee simple and fee taile, now he treateth of tenants of freehold *tantum*, that is, for terme of life, and therein first of tenant in taile after possibility of issue extinct; and he giveth unto him the first place, because this tenant hath eight qualities and privileges which tenant in taile himselfe hath, and which lessee for life hath not. [a] As first he is punishable for waste (2). Secondly, he shall not be compelled to attorne. Thirdly, he shall not have ayde of him in the reversion. Fourthly, upon his alienation, no writ of entrie in *consimili casu*, lyeth. Fifthly, after his death no writ of intrusion doth lie. Sixthly, he may joine the mise in a writ of right, in a speciall manner. Seventhly, in a *Præcipe*, brought by him he shall not name himselfe tenant for life. Eighthly, in a *Præcipe* brought against him he shall not be named barely tenant for life. And yet he hath four other qualities, which are not agreeable to an

TENANT en fee taile apres possibilitie diffue extinct *est, lou tenements sont dones a un home et a sa feme en especiall taile, si lun de eux devy sans issue, celui, que survesquist, est tenant en taile apres possibilitie diffue extinct. Et s'ils avoient issue, et lun de vie, coment que durant la vie l'issue, celui que survesquist ne serra dit tenant en taile apres possibilitie diffue extinct; uncore, si l'issue devy sans issue, issint que ne soit aucun issue en vie que poit enheriter perforce de le taile, donque celui, que survesquist,*

TENANT in fee taile after possibilitie of issue extinct is, where tenements are given to a man, and to his wife in especiall taile, if one of them die without issue, the survivor is tenant in taile after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in taile after possibilitie of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the taile, then the surviving party of the donees

(1) By what acts tenant in tail may prejudice his issue or those in remainder or reversion without fine or recovery, and where his acts shall not affect them, see Vin. Abr. *Estate* F. a. to I. a. and Tayle D.E.F.—(2) See acc. 2. Inst. 302. But yet he cannot have action of waste against another, for he cannot count *ad exheredationem*; and it is said, that tenant in tail loses his action of waste, if he becomes tenant in tail after possibility of issue extinct pending the writ. See Bro. Abr. *Waste* pl. 14. 59, 60. 2. Ro. Abr. 325. pl. 5. Mo. 18. and post 53. b. Note also that it is said, that though such tenant is not punishable for waste, yet if he cuts down trees, they are not his property. 4. Co. 63. As to this difference between being punishable for waste in felling trees and having the property in them, see 1. P. Wms. 528. See also 2. P. Wms. 241. where it is said by the court, that if tenant for life cuts down timber, it belongs to those, who at the time of its being severed were seized of the first estate of inheritance.

Quær. 87. and 133. and the very learned author illustrates it by a case, the same as that stated by lord Coke. In Quær. 87. the words of the book are, *If a remainder is appointed to the right heirs female of the body of I. S. who dies, having a son and daughter, the remainder shall be void; because the daughter cannot have it, in regard that she is not heir though she be female.* The next authority is Shelley's case, which arose between the second son of Edward Shelley and a posthumous son of Edward's deceased eldest son. One point was, whether the second son could take by purchase, under a remainder to the heirs male of Edward's body, and the heirs male of the bodies of such heirs male, in which case his estate would not have been devolved by the birth of the posthumous son of his brother, the eldest son having left a daughter, who at Edward's death was his heir general. Judgment was given against the second son; but from the report of lord Coke and More, it seems not to have been absolutely requisite to have decided whether the second son could take by purchase; for the judges held, that on account of the preceding use for life to Edward, the remainder operated as words of limitation, though Edward died before the use to him could arise, and that so the second son took in course and nature of a descent, till the birth of his brother's posthumous son, who then became intitled. See Mo. 140. and 1. Co. 106. However, lord Dyer in his report of the case places the remainder in both points of view, and besides observing that by descent the second son could only take the remainder till the birth of his elder brother's posthumous son, also says, that he could not have it as a purchaser, because he was not heir of the body of his father, for the daughter of the eldest son was heir general, and the second son was not heir male of the body of his father unless he was heir as well as male. These words from lord Dyer, when it is considered that he was one of the judges on whose opinion Shelley's case was decided, and that they are introduced to explain the reason of the judgment, are very strong evidence, that the judges in Shelley's case gave their sanction to lord Coke's doctrine in the full extent of it, that is, in the case of a gift where heirs male of the body were both words of purchase and of limitation; and lord Dyer's authority ought to have the greater weight, because he is not contradicted by any other report of the same case; not even by lord Anderson, who was counsel for the second son, for he only takes notice of lord Coke's

ACCOUNT

de les donees est tenant en le taile apres possibilitie diffue extinct.

nees is tenant in taile, after possibilitie of issue extinct.

estate in taile, but to a bare lessee for life. [b] (1) First, if he maketh a feoffment in fee, this is a forfeiture of his estate (2). Secondly, if an estate in fee, or in fee taile, in reversion,

[b] 13. E. Entre Cong. 56. 44. E. 3. 22. 28. E. 3. 96. 27. Aff. p. 60. F. N. B. 159. 32. E. 3. tit. 28. 55. 55. E. 3. 4. 9. E. 4. 17. 2. R. 2. 1. 1. 147. 41. E. 3. 12. 20. E. 3. 1. 1. 38. E. 3. 33. Lewes Bowles' case ubi supra.

or remainder, descend or come to this tenant, his estate is drowned, and the fee or fee taile executed. Thirdly, he in the reversion or remainder shall be received upon his default, as well as upon bare tenant for life (3). Fourthly, an exchange between a bare tenant for life and him is good, for their estates in respect of their quantity are equal; so as the difference standeth in the quality, and not in the quantity of the estate. And as an estate taile was originally carved out of a fee simple, so is the estate of this tenant out of an estate in especiall taile. And he is called tenant in taile after possibilitie of issue extinct; because by no possibility he can have any issue inheritable to the same estate taile. But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them be C. yeere old, and have no issue, yet do they continue tenant in taile; for that the law seeth no impossibilitie of having children. But when a man and his wife be tenant in especiall taile, and the wife dieth without issue, there the law seeth an apparent impossibility, that any issue that the husband can have by any other wife should inherit this estate. And let this tenant keep his estate, for he hath these privileges in respect of the privacy of his estate, and of the inheritance that was once in him. [c] For in the case of Evens (4), Mich. 28 & 29. Eliz. it was adjudged, that where tenant in taile after possibilitie of issue extinct granted over his estate to another, that his grantee was compelled to attorne in a *quid juris clamat* (5), as a bare tenant for life, and so be named in the writ; for by the assignement the privacy of the estate being altered, the privilege was gone; and this judgement was affirmed in a writ of error, and herewith agreeth 27. H. 6. tit. aid. 29. E. 3. 1. b(6). Statham 29. E. 3. 1. b(6).

[c] 11. Co. fol. 83. Lewes Bowles' case. (Post. 316.) 27. H. 6. tit. aid. Statham. 29. E. 3. 1. b.

27. H. 6. tit. aid. 29. E. 3. 1. b.

Sect. 33.

ITEM si tenements sont donees a un home et a ses heires, que il engendra de corps sa feme, en cest cas la feme nad ryen en les tenements, et le baron est seisie comme donee en speciall taile. Et en ceo cas, si la feme devy sans issue de son corps engendres per son baron, donques le baron est tenant en taile apres possibility diffue extinct.

ALSO if tenements be given to a man and to his heires which he shall beget on the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband is seised as donee in especiall taile. And in this case if the wife die without issue of her body begotten by her husband, then the husband is tenant in taile after possibility of issue extinct.

SI la feme devy sans issue.

So as Lewes Bowles' case 13. Co. fol. 80. the estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of a man and his wife for tearme of their lives, and after to the use of their next issue male to be begotten in taile, and after to the use of the husband and wife, and of the heires of their two bodies begotten, they having no issue male at that time; in this case the husband and wife are tenants in speciall taile executed (7), and after they have issue a sonne, in this case they are become tenants for life, the remainder to the sonne in taile, the remainder to them in speciall taile (8), for albeit their estate

taile is turned to an estate for life, yet they have but a bare estate for life; but if the issue die, and the husband die having no other issue, and then the sonne die without issue, the wife shall have the privileges belonging to a tenant in taile after possibility of issue extinct, as it appeareth in Lewes Bowles' case *ubi supra*, where it is said, that the state of this tenant must be created by the act of God, and not by limitation of the party, *ex dispositione Legis*, and not *ex provisione hominis* [d]. If land be given to a man and to his wife, and to the heires of their two bodies, and after they are divorced *causa pracontractus* or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life, and albeit they had once an inheritance in them, yet for that the estate is altered by their owne act, and not by the act of God, viz. by the

[d] 7. H. 4. 16. 8. E. 1. Aff. 415. 12. Aff. 21. 19. Aff. p. 2. 13. E. 3. Aff. 91. in fine. (9. Co. 140. 141. 7. Co. 42. b. Kenne's case. and 4. Co. 29.)

(1) 43. Aff. 24. Hal. MSS.—(2) *So if he mispleads*, 39 E. 3. 16. Hal. MSS.—(3) 28. E. 3. 96. Contra as to receipt Hal. MSS.—(4) M. 26. 27. Eliz. B. R. Leon. T. 29. Eliz. Clench 88. Evans and Aprichard. Hal. MSS. See Aprice's case, 2. Leon. 40. 3. Leon. 241. which seems to be the case referred to by lord Coke and lord Hale. The anonymous case in 1. Leon. 290. and 3. Leon. 121. seems also to be the same case.—(5) 28. E. 3. 96. *Grantee has the privilege*. Hal. MSS. But see the reasons for the judgment cited by lord Coke in the books cited in note 4.—(6) *Quære if punishable for waste*. Hal. MSS. See 2. Inst. 302.—(7) Cordall's case Cro. Eliz. 315. is to the contrary; for there land was devised to A for life, remainder to his first and other sons in tail male, remainder to the heirs of A's body, and according to Croke, who mentions the case as reported to him by lord Coke, it was resolved, that A's estate tail was not executed for the possibility of the mean estate's interposing, but was so disjoined during A's life, that his wife could not be endowed. But see Cal. B. R. temp. Hardw. 17. where lord Hardwicke says, that Cordall's case has been several times denied to be law.—(8) *Sic nota remainder supported, without particular estate, by the possibility that issue may be born. But if such tenant levies a fine, now this remainder is destroyed, because the estates are confounded*. Hal. MSS.—Here it is proper to add, that there is a difference between subjoining the inheritance to the particular estate by the same conveyance as limits the intermediate contingent remainder, and an accession of one to the other by a distinct and subsequent act or conveyance; for in the latter case the contingent remainder is destroyed, though not in the former. See acc. Puresoy and Rogers 2. Saund. 380. It has even been adjudged, that in the latter case the descent of the inheritance on the person having the particular estate will destroy the contingent remainder, where the descent has been subsequent to the commencement of the particular estate. See Kent, and Harpool. 1. Ventr. 306. T. Jo. 76. Hooker and Hooker Cal. in B. R. temp. Hardw. 13. But a descent of the fee on tenant for life will not hurt the contingent remainder, where the particular estate and the descent take place at the same time, and are derived from the same person; as where land is devised to A for life, remainder over on a contingency, and at the devifor's death the reversion descends upon A as his heir. See acc. Archer's case 1. Co. 96. Plunkett and Holmes 1. Lev. 111. and Boothby and Vernon 9. Mod. 147. The case of Wood and Ingersole Cro. Jam. 260. seems contra; but see the observation on the last case in T. Jo. 79. and Pollexf. 481. It would be a great omission not to apprise the student, that the subject of this note is fully gone into by Mr. Fearne in his Essay on Contingent Remainders. See page 111. to 118. of the second edition, where the author most learnedly and ingeniously states the several distinctions, explains the reasons on which they depend, and endeavours to reconcile all the cases on this nice subject.

account of the reasons of the judgment, by observing that they were not mentioned in court. See 1. And. 71. Accordingly Mr. Serjeant Rolle cites Shelley's case as having determined the point. See 2. Ro. Abr. 416. F. pl. 5. Affenhurst's case. Mich. 7. Jam. is the next authority, and in that land was devised to executors till 900l. should be raised for the preferment of the testator's

(1. Ro. Abr. 841.)

the death of either party without issue, they are not tenants in taile after possibility, of issue extinct (1). Lands are given to the husband and wife, and to the heires of the body of the husband, the remainder to the husband and wife, and to the heires of their two bodies begotten; the husband dies without issue; the wife shall not be tenant in taile after possibility, for the remainder in speciall taile was utterly void, for that it could never take effect; for so long as the husband should have issue, it should inherit by force of the generall taile, and if the husband die without issue, then the speciall estate taile cannot take effect, in as much as the issue, which should inherit the especiall, must be begotten by the husband, and so the generall, which is larger and greater, hath frustrated the especiall which is lesser. And the wife in that case shall be punished for waste.

Sect. 34.

IF lands be given to a man with a woman in frankmarriage, albeit the woman (which was the cause of the gift) dieth without issue, yet the husband shall be tenant in taile, *apres possibility*, &c. for that he and his wife were donees in especiall taile, and so within the words of Littleton. The residue of this section is evident.

ET nota que nul peut estre tenant en le taile apres possibility diffue extinct, forsque un des donees, ou le donee en le special taile. Car le donee en general taile ne peut estre unque dit tenant en taile apres possibility diffue extinct; pur ceo que tous temps durant sa vie, il peut per possibility aver issue que peut inheriter per force de mesme le taile. Et issint en meme le manere lissue, que est heire a les donees en un especial taile, ne peut estre dit tenant en taile apres possibilitie diffue extinct, causa qua supra.

AND note that none can be tenant in taile after possibility of issue extinct, but one of the donees, or the donee in especiall taile. For the donee in general taile cannot be said to be tenant in taile after possibility of issue extinct; because alwaies during his life, he may by possibility have issue which may inherit by force of the same entaile. And so in the same manner the issue, which is heir to the donees in especiall taile, cannot be tenant in taile after possibility of issue extinct, for the reason abovesaid.

(Dr. and Stud. 61. 11. Co. 80.)

* This, and that which follows, is not in the first (2) edition (which I have.) And therefore, (that I may speake it once for all) it was wrong to the authour to adde any thing, (especially in one context) to his worke.

* *Et nota que tenant en taile apres possibilitie diffue extinct ne serra unque puny de wast, pur lenheritance que fuit un foits en luy, 10. Hen. 6. 1. Mes cestuy en le reversion peut entrer sil alien en fee, 45. E. 3. 22.*

And note that tenant in taile after possibility of issue extinct shall not be punished of waste, for the inheritance that once was in him. 10. H. 6. 1. But he in the reversion may enter if he alien in fee, 45. E. 3. 22.

CHAP.

(1) *Husband and wife tenants in special tail; the husband was attainted of treason, or levies fine with proclamations; the husband dies having issue by the wife: the issue cannot inherit, and yet to many purposes the wife surviving is tenant in tail after possibility, for if she makes lease for 21 years according to the statute, it shall bind the devisee, or if it is for three lives, it shall not be a forfeiture.* H. 21. Jac. Rot. Crocker and Kelsey. Hob. Rep. Melton's case. Vid. 9. Rep. Beaumont's case. It seems, she cannot suffer recovery after. Quære. Vid. this case of Beaumont afterwards debated. H. 13. Cha. B. R. in Baker and Willis Cro. Cha. 476. The case of Crocker and Kelsey is in W. Jo. 60. Hutt. 84. Cro. Jam. 688. Bridgm. 27. 2. Ro. Rep. 490. 498. 1. Ro. Abr. 843. pl. 3. and O. Bendl. 139. 143. Beaumont's case is in 9. Co. 138. b. and Melton's case is in Hob. 254. Note, that in the case of Crocker and Kelsey, the question was on the operation of a lease for 21 years not warranted by the 32. H. 8. the ancient rent not having been reserved; but the issue in tail having levied a fine during the wife's life, it was adjudged that the lease was good; but it was to have been agreed, that the wife, notwithstanding the husband's death, was tenant in tail so as to be capable of making leases within the statute. Indeed this latter point had been adjudged in a former case, which is in Godb. 102. See too 4. Leon. 57. As to the former point, besides the books already cited, see 2. Sid. 62. — (2) By the first edition, lord Coke means that printed at Rohan, as appears by the preface to this his Commentary on Littleton. But the edition by Letton and Machlinia, which was really the first, is also without the addition here mentioned. It appears to have been first introduced into the edition by Redman. — See further as to the subject of tenant in tail after possibility. Vin. Abr. Tayle, I.

testator's three daughters, and afterwards to his right heirs males for ever, and one Beard was found by special verdict to be the heir male; but the court of king's bench held that he could not take the remainder, because the three daughters were the heirs general, and in Easter 17. James the judgment was affirmed in the exchequer chamber. This case is the stronger, because it arose on a will, and the testator, in the devise to his heirs male, mentions his heirs general, which no doubt was urged as a circumstance to shew that the testator meant a special kind of heir, and might have warranted a departure from the strict sense of heir without overturning lord Coke's general rule. See Hob. 34. and Palm. 50. Counden and Clerke already stated from lord Hobart at the beginning of this note, is another case where a devise to heirs male could not take effect, because the heirs general were females; and this judgment appears to have been also affirmed on error in B. R. See Jenk. Cent. 294. There are several modern determinations to the same purpose. In Southcott and Stowell, which was adjudged about the 29. of Cha. 2. one having two sons covenanted to stand seized to the use of the eldest in special tail male, remainder to the heirs male of the covenantor, or according to one report of the case the heirs male of his body, and for want of such issue to his own right heirs. The eldest son dies leaving a son and daughter; the covenantor dies, and then the son of the covenantor's eldest son; and the question was whether the second son or the daughters of the eldest son should have the estate. The court determined in favour of the second son, because the grandson survived the grandfather, and being heir general as well as male could take either by purchase or descent on his death, and therefore it was immaterial whether an estate for life arose to the covenantor by implication or not; but it was agreed by the whole court, and even by the counsel for the second son, that if the grandson had not survived, the second son could not have taken by purchase, because his nieces would have been heirs general, and consequently he could not have been complete heir. See 1. Freem. 216. 225. 1. Mod. 226. 237. 2. Mod. 207. and 3. Kebl. 704. In 1695 lord keeper Somers, in the case of Starling and Elrick, decreed against one, who claimed to take by purchase under a devise to heirs male, because a female was the heir general. See Prec. in Chanc. 54. The case of Ford and lord Ossulton, which was determined in Mich. 7. Ann. by the king's bench is still stronger, for in that one

CHAP. 4. Sect. 35.

Curtesie Dengleterre.

TENANT per la curtesie Dengleterre est, lou home prent feme seise en fee simple ou en fee taile general, ou seise come heire de le taile special, et ad issue per mesme la feme male ou female, oyes ou vife (1), soit lissue apres mort ou en vie, si la feme devie, le baron tiendra la terre durant sa vie, per la ley Dengleterre. Et est appel tenant per le Curtesie Dengleterre, pur ceo que ceo est use en nul auter realme, forsque tantsolement en Engleterre.

Et ascuns ont dit, que il ne serra tenant per le curtesie, si non que lenfant, quil ad per sa feme, soit oye crie, car per le crie est prove que le enfant fuit nee vife: Ideo

TENANT by the curtesie of England is, where a man taketh a wife seised in fee simple or in fee taile generall, or seised as heir in taile especiall, and hath issue by the same wife, male or female borne alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England And he is called tenant by the curtesie of England, because this is used in no other realme but in England onely.

And some have said, that he shall not be tenant by the curtesie, unlesse the childe, which he hath by his wife, be heard crie; for by the crie it is proved, that the child was borne alive. Therefore Quære.

Quære (2).

At the coronation of king R. 2. saith the record, [b] *Johannes rex Castilie et Legionis Dux Lancastrie, coram dicto domino rege et consilio suo comparens, clamavit ut comes Leicestrie officium Seneschalci Anglice, et ut dux Lancastrie ad gerendum principalem gladium domini regis vocat* Curtana die coronationis ejusdem regis, et ut comes Lincoln' ad sciendum et secandum coram ipso domino rege sedente ad mensam dicto die coronationis; et quia fact' diligenti examinatione coram peritis de consilio regis de premissis, satis constabat eidem consilio, quod ad ipsum ducem tanquam tenentem per legem Anglice post mortem Blanchie quondam uxoris sue pertinuit officia predicta prout superius clamabat exercere, consideratum fuit per ipsum regem et consilium suum predictum, quod idem Dux officia predicta per se et sufficientes deputatos suos faceret et exerceret, et feoda debita in

PRIST feme

seise. And first of what seisin a man shall be tenant by the curtesie. [c] There is in law a twofold seisin, viz. a seisin in deed, and a seisin in law, whereof more shall be said, Sect. 468, and 681. And here Littleton intendeth a seisin in deed, if it may be attained unto. [f] As if a man dieth seised of lands in fee simple or fee taile generall, and these lands descend to his daughter, and she taketh a husband and hath issue, and dyeth before any entry, the husband shall not be tenant by the curtesie, and yet in this case she had a seisin in law; but if she or her husband had during her life entred, he should have been tenant by the curtesie (3). [g] A man seised of an advowson (4) or rent in fee hath issue a daughter, who is married, and hath issue, and dyeth seised, the wife, before the rent became due or the church became voyd, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesie, because he could by no industry attaine to any other seisin, *Et impotentia excusat legem* (5) But a man shall not be tenant by the curtesie of a bare right, title, use (6), or of a reversion (7) or remainder expectant upon any estate of freehold, unlesse the particular estate be determined or ended during the coverture.

[c] F. N. B. 194.

(Post. 153.)

[f] 1. Mar. Dyer 55.

(Post. 40.)

[g] 7. E. 3. 66. 3. H. 7. 5.

(6. Co. 68. a. 1. Co. 97. b. 3. Co. 54. Ante 15. b.)

(8. Co. 56.)

[b] Proceff. fact. ad Coronationem R. 2. Anno regni sui primo Rot. clauf. m. 45.

(1) Instead of *oyes ou vife*, the words are *neex vif* in L. and M. This latter reading is conformable to lord Coke's translation. — (2) This *quære* is in L. and M. but not in Roh. — (3) But entry is not always necessary to give seisin in deed; for if the land is in lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee for years being deemed the possession of the husband and wife. See the case of De Grey and Richardson 3. Atk. 469. Lord Coke's doctrine about seisin for a *possessio fratris* is the same. See ante 15. a. In n. 4. there the case of Newman and Newman is cited, from Willf. vol. 1. p. 516. but no hint being given of the point adjudged, it may be proper to add here, that in that case the court construed the possession of a mother to be a possession for an infant her son as his guardian by law, she being next of blood to whom the inheritance could not descend, and held it a sufficient seisin to exclude the daughters by a former *wenter*. — (4) Whether it be an *advowson in gross* or *appendant*. A *seised of a manor, to which an advowson is appendant, dies, having issue a daughter, who takes husband and dies before entry into the manor*. It seems, that the husband shall not be tenant by the curtesy of the advowson, nor of the rents incident to the manor, because he had not seisin of the principal. Hal. MSS. — (5) According to Perkins, the husband shall have curtesy in an advowson, though he suffers the ordinary to present by lapse on an avoidance in his wife's life-time. Perk. Sect. 468. But such a case is not within lord Coke's reason for allowing curtesy of an advowson without seisin in deed; nor do I find any authority to support the doctrine, besides Mr. Perkins's name. That indeed, on account of the learning and ingenuity displayed in his *Profitable Book* on the laws of England, ought in general to have considerable weight; though one, who wrote soon after Mr. Perkins, describes him to be a man that writeth of diverse titles of our law rather subtilly than soundly. Fulb. Paral. 40. a. See also a more particular character of Mr. Perkins in Fulb. Prepar. 28. a. — (6) Here an use before or not executed by the 27. H. 8. must be meant; for an use within that statute is a legal estate. See acc. 2. And. 75. 147. and by lord Coke himself in Cro. Jam. 201. See also 1. New Abridgm. 660. But though in strictness of law there cannot be curtesy of trusts, yet since lord Coke's time our courts of equity have allowed curtesy both of trusts and of other interests, which, though in law mere rights and titles, are deemed estates in equity, and made to conform to many of the rules and consequences incident to estates in law. See in 1. Atk. 603 the case of Cashborn and Inglish, in which lord ch. Hardwicke decreed curtesy of an equity of redemption. See S. C. more fully reported in Vin. Abr. Curtesy E. pl. 23. However a *wife in point of benefit* may have a trust of inheritance, which may be so declared as to prevent curtesy, as by directing the profits during the wife's life to be paid for her *separate* use; for in such a case the intention to exclude the husband from curtesy is manifest, and he cannot have an equitable seisin. 3. Atk. 715. It is also proper to remark, that though curtesy out of a trust is allowed, yet *dower* has been refused; a partiality not easy to be reconciled with reason, however settled by the current of authorities. But as to this see Post 31. b. — (7) Mr. Perkins makes a *quære*, whether, if a woman seised in fee makes lease for life, reserving rent to her and her heirs, the husband shall not have curtesy in the rent during the lease; but he seems to admit, that the husband shall not have curtesy of the land itself, unless the lease determines before the wife's death. Perk. Sect. 467. See Post 32. a. where in a like case lord Coke says, that the wife shall not have dower. But if a rent is incident to a reversion expectant on an estate tail, the husband shall have curtesy of the rent till the tail determines. Post 30. a.

one Ford having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever, and the three sons being dead without issue, the whole court held, that the brother

Lib. I. Cap. 4. Of the Curtesie Dengleterre. Sect. 35.

hac parte obtineret. Qui quidem dux officium Seneschalcie prædictæ personaliter adimplevit, &c. And every man, that claimed to hold by grand serjanty to do any service to the king at his coronation, exhibited his petition to the said duke as steward of England, who upon hearing the proofes either allowed or disallowed the same.

Rot. Patent. Ann. 20. H. 6.

In letters patents made by King H. 6. to Richard earle of Salisbury you shall finde this clause, *Quod charissimus consanguineus noster Richardus, nunc comes Sarum, qui Aliciam filiam et hæredem Thomæ nuper comitis Sarum adhuc superstitem duxit in uxorem, et cum eadem Alicia prolem tempore mortis prædictæ Thomæ habuit et habet superstitem de præsentibus, coque preterito idem Richardus nunc comes Sarum nomen, statum et honorem comitis Sarum, &c. habet, et pro tempore vite sue de jure præterito præmissorum habere debet* (1). The name of the issue, which the said Richard earle of Salisbury had by the said Alice was Richard, who married with Anne the sister and heire of Henry Beauchamp earle of Warwicke, who was earle of Warwicke to him and to his heires, and duke of Warwicke to him and to the heires males of his body. And Richard the sonne having then no issue by his wife, king H. 6. in 27. yeare of his raigne granted to him that he should be earle of Warwicke, *Licet ipse et prædicta Anna exitum inter eos ad præsens non habent.* These and many more I have read concerning this matter, and only say to the reader, *Utere tuo judicio, nihil enim impedit.*

Rot. Patent. de anno 27. H. 6.
m.

[1] Vid. r. E. 3. G. 5. E. 3. 26.
(Post. 30)

[2] If an estate of freehold in feignories, rents, commons, or such like be suspended, a man shall not be tenant by the curtesie; but if the suspension be but for yeares, he shall be tenant by the curtesie. As if a tenant make a lease for life of the tenancie to the seignioresse, who taketh a husband, and hath issue, the wife dieth, he shall not be tenant by the curtesie (2), but if the lease had been made but for yeares he shall be tenant by the curtesie.

W. 2. ca. 1. Litt. ca. Dower fol.
40. fecl. 52.
Paine's case 8. Co. fol. 34.

En fee simple on en fee taile generall, ou seise come heire de la taile speciall, et ad issue per la feme male ou female. Secondly, of what estate. If lands be given to a woman and to the heires males of her body, she taketh a husband and hath issue a daughter and dieth, he shall not be tenant by the curtesie; because the daughter by no possibility could inherite the mother's estate in the land; and therefore where Littleton saith, issue by his wife male or female, it is to be understood, which by possibility may inherit as heir to her mother of such estate. Littleton himself explaneth this by expresse words Cap. Dower fo. 40. Sect. 52. And therefore if a woman tenant in taile generall maketh a feoffment in fee, and taketh back an estate in fee; and take a husband and hath issue, and the wife dieth, the issue may in a *formedon* recover the land against his father; because he is to recover by force of the estate taile as heir to his mother, and is not inheritable to his father (3).

[a] Old tenures 21. H. 3. tit.
dower 198.

Et ad issue. 3. The time of having the issue. 4. What kinde of issue. If a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enter, he [a] shall be tenant by the curtesie, albeit the issue was had before the wife was seised. And so it is albeit the issue had dyed in the life time of her father before any descent of the land, yet shall he be tenant by the curtesie (4). If a woman [b] seised of lands in fee taketh husband, and by him is bigge with childe, and in her travell dieth, and the childe is ripped out her body alive, yet shall he not be tenant by the curtesie; because the childe was not borne during the marriage, nor in the life time of the wife, but in the meane time the land descended, and in pleading he must alledge, that he had issue during the marriage.

[b] Vide Paine's case. ubi supra.

[c] Bract. lib. 5. 437. 438.
Britt. ca. 66. and ca. 83.
Fleta lib. 1. c. 5. and lib. 6. cap.
54.
(Ante 3. b. 7. b. 8. a.)

If the wife be [c] delivered of a monster, which hath not the shape of mankinde, this is no issue in the law; but although the issue hath some deformity in any part of his body, yet if he hath humane shape this sufficeth. *Hii, qui contra formam humani generis converso more procreantur, (ut si mulier monstruosum vel prodigiosum fuerit enixa) inter liberos non computantur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen superabundanter, ut si sex digitos vel nisi quatuor habuerit, bene debet inter liberos commemorari. Si inutilia natura reddidit membra, ut si curvus fuerit aut gibbosus vel membra tortuosa habuerit, non tamen est partus monstruosus. Item puerorum alii sunt masculi, alii feminae, alii hermophradite. Hermophradita tam masculino quam femina comparatur secundum prævalentiam sexus incalescentis.*

[d] 28. H. 8. 25. Dyer.
Paine's case ubi supra.

If the issue be born deaf or dumbe or both, or be born an idiot, yet it is a lawfull issue so make the husband tenant by the curtesie and to inherit the land.

[e] Mirror cap. 1. fecl. 3.

Oyes ou vive. If it be borne alive [d] it is sufficient, though it be not heard cry; for peradventure it may be born dumbe. And this is resolved cleerly in Paine's case *ubi supra*. For the pleading (as hath beene said) is, that during the marriage he had issue by his wife, and upon that point the triall is to be had, and upon the evidence (5) it must be proved, that the issue was alive, for *mortuus exitus non est exitus*, so as the crying is but a prooffe that the childe was born alive, and so is motion, stirring, and the like. And it is said by an ancient author [e] that it was ordained in the raigne of king H. 1. *Que tous que survenissent*

(1) So nota till issue the husband cannot use the title of his wife's dignity; but afterwards he may. So adjudged by Hen. 8. in the case of Wimby, who claimed the title of lord Talboys in right of his wife. Hal. MSS.—This annotation shews, that in the opinion of lord Hale a title of honour admits of curtesy. But lord Coke, after stating two precedents, one of curtesy in a title of honour, and another of curtesy in an office of honour, avoids making the least inference, and professedly leaves the reader to his own judgment; from which reserve it may be conjectured, that he had his doubts. In fact, the point had been several times controverted in lord Coke's time. About the year 1580 Richard Bertie claimed the barony of Willoughby in right of his lady Catherine, duchess of Suffolk, he having had issue by her. The claim was referred by queen Elizabeth, to lord Burghley, and two other commissioners, as was also a claim of the same dignity by Peregrine Bertie, the son and heir of the duchess of Suffolk by Richard Bertie. At one time the precedents urged for the husband were thought to make an impression on the commissioners; but finally they made a report in favour of the son, who was accordingly admitted to the dignity in the life-time of his father. See Coll. Proceed. on Claims of Baron. 1. to 23. But notwithstanding this case, two other claims of a like kind were made within a few years after, the first about 1586 by Sir Thomas Fane, in right of his wife Mary, the daughter and heir of Henry lord Bergavenny, and the second about 1604 by Sampson Lennard, in right of his wife Margaret lady Dacres. Of the event the former claim, I do not find any account; but as to the latter it appears, that king James referred it to commissioners, and that lady Dacres dying before any decision, the affair was compromised in 1612 by the king's granting precedency to the husband as eldest son of lord Dacres. The letters patent giving this precedency recite, that the commissioners had found baronies on the like right conferred on the husband in several families, and in this particular barony of Dacres three several precedents. There are other expressions equally remarkable for a studied ambiguity, such as leaves undecided whether the pretension to the wife's title was deemed a claim of favour or of right from the crown, and appears calculated to avoid an adjudication of the point; and in this unsettled state of things, it is not surprising, that lord Coke should be so cautious of advancing any positive doctrine on the subject. I cannot learn that there have been any claims of dignities by curtesy since lord Coke's time, and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against curtesy in titles of honour. However I have not yet discovered, whether this great question has ever formally received the judgment of the house of lords.—For the particulars of Wimby's case cited by lord Hale, see Coll. Claims of Bar. 11. 44 and 72.—(2) Lord Coke means, that the husband shall not be tenant by the curtesy of the seignory, it being suspended during the whole time of the marriage by the lease of the tenancy to the wife. See further as to the effect of suspension on curtesy in Perk. Sect. 459, 460, 461, 462.—(3) The husband could not have curtesy in respect of the fee, because that was defeated by the son's recovery in the formedon; nor in respect of the tail, because the wife's feoffment before the marriage had discontinued the tail, and consequently there could be no seisin of it during the marriage. This seems to be the rationale of the case put by lord Coke.—(4) Yet in some cases the time of having issue is of consequence. See Post 40.—(5) Vid. Pasch. 9. E. 1. rot.

brother could not take as heir male, 1. because a devise to heirs male operates as a limitation to heirs male of the body, and the

sent leur dount ils ussent conceive tenuissent les heritages leur fems par leur vies.

By the custom of Gavelkind [f] a man may be tenant by the curtesie without having of any issue (1).

Soit lissue apres mort ou en vie. And therefore, [g] if a woman tenant in taile generall taketh a husband, and hath issue, which issue dyeth, and the wife dieth without any other issue, yet the husband shall be tenant by the curtesie albeit the estate in taile be determined, because he was intituled to be tenant *per legem Angliæ* before the estate in taile was spent, and for that the land remaineth. But if a woman maketh a gift in taile, and reserve a rent to her and to her heires, and the donor taketh husband and hath issue, and the donee dieth without issue, the wife dieth; the husband shall not be tenant by the curtesie of the rent, for that the rent newly reserved is by the act of God determined, and no state thereof remaineth. But [h] if a man be seised in fee of a rent and maketh a gift in taile generall to a woman, she taketh husband and hath issue, the issue dieth, the wife dieth without issue, he shall be tenant by the curtesie of the rent, because the rent remaineth (2). The diversity appeareth.

Si la feme devie, le baron tiendra a la terre, &c. Four things doe belong to an estate of tenancy by the curtesie, *viz.* marriage, seisin of the wife, issue, and death of the wife. But it is not requisite, that these should concur all together at one time. And therefore, if a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesie. So if he hath issue which dieth before the descent, as is aforesaid.

And albeit the state be not consummate untill the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes.

First, after issue had, he shall doe homage alone, and is become tenant to the lord, and the avowrie shall be made onely upon the husband in the life of the wife, as shall be said hereafter when we come to the apt place (3). Secondly, if after issue [i] the husband maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heire of the wife shall not during his life recover it in *sur cui in vita*; for it could not be a forfeiture, for that the estate, at the time of the feoffment, was an estate of tenancy by the curtesie initiate (4) and not consummate. And it is adjudged in 29. E. 3. that the tenant by the curtesie cannot claime by a devise, and waive the state of his tenancy by the curtesie, because faith the booke the freehold commenced in him before the devise for terme of his life.

Et est appel tenant per le curtesie Dengleterre, pur ceo que nest use en auter realme forsque tant solement en Engleterre.

Per le Curtesie. In Latine *per legem Angliæ*.

Tantsolement en Engleterre. It is also used within the realme of Scotland, and there it is called *Curialitas Scotiae*. And so it is in the realme of Ireland (5).

Et ascuns ont dit, que il ne serra tenant per le curtesie, sinon que lenfant que il ad per sa feme soit oye crie, car per le crie est prove que le enfant fuit nee vise. Our author having delivered his owne opinion before, *viz.* Oyes ou

wife, now he sheweth the opinions of others: for so is said in the [k] statute *De tenentibus per legem Angliæ*: and of that opinion is Glanvill [l] lib. 7. cap. 8. Bracton lib. 5. tract. 5. cap. 30. Britton cap. 50. fol. 132. Fleta lib. 6. cap. 50. &c. But the reason is against their opinion; for by the cry it is proved, &c. so as it is but an evidence to prove the life of the enfant.

Ascuns ont dit. By these and the like speeches our author intendeth, that the point had been controverted, but thereby, except it be in this section where formerly he delivered his opinion as hath been said, he tacitely insinuateth his owne judgement which in all the rest holdeth for good law and warranted by good authority throughout his three bookes; which kinde of speech and the like I have collected together, as it appeareth by the sections in [m] the margin.

Ideo quere. This quere is not in the originall edition of Littleton, and therefore to be rejected (6).

And some have said, that in divers cases a man shall by having of issue be tenant by the curtesie where a woman shall not be endowed. And therefore they say, if lands be given to two women and to the heires of their two bodies begotten, and one of them take husband and have issue and die, the inheritances being severall the husband shall be tenant by the curtesie, as it is adjudged 7. E. 1. and in other bookes [n] this judgment is cited and allowed. But certaine it is, that if land be given to two men and to the heires of their two bodies begotten, and the one taketh wife and dieth, she shall not be endowed, for no estate in the land is altered by that marriage. But I leave the reader to his owne opinion or rather to suspend it untill he come to

rot. 4. Si habuit exitum, qui auditus fuit clamare seu vocem edere infra quatuor parietes; quia puer non fuit visus nec auditus clamare ab hominibus masculis, licet per feminas nominatus fuit Johannes. Therefore husband not tenant by the curtesy. H. 5. E. 1. rot. 1. Wigorn. Hal. MSS.—I cannot guess what lord Hale's view could be in citing this record, unless it was to shew, that anciently in the case of curtesy the having male issue born alive could be proved by men only; which must be confessed to have been a most unaccountable peculiarity.

(1) On the other hand, curtesy by the custom of Gavelkind is subject to several disadvantages; for it is only of a moiety of the wife's land, and it ceases if the husband marries again. See Robins. Gavelk. b. 2. c. 1. where the learned author suggests, that some have doubted, whether there is any such variance between the common law and the custom, and therefore undertakes to prove it by authorities on record.—(2) So if it was a rent de novo granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy. Hal. MSS.—(3) Hic fest. 90. 21. E. 3. 35. Hal. MSS.—(4) 4. E. 2. Cui in vita 15. 34. E. 1. ibid. 30. 10. E. 3. 11. 22. H. 6. 24. If husband intituled to be tenant by the curtesy aliens and retakes estate to him and his wife, by which the wife is remitted, he shall not be tenant by the curtesy. Contra if it was before issue had. 9. H. 7. 1. Vid. T. 7. Jac. Ley. n. 11. Sparrye's Case. Hal. MSS.—See Ley's Rep. 9.—(5) Pat. 11. H. 3. m. 3. Cum consuetudo et lex Angliæ sit, quod si aliquis desponsaverit aliquam hereditatem habentem, et ex ea prolem habuerit, cujus clamor auditus fuerit infra quatuor parietes, et vir supervixerit uxorem, habebit tota vita sua custodiam hereditatis uxoris, licet ea heredem habuerit ex primo viro, qui plenæ ætatis est; preceptum est, quod eadem lex observetur in Hibernia. Hal. MSS.—This same extract from the patent roll of 11. H. 3. is given in Hal. Hist. C. L. 180.—(6) It appears by the various reading already given, that this quere, though not in the Rohan edition, which lord Coke thought the oldest, is in that by Lettou and Machlinia, which is really the original one.

the brother could not be heir male of the devisor's body; 2. because the remainder to the heirs male were words of purchase, and by purchase the brother could not take as heir male, his niece being the heir at common law; and so jealous was lord chief justice Holt of departing from the established doctrine, that notwithstanding the special circumstances in the case of Pybus and Mitford, which will presently be stated, he doubted the authority of that case. See 3. Salk. 336. 11. Mod. 189 and Vin. Abr. Devise U. b. pl. 2. in marg. The doctrine was thought to be so firmly settled by this last case, that in 1712 lord ch. Macclesfield, in Dawes and Ferrars, which was a case similar to that of Ford and Ossulston, interrupted the counsel for the person claiming as heir male, by saying that he would not suffer the bar to dispute what was the land-mark and foundation of the law; adding, that in the case of Ford and lord Ossulston the point had been determined on trials at bar in every court in Westminster Hall, and appeared to be so very plain a case, that in the King's Bench the plaintiff's own counsel would not ask a special verdict. See 2. P. Wms. 1. and Prec. in Chanc. 54. However it was not thought proper to acquiesce in this opinion of lord Macclesfield, and a bill of review being brought to reverse

[f] 9. E. 3. 38. 16. E. 3. aids 229. Stat. de Consuetudinibus Mancie

[g] 21. H. 3. tit. Dower 198. Paine's case ubi supr. (1. Leon. 167.)

(Post. 32. a.)

[h] Brooke tit. per le Curtesie 86. 10. E. 3. 27.

(6. Co. 57. b. Post. 67. a. 124. b.)

[i] 34. E. 2. Cui in vita 15. 2.

E. 2. Cui in vita 26. 10. E. 3.

12. Dier 21. Eliz. 363.

29. E. 3. fo. 27.

(3. Co. 34.)

[k] Vet. Mag. Car. part. 2. fol.

70.

[l] Glanvill lib. 7. cap. 8. Bract.

lib. 5. tract. 5. ca. 30. Britton

cap. 50. fo. 132. Fleta lib. 6.

cap. 54.

[m] Sest 40. 119. 132. 136.

137. 138. 141. 145. 148. 156.

170. 179. 192. 202. 227. 234.

269. 336. 339. 357. 400. 415.

436. 440. 443. 460. 462. 478.

501. 503. 506. 522. 523. 524.

534. 576. 601. 633. 634. 640.

642. 643. 644. 646. 658. 675.

689. 721. 723. 726. 730. 731.

733. 734.

(2. Ro. Abr. 90. & Post. 183.

contra.)

7. E. 3. 6.

[n] 17. E. 3. 51.

Prærog. Regis ca. 13.

33. E. 3. tit. Travers 36.
(4. Co. 55. 1. Leon. 47.)

[*] Pl. Com. Dame Hales' case
263.
(9. Co. 129.)

[6] Magna Carta 30. E. 1. Dower
81. 17. H. 3. Dower. Bract.
lib. 2. fol. 46. & 314.

(Post. 32. 2. Cro. Cha. 300. 1.
Ro. Abr. 675.)

[p] 4. H. 3. dower 180. Bract.
fol. 93. Fleta lib. 5. cap. 23.
2. E. 2. dower 123. 3. E. 3.
dower 102. 9. H. 7. 1. 30.
E. 3.
(Hob. 338. Post. 278.)

to the proper place in the next chapter. If lands holden of the king by knights service *in capite* descend to a woman, and after office found she intrude and taketh husband and hath issue, in this case the husband shall be tenant by the curtesie (1); and yet if the heire male after office, in the like case intrudeth and taketh wife, his wife shall not be endowed, for so it is provided by the statute of *Prærogativa regis*, cap. 13. that in that case there accrue to the heire no freehold, nor dower to the wife, which by interpretation is as much as to say, that the heire shall have no freehold as to this respect to give any dower to his wife. If a man marry the niece of the king by licence and hath issue by her, and after lands descend to the niece and the husband enter, the niece dieth, he shall be tenant by the curtesie of this land, and the king upon any office found shall not evict it from him, because by the marriage, the niece was enfranchised during the coverture. But if a free woman marry the villaine of the king by licence, and lands descend to the villaine, the villaine dieth, the wife shall not be endowed, but upon an office found the king shall have the land, for the villaine remained still a villaine to the king. A woman [n] taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an idiot by office, the lands shall be seised by the king (2), for the title of the tenancy by the curtesie, and of the king begin at one instant, and the title of the king shall be preferred. A man shall be tenant by the curtesie of a castle [o] which serveth for the public defence of the realme, but a woman shall not be endowed thereof, as shall be said more at large hereafter (3).

A man shall be tenant by the curtesie of a common *feigns number*, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be tenant by the curtesie [p] of a house that is *Caput Baronie*, or *Comitatus*: (4) but it appeareth by 4. H. 3. Dower 180. that a woman shall not be endowed of it. For the law respecteth honour and order. A man is entitled to be tenant by the curtesie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be tenant by the curtesie, because albeit the state given by the feoffment, be conditionall, yet his title to be tenant by the curtesie was inclusively absolutely extinct by the feoffment, for the condition was not annexed to it (5). As if the lord disseise the tenant, and maketh a feoffment in fee of the land upon condition, and entreth for the condition broken, yet the seignior is extinct, for that was inclusively extinct by the feoffment. See more of tenant by curtesie. Section 52 (6).

CHAP. 5. Sect. 36.

Dower.

Tenant en dower (7).

Tenens in dote. Dos, dower in the common law [q] is taken for that portion of lands or tenements, which the wife hath for terme of her life of the lands or tenements of her husband after his decease, for the sustenance of herselfe, and the nurture and education of her children (8). *Propter onus matrimonij, et ad sustentationem uxoris et educationem liberorum cum fuerint procreati si vir præmoriatur: et hoc proprie dicitur dos mulieris secundum consuetudinem Anglicanam.* And dos is derived *ex donatione, et est*

TENANT in dower

er est, lou home est seisie de certaine terres ou tenements en fee simple, taile generall, ou come heire de le taile speciall, et prent feme, et devie, la feme apres le decesse de la baron sera endow de la tierce part de tiels terres et tenements, que fueront a ja baron en ascun temps durant

TENANT in dower

is, where a man is seised of certaine lands or tenements in fee simple, fee taile generall, or as heire in speciall taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture,

[7] Lib. Rub. cap. 70. Glanvill
lib. 6. cap. 1. Bract. lib. 2. fol.
92. Britt. cap. 101. Fleta lib.
5. cap. 22.

(1) 1. H. 7. 17. Dy. 95. Hal. MSS.—(2) Mr. Serjeant Hawkins makes a *quare* of this, observing that the fee and freehold were in the wife, and that the wife of an idiot shall have dower. Hawk. Abr. of Co. Littl. 42. It has been also remarked, that there is not any concurrence of titles between the king and the husband; the husband's title by curtesy not being *consummate*, till the death of the wife, when the king's title determines. See Plowd. 264. Engl. ed. in a note by the Editor. However, note the reasoning in Plowden. See also 3. Co. 170. where it is adjudged, that though in the case of idiotcy the office for *some* purposes has relation to the time when the idiot's estate commenced, yet the king is only intitled to the profits from the finding of the office; which, as it may have some influence on the point of curtesy, is proper to be attended to.—(3) See Post 31. b.—(4) If disseisee enters on disseisor's heir, and makes feoffment on condition, and enters for condition broken, and the heir enters the right is revived. Vid. 19. H. 6. 43. Hal. MSS.—(5) Hic fol. 266. Hal. MSS.—(6) See also Wright's Ten. 193. and Vin. Abr. Curtesy, and the same title New Abr.—(7) Nota, in tenancy in dower the wife shall be said to be in by the husband. 36. H. 6. Dower 30. But tenancy by the curtesy is in the Post. 5. E. 2. Entry 66. Hal. MSS.—(8) The following note is by the editor of the eleventh edition of lord Coke's Commentary.—(The reason why the law gave the wife dower will appear, if we consider how the law stood anciently; for by the old law, if this provision had not been made, and the party at the marriage had made no assignment of dower, the wife would have been without any provision, for the personal estates even of the richest were then very inconsiderable, and before fruits were invented, which is but lately, the husband could give his wife nothing during his own life, nor could he provide for her by will, because lands could not be devised, unless it was in some particular places by the custom, till the statute of Hen. 8.)

verse his decree, lord ch. Hardwicke directed a case for the opinion of the King's Bench; but the four judges of that court followed lord Macclesfield, and the person under whom the claim was made not being *heir general*, they, in February 1743, certified, that *he could not take by the description of right heir male*. See the certificate in Vin. Abr. Devise W. b. in a note on pl. 13. Such is the list of grave authorities which confirm lord Coke's doctrine as to the necessity of being *very heir*, in order to take by purchase under the description of *heir male* or *heir female*, whether of the body or not; and if they wanted aid from his name, it will scarce be denied by the coldest of his admirers, that his private opinion on a point of law he had so fully considered, will even in these times, when perhaps we are too apt to decry those ancient authors, whose writings are still the grand sources of information and instruction, will be no mean addition to their weight. However it must be confessed, that there are some cases, in which the doctrine has been deviated from; but all of them, except one, are determinations *since* his time, and besides, most of them may rather be deemed *exceptions* to lord Coke's general rule, than proofs of its *non-existence*. The earliest of these is a case in the time of Elizabeth, and cited by lord Hale in *Pybus and Milsford* 1. Vent. 381. A son of the testator's brother was admitted to take under a devise to the testator's *heir male*, though he left three daughters; but the reason was, because the testator introduced the devise with taking notice that his brother had left a son, and that he himself had three daughters who were his *right heirs*, and he also gave the daughters 2000l. on condition not to trouble the *heir*. In this case the special intent of *heir male*, is so marked by the other words, as clearly to take it out of the general rule; and that lord Hale meant

rant le couverture, a aver et tener a mesme la feme en feveralte per metes et bounds pur terme de sa vie, le quel el avoit issue per sa baron ou nemy et de quel age que la feme soit, issint que el passe lage de neuf ans al temps de le mort sa baron, [car il covient que el soit passe lage de neuf ans al temps del mort sa baron,] (1) ou auterment el ne serra my endow.

To have and to hold to the same wife in feveralty by metes and bounds for terme of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine yeares at the time of the death of her husband, for she must be above nine yeares old, at the time of the decease of her husband, otherwise she shall not be endowed.

quasi dotarium, because either the law it self doth (without any gift) or the husband himself giveth it to her, as shall be said hereafter. And at this day *dos* or dower is not taken by the professors of the common law, either for the land which the wife bringeth with her in marriage to her husband, for then it is either called in frankmarriage or in marriage, as hath beene said, nor for the portion of money or other goods or chattels, which she bringeth with her in marriage, for that is called her marriage portion. And yet of ancient time [r] *Dos mulieris*, the dower or dowrie of the woman was also applyed to them. But it is commonly taken for her third part, which she hath of her husband's lands or tenements.

[r] Britton cap. 201. Bracton lib. 2. fo. 92. Glanvil lib. 6. ca. 1. lib. 7. ca. 1. 2. Co. 93. Bingham's case. 4. H. 3. dower 179.

In Domeſday, *Dos* is called *Maritagium*.

To the consummation of this dower three things are necessary; viz. marriage, seisin and the death of her husband.

Dos, [1] the very name doth import a freedome, for the law doth give her therewith many freedoms. *Secundum consuetudinem regni mulieres vidue, &c. debent esse quiete de tallagiis, &c.* And tenant in dower shall not be distreyned for the debt due to the king by the husband in his life time in the lands which she held in dower. And other privileges she hath; of all which Ockam yeelds the reason, *Doti ejus parcatur quia premium pudoris est* (2).

[f] Clauf. 11. H. 3. nu. 17. Regist. 142. 143. F. N. B. 150. Ockham fol. 40.

Lou home. If the husband be an alien (1) the wife shall not be indowed. So if the husband be the king's villaine, the wife shall not be endowed, (as hath beene said) but if the husband be a villaine to a common person, the wife shall be endowed if she be intituled to dower before the entrie of the lord. And so if a free man take a niese to wife and dieth she shall be endowed. The wife of an ideot (3), *non compos mentis*, outlawed, or attainted of felony or trespass, attainted of hereſie, *præmunire*, or the like, shall be endowed. But if the husband be attainted of treason, albeit it be treason done after the title of dower she shall not be endowed, as shall be said hereafter.

[1] Bract. fol. 298. 19. E. 2. dower 171. Dame Hale's case 13. E. 3. dower Statham. 13. E. 1. tit. Dower. (Post 392. b.)

Seisie. Here this word (seised) extendeth it selfe as well to a seisin in law, or a civil seisin, as to a seisin in deed, which is a naturall seisin: but seised he must be either the one way or the other during (4) the coverture. For a woman shall be endowed of a seisin in law. As where lands or tenements descend to the husband, before entrie, he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession, for it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wives land, when he is to be tenant by curtesie, which is worthy the observation. And yet of every seisin in law, or actual seisin of lands or tenements, a woman shall not be endowed. For example, if there be grandfather, father, and sonne, and the grandfather is seised of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father, who dieth either before or after entrie, now is the wife of the father dowable. The father dieth and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed onely of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actual) is defeated (5), and now upon the matter the father had but a reversion expectant upon a freehold, and in that case, *Dos de dote peti non debet*; although the wife of the grandfather dieth living the father's wife (6). And here note a diversity [w] betweene a descent and a purchase. For in the case aforesaid, if the grandfather had infeoffed the father, or made a gift in taile unto him, therein the case aforesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother

(Ante 29. a.)

[u] 43. E. 3. 32. 45. E. 3. 17. 9. E. 3. 4. F. N. B. 149. 8. E. 3. tit. Aff. 393. 19. E. 2. dower 170. 23. E. 3. dower 30. (Perk. test. 315. 316. 4. Co. 122. Ro. 1. Abr. 677.)

[w] 5. E. 3. tit. Voucher 249. Paris's case 9. E. 3. 4.

(1) All between the brackets omitted in L. and M. and in Roh.—(2) Clauf. 26. H. 3. m. 15. *Mulier ratione tenuræ in dōtem non debet venire coram iudiciariis itinerantibus ratione communis summationis. But yet she shall be attendant to the heir for a third part of the services, for which he is attendant over. Tenant in frank-marriage in the fourth degree dies; his issue endows his mother; she shall be attendant as the issue is and shall not hold acquitted. So if A gives to B in tail rendering during his life 5 s. and afterwards 10 s. the wife of B endowed shall hold of the heir by a third part of 10 s. But if there be tenant by 5 s. and mesne holds over by 10 s. and tenant dies without heir, his wife shall be attendant to the mesne only for the third part of 5 s. Kelw. 124. 129. Hic fol. 46. lease by tenant in tail, avoided by the issue yet revived against tenant in dower—Hal. MSS.—(3) See ante 30. b. n. 3.—(4) Lessee for life surrenders to him in reversion on condition, and enters for the condition broken; yet the wife of the reversioner shall be endowed. Noy n. 284. Ormond's case.—Hal. MSS. See Noy 66.—(5) Hic fol. 8. 8. E. 3. 13. 3. Aff. 6. But by some the heir shall have mortdancester of such seisin.—Hal. MSS.—(6) 17. E. 3. 65. hic fol. 42. Vid. 6. E. 3. 43. contra. Nota the case 5. E. 3. Vouch. 249. A gives in tail to B his eldest son who dies, the wife of B is endowed of the third part of the whole. A dies, his wife brings dower against the wife of B, she vouches the heir of her husband by reason of the reversion, and adjudged that he shall warrant. But quære if she shall recover in value the third part of the whole or only the third part of two parts. It seems only the third part of two parts, by reason of the evasion. Therefore quære if in this case the seisin of B be not fully avoided. Suppose that the wife of A had first recovered, during her life the wife of B cannot demand dower except of the two parts which are in the hands of the heir.—Hal. MSS.*

meant to cite it as an exception appears from his saying, that it is not inconsistent with *Counden* and *Clerks*. See 1. Ventr. 382. *Bowman* and *Yates* 1. Cha. Caf. 145. is another case which was determined on special circumstances; for the son of a second marriage was allowed to take a rent-charge under a limitation to heirs male by a second wife, though not strictly heir, there being a son of the first wife, because the settlement was apparently made as a provision for the issue of the second marriage. The case of *Pybus* and *Mitford*, adjudged 36. Ch. 2. is liable to a similar observation. One, who had issue two sons by two different wives, covenanted to stand seized to the use of the heirs male of his body by his second wife. The point determined by three judges against one was, that an use arose to the covenantor's son for life, and that so the limitation to his heirs male on the body of his second wife being a remainder in tail special executed in him, his son by the second wife took by descent as special heir; but Hale, chief justice, held, that the son of the second wife, though not heir general, might have taken by purchase, and according to Ventriss, Wild, justice was of the same opinion, though another book mentions, that in this respect all the three other judges differed from lord Hale. See 1. Freem. 370, 371. But the reasoning of lord Hale shews, that he did not mean to shake Coke's general doctrine, and that he founded himself on the special penning

(4. Co. 122.)

[x] 8. E. 3. tit. Aff. 393. 13. R.
2. Dower 55. 22. E. 3. 5. 8.
E. 3. 3. 7. H. 6. 4.
(Post. 42. a. 4. Co. 122.)

[y] 6. E. 3. 50. F. N. B. 149.
(Cro. Cha. 190. 191. 1. Ro. Abr.
676. 474. Cro. Jam. 615. Doctr.
Plac. 148. 2. Co. 77.)

[z] 27. H. 8. 23. F. N. B.
17. H. 3. Dower 192.

Vide sect. 242.
(Post. 165. a. Ante 30. b.)

[a] Pasf. 23. Eli. in Com. Banco.
Bract. fol. 96. Brit. ca. 103. Flet.
1. 5. c. 23. 30. E. 1. tit. Dower 81.
b. 30. E. 1. Vouch. 298. 17. H.
3. Dower 192. 8. H. 3. Dower
196. 8. H. 3. ib. 194.
[b] Pat. 1. E. 1. part. 1. m. 17.
Ech. 4. E. 1. nu. 88.

[c] Bract. 1. 2. f. 93. Brit. c.
103. Fleta lib. 5. ca. 22. Trin.
17. El. in com. Banco.

[d] 41. E. 3. 30. 44. E. 3. 26.
30. H. 8. Dyer 41.

30. H. 8. Dyer. 41.

(Doctr. Plac. 148. Post. 33. a.)
[e] Rot. Parl. 26. E. 1. Rot. 1.

mother, and the reason of this diversitie is, for that the seisin, that descended after the decease of the grandfather to the father, is avoyded by the indowment of the grandmother, whose title was consummate by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate) is not defeated, but onely *quoad* the grandmother, and in that case there shall be *Dos de dote*. And yet there is another diversitie [x] (1) where the wife of the father is first indowed, and where the wife of the grandfather; for in the same case after the decease of the grandfather and father the sonne entreth and indoweth his mother of a third part, against whom the grandmother recovereth a third part and dyeth, the mother shall enter againe into the land recovered by the grandmother, because she had in it an estate for terme of her life, and the estate for the life of the grandmother is lesser in the eye of law, as to her then her owne life. Also the husband [y] (2) may be seised in his demesne, as of fee absolutely, yet the woman shall not be endowed, as she shall not be indowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was seised of both, but she may have her election to be indowed of which she will.

Also of a seisin for an instant a woman shall not be indowed (3), As if *Cestuy que use* [z] after the statute of 1. R. 3. and before the statute of 27. H. 8. had made a feoffment in fee, his wife should not be indowed (3a).

Likewise if two joyntenants be in fee, and the one maketh a feoffment in fee, his wife shall not be indowed (4). And so if the conusee of a fine doth grant and render the land to the conu- for, the wife of the conusee shall not be indowed, for it is not possible that the husband could have indowed his wife of such an estate as the usual pleading is, lib. intrat. 225. *Quia dicit quod W. quondam vir suus nunquam fuit seifitus de tenementis predictis de tali statu ita quod eandem A. inde dotasse potuit.*

Des terres ou tenements. Of a castle that is maintained for the necessary defence of the realme a woman shall not be indowed, because it ought not to be divided, and the publique shall be preferred before the private (5). But of a castle that is onely maintained for the private use and habitation of the owner, a woman shall be indowed. And so it was adjudged in the court of [a] Common Pleas, where in a writ of dower the demand was, *De tertia parte Castri de Hilderker in Comitatu Northumb.* And the statute of *Magna Charta* cap. 7. whereby it is provided, *nisi domus illa sit Castrum*, is to be understood, a castle maintained for the necessary and publique defence of the realme. And this agreeth with ancient records, [b] (albeit in the argument of the said case they were not vouched) the effect whereof be, *Non debent mulieribus assignari in dotem castra quæ fuerant virorum suorum et quæ de guerra existunt, vel etiam homagia et servicia aliquorum de guerra existent.* Wherein it is to be observed, that the law is not satisfied with the names of things, or nominatives, but with things reall and substantial. But of the principal mansion, or capitall messuage, the wife shall be indowed, [c] *si non sit caput Comitatus, sive Baronie* (6), for the honour of the realme, or (as hath beene said) a castle for the publique defence of the realme. And so are the old bookes to be intended, as it was resolved Tr. 17. Eliz. in the court of Common Pleas, which I heard and observed. And of an estate taile in lands determined, a woman shall be indowed in the like manner and forme as a man shall be tenant by the curtesie *mutatis mutandis*.

En fee simple, fee taile general, &c. If a man be tenant in fee taile generall, [d] and make a feoffment in fee, and taketh back an estate to him and to his wife, and to the heires of their two bodies, and they have issue, and the wife dyeth, the husband taketh another wife, and dyeth, the wife shall not be indowed, for during the coverture, he was seised of an estate taile speciall, and yet the issue which the second wife may have, by possibilitie may inherit (7).

The same law it is, if in this case he had taken backe an estate in fee simple, and after had taken wife and had issue by her; yet she shall not be indowed, for that the fee simple is vanished by the remitter, and her issue hath the land by force of the entaile. But in that case the tenant cannot plead, that the husband was never seised of such an estate whereof the demandant might be indowed, but he must plead the speciall matter (8).

Et prent feme. If a man so seised as is aforesaid, taketh an alien to wife, and dyeth, she shall not be indowed (9); but if the king take an alien borne, and dyeth, she shall be indowed by the law of the crowne. And Edmond the brother of king Edward the first, married the queen of Navarre, and dyed, and it was resolved [e] by all the judges, that she should be indowed of the third part of all the lands whereof her husband was seised in fee (10).

If a Jew born in England taketh to wife a Jew borne also in England, the husband is converted to the Christian faith, purchaseth lands, and infeoffeth another, and dyeth, the wife brought

(1) 8. E. 2. *Recovery in value* 10.—Hal. MSS.—(2) *Hic fecit*. 56. fol. 42.—Hal. MSS.—(3) *If tenant for life makes feoffment in fee and dies, the wife shall not be endowed*. 3. H. 4. 6. 14. H. 4. 13. *Yet if tenant at will makes feoffment and dies, his wife shall be endowed*. Cited by Jones 9. Cha. to have been adjudged 34. Eliz. in *Moseley and Taylor*.—Hal. MSS.—See W. Jo. 317.—(3a) That there cannot be dower of a trust, see *Forrest*. 138. 2. Atk. 525. See further 2. P. Wms. 700.—(4) S. p. Acc. in MSS. *Common Place-book supposed to be by judge Doderidge*, and 14. H. 4. 13. b. and P. 34. E. 1. Fitzh. Dower 178. cited.—See further Cro. Eliz. 502. Noy 64. Cro. Jam. 615. 1. Atk. 442. and 2. Blackst. Comment. 132.—(5) Pat. 1. E. 1. m. 17. *Præsertim cum hujusmodi mulieribus castra, quæ fuerunt virorum suorum, et quæ sunt de guerra, vel etiam homagia et servitia aliquorum, quæ sunt de guerra, in dotem non debuerunt, nec consueverunt assignari, ideo salvis nobis castris et homagiis predictis, &c.*—Hal. MSS.—(6) Vid. *a whole manor resealed, because it was caput baroniam, though assigned by the husband*. Claus. 20. H. 3. m. 20. pro uxore Roberti Fitzwalter.—Hal. MSS.—But this doctrine must be understood to be applicable only to baronies by tenure, of which it is said there is not any now remaining except Arundel; and therefore creating a person baron by a title taken from a principal mansion house in his possession will not make the house *caput baronia* and so exclude the wife from dower out of it, because such a barony is merely titular, and a titular barony cannot have *caput baronia*. Adj. in lady Gerard's case 1. L. Raym. 72. and other books. See *Mad. Bar. Angl.* 10.—(7) Vid. 24. E. 3. 28. 59. *Tenant in tail has issue A and B, and leases to A for years and releases to him and his heirs with warranty, and A takes C to wife and dies having issue D; tenant in tail dies, D dies, and C recovers dower against B. Adjudged*.—Hal. MSS.—(8) 21. E. 3. 36. 3. H. 6. 55.—Hal. MSS.—(9) *Nota* anciently a woman alien was not dowable; but by special act of parliament not printed rot. parl. 8. H. 5. n. 15. *all women aliens, who from thenceforth (desores ou avant) should be married to Englishmen by licence of the king are enabled to demand their dower after the death of their husbands, to whom they should in time to come be married, in the same manner as English women.* But this act did not extend to those married before, and therefore in Rot. Parl. 9. H. 5. n. 9. there is a special act of parliament to enable Beatrice countess of Arundel born in Portugal to demand her dower.—Hal. MSS.—See acc. 1. Ro. Abr. 675.—(10) Yet Edmond the queen of Navarre's husband was only a subject, therefore *quare* the reason of the case.

ning of the deed; and he distinguished it, by observing that the limitation was to the heirs by the second wife, and that the covenantor had taken notice in the deed that another was his heir general, there being a proviso that if the son by the first wife should, after the death of the son by the second wife, and within five years after attaining 21, pay 1200l. for the covenantor's younger children, the uses should cease; and for these two reasons he thought the deed sufficient to describe a special heir. See *Pybus and Mitford* 1. Ventr. 372. 1. Freem. 351. 369. Raym. 228. 1. Mod. 121. 159. 3. Keb. 129. 239. 316. 338. and 2. Lev. 75. in which last book the case is most fully stated. In *Wall and Baker* Trin. 8. W. 3. the circumstances were still more special; for according to lord Cowper's state of the case the testator expressly directed, that if his heir should be a female his heir male should pay to his heir female 12l. a year out of his lands; words, manifestly implying, that by *heir male* was meant a special kind of

brought a writ of dower, and was barred of her dower, and the reason yeilded in the record [f] is this, *Quia verò contra justitiam est, quod ipsa dotem petat vel habeat de Tenemento quod fuit viri sui, ex quo in conversione sua noluit cum eo adhaerere et cum eo converti* (1).

[f] Doff. claus. 18. H. 3. m. 17.

Del tierce part de tiels terres et tenements per severaltie per metes

et bonds. Albeit of many inheritances that be entire, whereof no division can be made by metes and bounds, a woman cannot be endowed of the thing itselfe, yet a woman [g] shall be endowed thereof in a speciall and certaine manner. As of a mill a woman shall not be endowed by metes and bounds, nor in common with the heire, but either she may be endowed of the third tolle dish, or *de integro molendino per quemlibet 3. mensem.* And so of a villeine, [h] either the third dayes work, or everie third weeke or month. A woman shall be endowed of the third part of the profit of stallage, of the third part of the profits of a faire, of the third part of the profits of the office of marshalle, of the [i] third part of the profits of the keeping of a parke. Of the third part of the profit of a dove-house; and likewise of the third part of a piscary, [k] *viz. tertium piscem, vel jactum retis tertium.* Of the third presentation to an advowson (2). A writ of dower lieth de 3. parte exituum provenientium de custodia gaolæ Abathie Westm. And herewith agreeth reverend antiquitie. *De [l] nullo, quod est sua natura indivisibile et sectionem sive divisionem non patitur, nullam partem habebit, sed satisfaciatur ei ad valentiam.* Of the third part of profits of courts, [m] fines, heriots, &c. Also a woman shall be endowed of tithes; and the surest indowment of tithes is of the third sheafe, for what land shall be sowne is uncertaine (3).

(1. Ro. Abr. 681.)
[g] Bract. lib. 2. fo. 97. b. 23.
H. 3. tit. Aff. 435. F. N. B. 149.
45. E. 3. Dower 50.
(Post. 165. a.)
[h] 2. H. 6. 11. Bract. lib. 2.
fo. 97. Britt. 247. 11. E. 3. tit.
Dower 85. 15. E. 3. ibid. 81. 2.
E. 3. 57. F. N. B. 8. k.
[i] 4. E. 2. Tr. 233. 26. E. 3.
58. 45. E. 3. Dower 50.
(Cro. Jam. 621.)
[k] Bract. 98. 208. Brit. 247.
Flet. lib. 5. ca. 23. 17. Ed. 2.
Dower 104. 163. 19. Ed. 3. Quar.
Imp. 154. 7. E. 3. 7.
[l] Bract. 97. Brit. 146. 147.
[m] Lib. Intr. Judgme. 18. fo.
230.
11. Co. 25. 26.
Harper's case.
[n] 28. Aff. 3. 8. R. 2. Dower
184. 1. E. 6. Dow. 89.

But in some cases of lands and tenements, which are divisible, and which the heire of the husband shall inherit, yet the wife shall not be endowed. As if the husband [n] maketh a lease for life of certaine lands, reserving a rent to him and his heires, and he taketh wife and dieth, the wife shall not be endowed, neither of the reversion (albeit it is within these words tenements) because there was no seisin in deed or in law of the freehold nor of the rent, because the husband had but a particular state therein, and no fee simple (4). But if the husband maketh a lease for yeares, reserving a rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the yeares (5). And herewith agreeth the common experience at this day. But if the husband maketh a gift in taile, reserving a rent to him and to his heires, and after the donor taketh wife and dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibilitie may continue for ever.

Vid 1. E. 6. Dow. B. 89.
(Ante 30. a.)

Of a common certaine a woman shall be endowed, but of a common *sauns nombre en grosse* she shall not be endowed, as hath beene said before. And so of a rent service, rent charge, and rent secke, she shall be endowed (6): but of an annuitie that chargeth onely the person, and issueth not out of any lands or tenements, she shall not be endowed. But if the freehold of the rents, common, &c. were suspended before the coverture, and so continue during the coverture, she shall not be endowed of them. If after the coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her dower they in the eye of the law have continuance.

(Cro. Cha. 300. Ante 30. b.)
2. Ro. Abr. 675. Ante 29. b.)

If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heire by his industry and charge maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's time: for her title is to the quantitie of the land, *viz. one just third part* (7).

7. Co. 38. Lillingston's case.
6. Co. 78. Seig. Aburganie's case.
(Post. 56. a. 171. a. 179. a. Peik. sect. 328. Contra.)

And the like law it is, if the heire improve the value of the land by building: and on the other side, if the value be impaired in the time of the heire, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband (8).

(F. N. B. 149. C.)
V. 30. E. 1. Vouch. 298.

Afcuns temps durant le coverture. For the better understanding whereof it is to be knowne, that (as hath beene said) to dower three things doe belong, *viz.* marriage, seisin, and the death of the husband. Concerning the seisin, it is not necessarie that the same should continue during the coverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shall be endowed. But it is necessary that the marriage doe continue, for if that be dissolved the dower ceaseth, *ubi nullum matrimonium, ibi nulla dos.* But this is to be understood when the husband and wife are divorced à vinculo matrimonii, as in case of precontract, consanguinity, affinity, &c. and not à mensa et thoro only, as for adulterie (9). And yet it is said, that if the assignment of dower *ad osium ecclesiæ* be specified, *viz.* that notwithstanding any divorce shall happen, yet that she shall hold it for life, that this is good.

Bract. 92. Brit. cap. 101.
Brit. cap. eodem.
(1. Ro. Abr. 681. Doffr. Plac.
148. Post. 73. b. 4. Co. 29.
5. Co. 9. b.)
[e] W. 2. ca. 34. Lib. Intr. 224.
Fleta lib. 5. c. 22. Br. c. 109.
Mirror ca. 5. sect 5.
(F. N. B. 150. Perk. sect. 354.
1. Ro. Abr. 680. 1. Sid. 118.)

If the wife clope [o] from her husband, that is, if the wife leave her husband, and goeth away and tarrieth with her adulterer (10), she shall lose her dower until her husband willingly with-

out

(1) Nota placitum illud fuit coram justiciariis ad custodiam Judæorum assignatis. Hal. MSS.—See the record at length in *Tov. Angl. Judaic.* 230. See also *Moll. de Jur. Marit.* 8th ed. b. 3. c. 6. f. 11.—(2) See post. 32. b. n. 2.—(3) But the assignment is good, though tithes of the third yard-land be assigned. M. 9. Jac. C. B. *Kettleby's case*.—Hal. MSS.—(4) 25. E. 3. 46. But she shall be endowed of rent reserved in tail so long as the tail continues. 10. E. 3. 27. hic *sol. 30*.—Hal. MSS.—(5) P. 8. Jac. C. B. n. 23. *Fulgeam's case* Noy n. 280. *Whitley and Best* a proviso in the writ of seisin quod tenens non expellatur. But see 27. H. 8. 7. If tenant for yeares be received and his term is allowed, cesset executio durante termino. Yet the law vests the actual possession in him who recovers; and nota here she shall recover damages according to the value of the rent. P. 22. Jac. C. B. P. 16. E. 3.—Hal. MSS.—(6) Yet demand of land and common pro omnibus averiis, without saying eidem spectant, is good after verdict and shall not be intended common without number. P. 9. Car. B. R. *Prewet and Drake* Crook n. 3.—Hal. MSS. See *Cro. Cha.* 300. W. Jo. 315.—(7) But she shall not have emblements. Dy. 316.—Hal. MSS.—(8) Vid. 1. H. 5. 11. 17. E. 3. If seoffee improves by buildings, yet dower shall be as it was in the seisin of the husband. 17. H. 3. Dower 193. 31. E. 1. Vouch. 288. For the heir is not bound to warrant, except according to the value as it was at the time of the seoffment, and so the wife would recover more against the seoffee than he would recover in value, which is not reasonable.—Hal. MSS. See further *Hugh. Comment. on Orig. Writs* 196.—(9) 18. E. 4. 29. Vid. acc. Noy. n. 433. and n. 467. *Porvel and Weekes* in case of divorce causa adulterii. Yet dower lies. Vid. acc. 10. E. 3. 15. in case of divorce ex voto castitatis. Yet this in some cases dissolves the marriage ex tunc. 45. E. 3. Hal. MSS. See *Powel's case* acc. Godb. 145. But according to Rolle's report it was adjudged, that the divorce for adultery was a bar of dower, 1. Ro. Abr. 681.—(10) Dy. 107. Where issue is joined on reconciliation after elopement, advantage shall not be had except of one elopement. Vid. Lib. Parl. 30. E. 1. *John Comoy's grant* of his wife. Noveritis me tradidisse et demisisse spontanea mea voluntate domino Willielmo Paynell militi Margaretam uxorem meam; et concedo, quod Margareta cum predicto Willielmo remaneat pro voluntate ipsius Willielmi. Afterwards William and Mary lived together, and John died. Ruled 1. that this was a void grant: 2. that it did not amount to a licence, or at least was a void licence: 3. that after elopement there shall not be any averment, quod non fuit adulterium, though William and Mary after the death of John intermarried. So she was barred of dower. Nota they produced a sentence of purgation of adultery in the ecclesiastical court; yet not allowed against such presumption. Hal. MSS. See *Comoy's grant* of his wife at length in 2. Init. 435. and in *Marg. of Dy.* ed. 1688. fol. 106. b. See S. C. cited in 1. Ro. Abr. 680. See further *Vin. Abr. Dower* P. and *R. Hugh. Comment. Orig. Writs* 190.

of heir in contradistinction to the heir general. See 1. Stra. 41. 42. Hitherto lord Coke's general rule as to being both heir and female to take by purchase seems unimpeached. But it must be owned, that there is a case in which the doctrine, after a very solemn discussion, received a most severe attack from a judge of the highest authority. This happened in the famous case of

(1. Ro. Abr. 680. Perk. sect. 354.)
 [p] 3. E. 3. 2. 6. E. 3. 29. 9.
 E. 3. 29. 19. E. 3. Dower. 94.
 43. E. 3. 19.
 Vid. Fitz. N. B. 150. h.
 3. E. 2. Dower 153.

[9] M. 2. & 3. Elis. Dier 187. b.
 10. Aff. p. 2. 17. E. 3. 4.
 Tr. 10. H. 5. Rot. 447.

26. E. 3. Dower 133.
 30. E. 3. 31.
 17. E. 2. Dower 164.
 19. E. 3. qua. Imp. 154.
 32. E. 4. 2.
 38. H. 6. 27. per Paston.

[r] Magna Carta, cap. 6.
 Fleta lib. 5. cap. 23.
 Bracton lib. 2. fol. 96.
 Britton ca. 103.
 (Post. 34. b.)
 29. H. 6. 14. 6. E. 6.
 Dyer 76. F. N. B. 161.
 Regist. orig. 175.
 1. Marie Dower 101.
 (2. Inst. 17. F. N. B. 161. A.)
 [f] Lamb. Sect. 120. 71. & di-
 vers ancient manuscripts. See the
 2. part of the Institutes, cap. 7.
 [r] Bract. lib. 4. 312. & lib. 2.
 96.
 Britton. cap. 103.
 Fleta, lib. 5. cap. 23.

(Cro. Jam. 621. 1. Leon. 56.)
 [u] Regist. Iudic. 4.
 Origin. 173.
 Dyer 11. El. 284.
 Rast. pl. fo. 226. &c.
 16. E. 3. tit. Damages 83.
 3. E. 2. ibid. 11.

(Dr. and Stud. Dial. 2. c. 23.)
 [w] 5. E. 3. 1. 41. E. 3.
 Dower 46. and not in the booke
 at large.
 (Doctr. Plac. 152.)
 [x] 16. E. 3. Dower 59.
 2. H. 4. 7. 9. H. 4. 4. tit. issue
 233. 11. H. 4. 40.
 23. E. 4. 7. 14. H. 8. 25. b.

(1) Nota if the sheriff doth not return *seisin per metas et bundas*, it is ill, unless certain closes are assigned by name. M. 44. 45. El. C. B. Husband makes lease for years and dies, the heir says to the wife, I endow you of the third part of all the lands whereof your husband was seised. Ruled 1. This a good endowment, though not by metes and bounds. Otherwise where the sheriff assigns dower. 2. This assignment shall bind the lessee, and they shall hold in common. Tr. 1651. B. R. Couss and Lambert. Hal. MSS. See further as to assignment of dower post. 34. b.—(2) Where the wife shall hold charged. First 19. E. 3. Quare Impedit 154. Husband seised of the manors of A B and C, to which several advowsons are appendant, grants the next avoidance of the three advowsons and dies. The heir assigns the manor of A to the wife, with the advowson of A, which becomes void. The grantee shall present, for assignment of common right is of the third part of every manor and the third presentment of every church. Otherwise if the dower had been assigned to her ad ostium ecclesie. Secondly if the husband had granted a rent-charge, then in the former case the wife shall hold it discharged, for she may distrain in the other two manors, and for the same reason the wife of the heir shall not have dos de dote. But thirdly if he had granted a rent out of the manor of A, and this manor had been assigned, she should hold charged. 5. E. 2. Avowry 106. Husband's feoffee grants rent-charge to the wife, the husband dies, the third part of the land charged is assigned in dower. The rent shall be appor- tioned, and shall not issue wholly out of the residue. Hal. MSS. See further Vin. Abr. Dower D. a.—(3) See further as to *Quarentine* 2. Inst. 17. Barringt. Ant Stat. ad. ed. p. 9. 10. Hugh. on Orig. Writs 193. and Vin. Abr. Dower I. a.—(4) Vide quoad *damages in dower*. First what shall be said to be a dying seised. Husband makes feoffment to the use of himself for life, remainder to his son in tail, and dies seised: the wife shall not have damages, because he doth not die seised of the inheritance, which descends to the son. T. 6. Car. And therefore finding that the husband dies seised without saying of what estate is ill. M. 5. Car. Bromly and Littleton. Secondly, How the inquiry shall be of the dying seised and damages. If judgment be by confession or default, a writ shall issue to deliver *seisin* and inquire of damages; but if it be by verdict, the same jury shall inquire of the dying seised and damages; but if it be omitted, it may be supplied by writ of inquiry. Thirdly, What the damage shall be. Nota before the statute of Merton no damages in dower, and by that statute the wife shall have damages, viz. the value of the third part de tempore mortis usque iudicium, and by the statute of Gloucester 6. E. 1. c. 1. costs as well as damages. Therefore the judgment quoad the land may be affirmed in writ of error and the judgment for damages be reversed, because they are several in their nature, 22. E. 4. 46. and error lies after judgment for *seisin* and before judgment for damages. T. 24. Car. B. R. Dudley and Glyde. The damages in dower are 1. the value de tempore mortis: 2. *damna occasione detentionis dotis*, which are usually assessed severally. But if they are mixed together by the verdict, yet it is good. T. 5. Car. C. B. Harves case. Judgment to recover *seisin* by default, and writ to enquire of the value; the jury assess the value to the taking of the inquisition, and judgment given for them, and affirmed good in writ of error; so that the judgment intended by the statute of Merton is not the first judgment but the second. T. 1649. Thynne and Thynne. Hal. MSS. See in Barn. Not. 2d. ed. p. 234. Penrice's case, according to which damages should be computed only to the awarding of the writ of inquisition. But Walker and Nevil 1. Leon. 56. and the case cited by lord Hale are contra.—(5) Damages in such case according to the value, not of the land, but of the rent. P. 22. Jac. C. B. Hal. MSS.

Brown and Barkham determined by lord chancellor Cowper; who held a younger brother to be capable of taking as heir male

And the reason why *tout temps prift* is a good plea in a writ of dower brought against the heire to barre her of the meane values and damages is, because the heire holdeth by title, and doth no wrong till a demand be made (1). But in a writ of aiel, cofinage, &c. where the land and damages are to be recovered, there such a plea is not good; for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heire cannot at the first day plead *tout temps prift*, because he had not the land all the time, since the death of the ancestor. 5. It is to be observed, that the meane values and damages are to be recovered against the tenant in a writ of dower, as it appeareth in a notable record [y] between Belfield and Rowse (2). The tenant as to parcell pleaded non-tenure, and for the rest due deteynement of charters, upon which pleas they were at issue, and both issues found by the jury against the tenant, and found further that the husband died seised such a day and yeare, and had issue a sonne, and that the demandant and the sonne by 6 yeares after the decease of the husband together tooke the profits of the land, and after the sonne such a day and yeare died without issue, after whose decease the land descended to the tenant as uncle and heire to him, by force whereof he entred and tooke the profits untill the purchasing of the originall writ, and found the value of the land by the yeare, and assessed damages for the deteyning of the dower, and costs; and upon this verdict, after often debating, the demandant had judgment to recover her dammages for all the time from the death of her husband without any defalcation (3). In which case many things apparent therein are observable. Let the tenant therefore take heed how he plead false pleas. 6. That this statute of Merton doth extend to copiholds [z] where the custome is, that women be dowable (4). 7. That if the wife hath dower assigned to her in chancery she shall have no damages, [a] for the words of the statute be, *Et vidue per placitum recuperaverint, &c.* So it is if the heire or his feoffee assigne dower, and the wife accepteth it she loseth her damages.

A man seised of lands in fee taketh a wife and granteth a rent charge, and after maketh a feoffment in fee, and taketh backe an estate taile and dieth, the wife recovereth dower against the issue in taile by reddition, the wife maketh a furmise that her husband died seised, and prayeth a writ to enquire of the damages, and that is granted to her. In this case she holds the land charged with the rent charge, for by her prayer she accepteth herselfe dowable of the second estate (5), for of the first estate, whereof she was dowable, her husband died not seised, and so she hath concluded herselfe, wherefore if the rent charge be more to her detriment then the damages beneficiall to her, it is good for her in that case to make no such prayer (6).

De quel age que la feme soit, issint que el passe l'age de neufe ans (7) al temps del mort son baron. Feme, wife, here Littleton speaketh of a wife generally, and generally it is to be understood as well of a wife *de facto*, as *de jure*. Therefore if the wife be past the age of 9 yeares [b] at the time of the death of her husband, she shall be endowed, of what age soever her husband be, albeit he were but 4 yeares old. *Quia junior non potest dotem promereri, neque virum sustinere; nec obstat mulieri petenti minor aetas viri.* Wherein it is to be observed, that albeit *Consensus non concubitus facit matrimonium*, and that a woman cannot consent before 12 nor a man before 14, yet this inchoate and imperfect marriage (from the which either of the parties of the age of consent may disagree) after the death of the husband shall give dower to the wife, and therefore it is accounted in law after the death of the husband *legitimum matrimonium*, a lawfull marriage, *quoad dotem*. If a man taketh a wife of the age of 7 yeares, and after alien his land, and after the alienation the wife attaineth to the age of 9 yeares, and after the husband dieth, the wife shall be endowed; for albeit she was not absolutely dowable at the time of the marriage, yet she was conditionably dowable, *viz.* if she attained to the age of 9 yeares before the death of the husband, for so Littleton here saith, so that she passe the age of 9 yeares at the death of her husband, for by his death the possibility of dower is consummate.

And so it is if the husband alien his land, and then the wife is attainted of felony, now is she disabled, but if she be pardoned before the death of the husband, she shall be indowed. If the son indow his wife at her age of 7 yeares *ex assensu patris*, if she before the death of her husband attaine to the age of 9 yeares, the dower is good. But otherwise it is of an originall absolute disability; as if a man take an alien to wife, and after the husband alien the land, and after she is made denizen, the husband dieth, she shall not be indowed, (8) because her capacity and possibility to be indowed came by the denization. Otherwise it is if she were naturalized by act of parliament, whereof see more in the chapter of villenage (9).

And the bishop upon an issue joyned in a writ of dower, *Quod nunquam fuerunt copulati legitimo matrimonio*, ought to certifie that they were coupled in lawfull marriage, albeit the man were under fourteen, or the wife above nine, and under twelve (10). So it is if a marriage *de facto*, be voidable by divorce (11), in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have bene dissolved, and the parties freed *a vinculo matrimonij*, yet if the husband die before any divorce, then for that it cannot now be avoyded, this wife *de facto* shall be endowed, [c] for this is *legitimum matrimonium* (as in the other case

(Doctr. Plac. 152.)

(S. C. Mo. 80. N. Benl. 155. 4. Leon. 198.)
[y] Mich. 8. & 9. Eliz. rot. 904. in Comm. banc.
(9. Co. 15. b. Beddingfield's case. 1. Ro. Abr. 679.)

[z] Tr. 37. Eliz. 4. Co. 30. b. Shawe's case.

[a] 43. Aff. Pl. 32. (F. N. B. 263.)

14. H. 8. 28.

(1. Ro. Abr. 675. Doctr. Plac. 148.)

[b] 3. E. 1. Dower 172. Itin. North. 8. E. 2. Dower 112. 7. E. 2. Dower 147. 12. E. 2. ibid. 159. 21. E. 3. 28. 15. E. 3. Dower 67. 12. R. 2. Dower 54. 12. H. 4. 3. 35. H. 6. 40. 7. H. 6. 11. 12. 12. H. 4. Doctr. & Stud. Fitz. N. B. 149. b. 22. Eliz. Dower 369. Bract. fol. 92. Fleta lib. 5. ca. 21. Lib. Intrat. fo. 123.
(Post 37. a. Ante 31. Cro. Jam. 539.)

(See 1. Salk. 120. S. C. 3. Leo. 410.)
(5. Co. 98. b. Berrie's case.)

[c] 10. E. 3. 35. Fleta lib. 5. cap. 22. Brit. cap. 107.
(7. Co. 41. b.)

(1) If the tenant comes the first day, and acknowledges the action, and avers that he was at all times ready to render dower, the demandant may take judgment immediately, and then there shall only be recovery of seisin et nihil de missa quia venit primo die. But if the demandant would have damages, she may aver, that she requested her dower and the tenant did not endow her, and then the judgment for damages and value shall wait till the issue is tried. N. Entries Dower in Judgment 4. Hal. MSS.—(2) Mich. 8. and 9. Eliz. Belford and Rows, Moor and Bendl. Hal. MSS. See Mo. 80. and N. Bendl. 153.—(3) Ratio istius casus videtur, because the wife ought to accompt to the heir for the whole. But if the heir be in ward in chivalry and the wardship is granted to the wife, or if the wife has estate for years, and after the years expired or the full age she brings dower, it seems that the heir shall not be charged pro tempore, because she has a good estate to her own use. The reason is, because the statute of Gloucester, that every one shall render for his time, doth not extend to this case. H. 8. Jac. C. B. Casus Archiepisc. Ebor. Hal. MSS.—(4) Vid. Rot. Parl. 3. H. 6. n. 29. special act of parliament for giving mesne values to the wife against the king, in casu comitis Marche. Hal. MSS.—(5) Sic nota, the wife has election to be endowed of the last seisin; and therefore if husband and wife levy fine and take back estate to the husband in fee, the wife shall dower of the second seisin; but otherwise it is in the case of a husband intitled to be tenant by the curtesy, ut videtur. Hic fol. 30. a.—Hal. MSS.—(6) See further as to damages in dower. Hugh. on Orig. Wr. 180. Treat. on Dow. in Gilb. Law of Uses 375. 2. L. Raym. 1384. New Abr. Dower I. Vin. Abr. Dower O. a. P. a. Say. Law of Dam. 16. and 17. Ch. 2. c. 8. sect. 3. and 4. Caf. B. R. temp. Hardw. 19. 50. 23.—(7) Vid. Raft. Entr. 228. novem annorum et dimid. She ought to shew how much more she is than 9 yeares.—Hal. MSS.—(8) Philips in his reading holds, that if the wife be attainted, and then the husband purchases lands and aliens it again, and then the wife is pardoned, she shall have dower of the land which was purchased and aliened during the time she was not dowable. And he cited Maunsfield's case adjudged 28. Elizabeth. In that case a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands and aliened them again and died, the land which the wife had in jointure was evicted, and the wife had dower of the land which was purchased and aliened by her husband at the time when she was barred of her action of dower. So if wife elopes and husband purchases lands and aliens them, and then the wife is reconciled, she shall have dower of those lands. MS. Comment. on Litt. penes editorem, supposed to have been written before the publication of lord Coke's Commentary.—See the list of readers of the Middle Temple in Dugd. Orig. Jurid. by which it appears that Mr. Philips was autumn reader in 38. Eliz.—See further Plowd. Quær. 181. and 204.—(9) Vide supra fol. 31. b.—Hal. MSS.—See note 9. in 31. b.—(10) Vid. M. 9. and 10. E. 1. coram rege Rot. 24. Ebor. A contract per verba de presenti with B, and has issue by her, and afterwards marries C in facie ecclesiæ. B recovers A for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D, and then marries B in facie ecclesiæ, and dies. She brings dower against D, and recovers because the feoffment was per fraudem mediate between the sentence and the solemn marriage, sed reveratur coram rege et concilio quia predictis A non fuit seiscitus during the espousals between him and B. Nota, neither the contract nor the sentence was a marriage. Quoad marriage infra annos nobiles, nota infra sect. 104. It is only sponsalia de futuro quoad other purposes. Dy. 105. 313. 369. 47. E. 3. Action sur lestatute 37. Whether husband shall have trespass de tali uxore abducta.—Hal. MSS.—(11) Nota obiter. When A per judicium ecclesiæ recuperasset aliquam in uxorem, vel in divortium celebratum

male under a devise to the heirs male of the body of the testator's great grandfather, though the daughter of an elder brother

[d] Bracton lib. 4. fol. 304.
Britton ibidem. Fleta lib. 5.
cap. 23. 32. E. 1. Dier 156.
(5. Co. 98. b. Ante 32. a. 1. Ro.
Abr. 341. 681. Noy 108.)

[e] Tr. 2. Ja. Rot. 1815. in
Communi Banco. Inter Stowell
and Wikes in Dower.

[f] 50. E. 3. 15. b.

[g] W. 2. cap. 34.
(1. Mod. Rep. 130. 2. Inf. 68.)

[h] Britton cap. 106. Bracton
lib. 4. fol. 301
[i] 31. E. 3. tit. Collusion 29.

[k] Bract. lib. 2. cap. 39. fol.
92. &c.
Fleta lib. 5. cap. 22.
Britton cap. 101.

[l] Glanvil lib. 6. cap. 1.
Bracton ubi supra.
Britton ubi supra.
Fleta ubi supra.
Mirror cap. 1. sect. 3.
Magna Carta cap. 7.

Fitz. N. B. 150. O.

[m] 21. E. 4. 53. 54. 7. H. 6.
26. 22. H. 6. 14. 21. H. 7. 17.
40. Aff. 27. 41. 16. E. 2. Pre-
scription 53. 43. E. 3. 32. 45.
Aff. 8. Dier 363. 39. E. 3. 2. 10.
14. E. 3. Barre 27. 13. E. 3. tit.
Dower, 65. (1. Ro. Abr. 558.
563.)

[n] Vide le statute de consuetud.
Kancie, &c. Trin. 17. E. 3. co-
ram rege Kan. in Thesaur. in
which record Sententia significeth
Widowhood.

bratum inter A & B his wife, and she is married to C, et postea ad prosecutionem A sententia divortii reversatur by appeal, a writ directed to the sheriff shall issue out of chancery on the sentence there certified. Claus. 19. H. 3. m. 1. pro Willelmo de Tregor. Claus. 20. H. 3. m. 9. pro Willelmo de Dauntsey. Claus. 21. H. 3. m. 17. pro Roberto de Halsted. And vid. M. 9. and 10. E. 1. ubi supra. Et cum eundem Willelmum, si in malitia sua ulterius perseverasset, ad executionem dictæ sententiæ regia potestas temebatur compulisse, si a loci diocesano fuisset super hoc requisitus. Hal. MSS.

(1) 10. E. 3. 15. Supra 32. Hal. MSS. See n. 9. in 32. a.—(2) Acc. 2. Hawk. Pl. C. b. 2. c. 23. f. 36. and the authorities there cited.—(3) To the books cited ante 32. a. n. 10. as to the effect of elopement on dower, add New Abr. tit. Marriage E. 1. Treat. on Dower in Gilb. Law of Uses, 402.—(4) Acc. Bro. Appeal 17. Staund. Pl. C. 59. But see contra 2. Inf. 317. and 1. Mod. 130. by judge Hide.—(5) See post 37. a.—(6) The reason is, because post carnalem copulam the husband cannot be professed without the consent of the wife. Extrav. de conversione conjugatorum cap. 2. et per totum. Nec è converso. Hal. MSS. See New Abr. Marriage E. 3. Vin. Dower K. and Treat. on Dow. in Gilb. Law of Uses, 401.—(7) Vid. 15. H. 3. Prescription 57. Custom of the town of Salop, that the wife shall have a moiety of socage, but if the husband has socage and chivalry the wife shall have only a third part. Hal. MSS.—(8) Nota, the writ special. Hal. MSS.—(9) See Acc. Robinf. Gavelk. 159.—(10) Accordingly adjudged that she cannot waive. H. 24. Eliz. rot. 1515. C. B. P. 43. Eliz. Davers and Selby T. 30. Eliz. C. B. Rot. 157. Hunt and Gilbert. Hal. MSS.—See the former case in Cro. Eliz. 825. and the latter in Mo. 260. 1. Leon 133. Gouldsb. 108. Cro. Eliz. 121. and Sav. 91. See further on the subject in Robinf. Gavelk. 179. and Hugh. on Orig. Wr. 160.—(11) By the custom of some places the wife shall have the whole of her husband's lands in dower. See Fitzh. N. Br. 150. p.

ther was heir general, and instead of founding his decree on special circumstances, which were not wanting in the case, moit expressly denied lord Coke's distinction between descent and purchase. See Prec. in Cha. 442. 461. Gilb. Rep. 116. 131. and 1. Stra. 35. But lord Cowper's decree, notwithstanding his high character, was not acquiesced in; for in November 1641 the same case was brought, by bill of review, before lord chancellor Hardwicke, who indeed decreed in favour of the same person, but was far from following lord Cowper in his reasons. He admitted lord Coke's distinction to have been long ago established, and professed to determine wholly on the special circumstances, without the least intention of impeaching the general rule. In giving judgment he divided the case into two questions, 1st. whether it was an established rule, that he who claims as heir male by purchase must be general heir as well as nearest male descendant; 2dly, whether the apparent intent of a testator to the contrary may not create an exception to the general rule. According to a very good note of the case lord Hardwicke's words on the first question were these: As to the first of these questions, it cannot be denied, but that the distinction between an heir male of the body to take by descent, who is the nearest male descendant of the party claiming through males, and to take by purchase, who must be heir as well as a male descendant of the body, has been long ago established. The statute de donis established the first, and the second has been laid down by lord Coke in his Comment upon Littleton, and is taken from his argument in Shelley's case and Dyer's report of that case, and he has been followed by some later authorities. Lord Cowper argued strongly against this rule; but as his argument is well known and very common, I shall not now take notice of it. If this doctrine had been res integra at the time of his decree, or was so now, I am so fully convinced of the unreasonableness of it that I would never establish it. But when a rule of law has long prevailed, it ought to be supported, though it be not strictly agreeable to natural reason; for in many instances it is more material, that the law is settled than how it is settled. But as I think that this case may be determined without determining this question, I shall leave the rule

when the wife is *infra annos nobiles*) quoad dotem. And so in a writ of dower the bishop ought to certify, that they were *legitimo matrimonio copulati*, according to the words of the writ. And herewith agreeth 10. E. 3. 35. And [d] Bracton: *quamdiu duravit matrimonium, duravit dotis exactio, eo deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam, quod si aliquando fuit matrimonium propter consanguinitatem, &c. inter eos accusatum, nunquam tamen fuit in vita viri sui solum nec divortium celebratum.* But if they were divorced à vinculo matrimonij in the life of her husband, she loseth her dower: otherwise it is if they were divorced [e] *Causa adulterij* (1), which is but à mensa et thoro, and not à vinculo matrimonij, as it was adjudged. But some doe hold that a wife de facto shall not have an appeale of the death of her husband, but onely she that is a wife, de jure in favorem vitæ (2). Vide 50. E. 3. fol. 15. 28. E. 3. 92. 27. Aff. Stamf. Pl. Cor. 59. and that there *unques accomple in loyall matrimonie* shall be taken de jure strictly. And so in some case a wife shall have dower where she cannot have an appeale, [f] and in other cases she shall have an appeale, where she cannot have a writ of dower, as if she elope (3), &c. she is barred of her dower, but not of her appeale (4): and the reason is for that the statute [g] barreth her of her dower, but not of her appeale. So if the husband be attainted of treason, &c. his wife shall not be endowed, and yet if any doe kill him, the wife shall have an appeale, the reason of the diversity shall appeare hereafter in this chapter (5).

Après le mort le baron. [h] *mortuo viro hinc confirmatur dos.* This is intended of a naturall, not of a civill death. For if the husband entred in religion, [i] the wife shall not be endowed untill he be naturally dead (6).

And in this chapter Littleton divideth dower into five parts, viz. dower by the common law. Secondly, dower by the custome. Thirdly, dower *ad osium ecclesiæ*. Fourthly, dower *ex assensu patris*. And fifthly, dower *De la plus beale*. And all these dowers were instituted for a competent livelihood for the wife during her life. [k] *Propter onus matrimonij, et ad sustentationem uxoris et educationem liberorum, cum fuerint procreati, si vir præmoriatur.*

Sect. 37.

NOTA per le com-
mon ley la feme
navera pur sa dower
forsque [1] la tierce
part, &c. This third part
is called *rationalis dos*, or
dos legitima, because it is the
dower that the common law
giveth, *rationalis autem dos
est cujuslibet mulieris de quocun-
que tenemento tertia pars om-
nium terrarum, et tenementorum
quæ vir suus tenuit in dominio
suo ut de feodo, &c.*

*Mes pur custome daf-
cun pais (7) el avera le
moitie, et per le custome
en ascun Ville et Burgh
el avera lentierte.* Such

a [m] custome may extend to a county, city, or an ancient burgh without question; and so this custome, as here it appeareth by Littleton, may extend to upland towns, which are neither counties, cities, nor boroughs. But the furer pleading, in this and the like cases, is to lay the custome within a manor or seignory, if the truth of the case will so beare it (8). By the custome of Gavelkind [n] the wife shall be endowed of the moiety, so long as she keepe herselfe sole, and without child, which she cannot waive and take her thirds for her life (9). For in that case, *Consuetudo tollit communem legem* (10).

And as custome may enlarge, so may custome abridge dower, and restraine it to a fourth part, &c.

ET nota, que per
le common ley
la feme navera pur
sa dower forsque la
tierce part des tene-
ment que fueront a
sa baron durant le
espousels; mes per
custome dascun pais
el avera le moitie, et
per le custome en af-
cun ville et burgh,
el avera lentierte;
et en tous tiels ca-
ses, el serra dit tenant
en dower.

AND note, that by
the common law,
the wife shall have for
her dower, but the third
part of the tenements
which were her hus-
band's during the ef-
pousals; but by the cus-
tome of some county
she shall have the halfe,
and by the custome in
some towne or bo-
rough, she shall have
the whole; and in all
these cases she shall be
called tenant in dower.

Sect.

Sect. 38.

This shall be explained by that which shall be said in the two Sections next ensuing.

AUXY sont deux autres man-
ners de dower, cestascavoir,
dower que est appelle dowment ad
ostium Ecclesiæ, et dower appelle
dowment ex assensu patris.

ALSO there be two other kinds
of dower, viz. dower which
is called dowment at the church
doore, and dower called dow-
ment by the father's assent.

Sect. 39.

*D*owment ad of-
tium Ecclesiæ
est, lou home de plein
age seisie en fee sim-
ple que serra es-
pouse a une femme, quant
il vient al huis del
monastery ou desgli-
se destre espouse, et la
apres affiance enter
eux fait, il endowe
la femme de sa entier
terre ou de la moity,
ou dautre meindre
parcel, et la overt-
ment declare le quant-
titie et la certaintie de
la terre, que el avera
pur sa dower. In ceo
case la femme, apres le
mort le baron, poit
entrer en le dit quan-
titie de terre dont le
baron luy endowa,
sans autre assigne-
ment de nulluy.

*D*owment at the
church doore is,
where a man of full age
seised in fee simple, who
shall be married to a
woman, and when he
commeth to the church
doore to be married,
there, after affiance and
troth plight betweene
them, he endoweth the
woman of his whole
land or of the halfe or
other lesser part there-
of, and there openly
doth declare the quanti-
ty and the certaintie of
the land which she shall
have for her dower.
In this case the wife, af-
ter the death of the
husband, may enter in-
to the said quantity of
land of which her hus-
band endowed her,
without other assigne-
ment of any.

ever after marriage solemnized (3), and therefore this dower is good without deed, because he cannot make a deed to his wife. For no assignment of dower *ad ostium ecclesiæ* can be made before marriage, for that before marriage the woman is not intitled to have dower.

De sa entier terre ou de le moitie. (4) In ancient time [9] as it appeareth by Glanvill

(1) Post affidationem et carnalem copulam sunt quasi husband and wife, and gift by him to the wife is void. 16. H. 3. Feoffments 117. 13. E. 1. ibid. 113. Hal. MSS.—(2) This explanation of affiance or sponsalia is conformable to the strict sense of the word amongst the civilians and canonists; but our law books, as Mr. Swinburne long ago observed, use affiance and marriage promiscuously for one and the same thing, and lord Coke apparently supposes Littleton by affiance to mean marriage; for lord Coke says that dower *ad ostium* ever is after marriage, without professing to contradict Littleton. See Swinb. on Spousals. 2. Perk. sect. 442.—(3) But though dower *ad ostium* cannot be till after marriage, yet it seems that such endowment cannot be made at any time after, but must be immediately after. See Perk. sect. 442. where the time of assigning dower *ex assensu patris* is so explained. But Mr. Perkins adds a case, in which, according to some ancient books, dower *ex assensu patris* made 8 weeks after the marriage was held good. Perk. Sect. 443. See further Hugh. on Orig. Wr. 167. and note p. in 2. Blackst. Comment. 5th edit. 134.—(4) Vid. 9. H. 3. Dower 190. Dower *ad ostium ecclesiæ* of a moiety of all lands which he has or may have. He purchases lands afterwards, and the dower good for them. Hal. MSS.

unimpeached, and found my decree on the second question. He then proceeded to consider the second question, and after stating several authorities to shew there might be exceptions to the general rule, he pointed out the particular circumstances which he relied upon in the case before him, and on account of them only affirmed lord Cowper's decree. Lord Hardwicke's guarded manner of expressing himself on this last case amounts to a full acknowledgment of the general rule, and is the strongest authority to prove its existence, because he avowed his dislike of it.—Upon the whole, it is submitted to the learned reader, that the general rule of being heir general to as take heir male or female by purchase may be defended as a reasonable rule of construction, where the words merely operate as words of purchase, and more particularly if the superadded words of limitation are to heirs general, as where land is given to the heirs female of the body of one and the heirs of their bodies; that the authorities before and in the time of lord Coke fully warranted him in advancing the rule in its full extent, that is, where the words operate as words both of purchase and limitation; that the rule has been confirmed by many cases since lord Coke's time; and lastly, that as lord Cowper's opinion is the single direct authority in any printed book against the rule, and it has been acted upon and acknowledged in several subsequent cases, it ought still to be observed, where the construction rests singly on the words heirs female, and they stand unexplained by any other words or circumstances.

*I*F this dower be made *ad ostium castri sive mesuagii* it is not good, but ought to be made, *ad ostium Ecclesiæ sive monasterii*.

Et sciendum est [a] quod hac constitutio fieri debet in facie Ecclesiæ, et ad ostium Ecclesiæ; non enim valet facta in lecto mortali, vel in camera, vel alibi ubi clandestina fuere conjugia. For the law requires, that this and like matters be done publickly and solemnly.

10. H. 3. Dower 200.

[a] Bracton. lib. 2. cap. 13. Mirror. cap. 1. sect. 2. and cap. 5. 10. H. 3. Dower 201. F.N.B. 150. m. n. Fleta lib. 5. cap. 22. &c. Britton cap. 101. 108. &c.

(Perk. sect. 305.)

Ou home de pleine

age. That is of one and twenty yeares. Anno 9. H. 3. dower 197. A man of the age of eighteen yeares tooke a wife, and by assent of his guardian endowed her *ad ostium ecclesiæ*, and it was adjudged a good endowment, albeit the husband dyed before the age of one and twentie yeares; but I hold Littleton's opinion to be good law.

9. H. 3. Dower 197.

(Post. 38. 4. 1. Ro. Abr. 681.)

La apres affiance enter eux. (1) *Affidare est fidem dare*, Affiance or sponsalitie, and is derived of this word *spondeo*, because they contract themselves together, et ideo sponsalia dicuntur [p] futurarum nuptiarum conventio, et re-promissio (2). But this dower is

good without deed, because he

[p] Glanvill. lib. 6. ca. 1. 40. E. 3. 43. Vide Vernon's case, 4. Co. 1. 2.

[q] Glanvill. lib. 6. cap. 1. Bract. lib. 2. cap. 38. 39. and lib. 4. tract. 6. cap. 1. & 6. Britton cap. 101. &c. Fleta lib. 5. cap. 22. &c.

(1. Ro. Abr. 682.)
 [r] F. N. B. 150.
 [f] 20. E. 3. Barre 132.
 45. E. 3. 6. Fleta lib. 5. 23.

[i] Britton cap. 101.
 Bracton lib. 2. cap. 18.

[u] Vide 14. H. 3. Dower 189.
 9. H. 3. Dower 190. 8. H. 3.
 Dower 195. F. N. B. 150. 40.
 E. 3. 43.

[w] Magna Carta cap. 7. See
 the second part of the Institutes
 cap. 7. Fleta lib. 5. cap. 23.
 Britton cap. 103. Bract. lib. 2.
 cap. 40. Regist. 175. Vide
 Dyer 6. E. 6. 76. b. and 161. a.
 F. N. B. 161. 1. Marie. Br. 101.
 (Aate 32. b.)

Nota. surest way.

(1. Ro. Abr. 681. 2. Inst 678.
 32. H. 8. cap. 5. of execution.)

[x] 45. E. 3. 26. 48. E. 3. 36.
 22. Aff. 87. 39. E. 3. 12. 37.
 H. 6. 38. 39. H. 6. 25. 1. H.
 5. 8. Brev. 199. 30. E. 3. 30.
 21. E. 4. 3. Vide 1. Co. Shel-
 ley's case. 40. E. 3. 22.

[a] 8. E. 2. Ent. 75. 40. E. 3.
 22. 45. E. 3. 5. 6.
 [b] 1. Mar. Dyer. 91. 1. E. 2.
 Dower 146. 28. H. 6. 2. Dyer
 9. El. 263. 26. Aff. 41. 31. E.
 3. Scir. fa. 99. 33. H. 6. 2. Ver-
 non's case. 4. Co. 1. 5. E. 4. 22.
 (1. Ro. Abr. 682. 684. Cro. Eliz.
 451. Noy 55. Mo. 59. Post. 169.)

[c] 7. H. 6. 34. 10. E. 2. Dower
 169. 10. E. 3. 38.
 (2. Co. 67.)

Glanvill lib. 6. cap. 1. It was taken that a man could not have indowed his wife *ad osium ec-*
clesie of more then a third part, but of lesse he might. But at this day [r] the law is taken as
 Littleton here holdeth. An assignement of dower, [f] where the husband was sole seised, can-
 not be made of the third or fourth part in common, but ought to be in severaltie (1).

Et la overtment [t] declare le quantitie et certeintie del terre. Here
 be two things that the law doth delight in, *viz.* first, to have this and the like openly and so-
 lemnly done. Secondly, to have certaintie, which is the mother of quiet and repote. And
 this word (moitie) above said is to be entended of the halfe in certaintie, and not of the moitie
 in common, which cleerly [u] appeareth in that here Littleton saith, the quantitie and certaintie
 of the land.

En ceo case la feme poet entrer en le dit quantitie del terre. And after-
 wards Sectione 43. he saith, *Nota, que en tous cases lou le certaintie appeirt, queux terres ou te-*
nements feme avera pur sa dower, la feme poet entrer apres la mort son baron. It was instituted
 in favour and reliefe of wives, that a man after marriage might assigne to his wife certaintie
 of dower, to the end that the widow should not be driven to a long and chargeable suit, wherein
 delay might be used, and in the meane time her life spent, together with her money also.
 For albeit the [w] law hath provided, *Quod vidua post mortem mariti sui non det aliquid pro*
dote sua, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui,
infra quos dies assignetur ei dos sua, nisi prius ei assignata fuerit, &c. et habeat rationabile estove-
rium suum interim in communi, yet because there was no penaltie or punishment inflicted, the
 tenant of the land may drive her to sue for her dower. And this continuance of the widow
 in the capitall messuage, is in law called a quarantine, *quarentina*, for that it is by the space of
 fortie days, as is aforesaid (2). And if the heire or other tenant of the land put her out, she may
 have her writ, *De quarentina habenda*. If the wife marry within the fortie dayes she loseth
 her quarantine, for her habitation in the house is personall to her, and only given to her in
 judgment of law during her widowhood, albeit the words of the law be generall. And there-
 fore to the end that widowes might have certaintie of estate, and that they might enter (3) and
 not be driven to suit, the law hath provided dower *ad osium ecclesie*, and as it shall appeare
 hereafter, dower *ex assensu patris*. And lastly, by making of a joynture of which (being
 no dower but made in satisfaction of dower either before or after marriage) it is necessary
 that something should be said hereafter in his apt place, for that this now falleth out to be
 the surest way.

En tous cases quant le certaintie appeirt, &c. la feme poet entrer apres
le mort del baron. This is to be intended where the certaintie appeareth upon an assigne-
 ment of dower *ad osium ecclesie*, or *ex assensu patris*. For if a woman bring a writ of dower of
 fixe pound rent charge, and she hath judgement to recover the third part, albeit it be certain
 that she shall have fortie shillings, yet she cannot [x] distreine for 40 shillings, before the sherife
 doe deliver the same unto her: (4) for wheresoever the writ demands land, rent, or other things
 in certain, the demandant after judgement may enter or distrein before any seisin delivered
 to him by the sherife upon a writ of *habere facias seisinam*. But in dower where the writ de-
 mandeth nothing in certaine, there the demandant after the judgement cannot enter or dis-
 treine untill execution sued, by which execution the sherife is by the king's writ to deliver the
 third part in certaintie to the demandant. And so it is when the wife of one tenant in common
 demand a third part of a moitie, yet after judgement she cannot enter until the sherife deliver to
 her the third part, albeit the deliverie of the sherife shall reduce it to no more certaintie then
 it was (5).

Sauns auter assignement (6) de nulluy. For as concerning dower at the common
 law, there must be assignement either by the sherife, (as hath been said) by the king's writ, or
 else by the heire or other tenant of the land by consent and agreement between them. To a
 perfect assignement of dower eight things are to be observed: [a] first regularly the assignement
 must be certaine, as our author here saith (7).

Secondly, (8) it [b] must be either of some part of the land whereof she is dowable, or of a
 rent or some other profit issuing out of the same, either before judgement or after, which rent
 may be assigned to her by parol. But an assignement of other land whereof she is not dowable,
 or of a rent issuing out of the same, is no barre of her dower (9).

Thirdly, the assignement must be absolute, and not conditionall, or subject to any limita-
 tion (10).

Fourthly, it must be made by him that is tenant of the land, but herein certaine diversities
 are to be observed (11).

If two or more be joyntenants of lands, [c] the one of them may assigne dower to the
 wife,

(1) Vide contra adjudged supra. Hal. MSS. See Lambert's case ante 32. b. n. 1. See S. C. in 1. Ro. Abr. 682. X. pl. 3. and
 Sty. 176. in both of which books the case is so explained as to make it consistent with lord Coke's general doctrine as to the
 manner of assigning; for according to them the court held, that the assignment of the third part in common would have been
 bad, if the wife and heir had not by mutual assent waived the assignment by metes and bounds, and that it would have been
 error, if the sheriff had so assigned.

(2) See further as to quarantine ante 32. a. and n. 3. there, and Treat. on Dow. in Gilb. Law of Uses 372.

(3) 24. H. 3. Dower 189. A man endows his wife of all the lands which his mother then had in dower; the mother and husband
 dye; the wife brings writ of dower *ad osium ecclesie* and recovers. Sic nota, that the wife may have action *orenter*. MSS. Com.
 on Litt.—See acc. post 35. b.

(4) 20. E. 4. 14. Hal. MSS.

(5) If the sheriff reduces to certainty by metes and bounds, though the demandant refuses, yet she may afterwards enter. 10. Eliz.
 Dy. 278. Hal. MSS.

(6) Nota P. 38. Eliz. Wentworth's case. It ought to be pleaded by the word *assignavit* not *dedit*. Hal. MSS.—See Cro. Eliz. 451.

(7) Vid. ante 32. b. Lambert's case. Hal. MSS.—See n. 1. in 32. b. & supra n. 1.

(8) 12. H. 4. 17. Hal. MSS.

(9) But see 2. H. 5. 12. The heir assigns dower of lands of which the husband was seised, but the wife not dowable: she is tenant in
 dower. 30. E. 1. Briefe 884. If wife be endowed, and afterwards exchanges with the heir for other lands which were the inheritance
 of the husband, she shall be said to be tenant in dower of the lands so taken in exchange, and her entry shall be said to be by the husband.
 Per omnes justiciarios. Hal. MSS.

(10) P. 33. Eliz. Wentworth's case. A conditional assignment of rent doth not bar dower. Hal. MSS.

(11) And this ought to be averred in pleading. Dy. 361. Hal. MSS.—See S. C. in Cro. Eliz. 451. and Noy 55.

wife of a third part in certainty, and this shall binde his companions, because they were compellable to do the same by law⁽¹⁾. But if one of them assigne a rent out of the land to the wife, this shall not binde his companion, because he was not compellable by the law therunto⁽²⁾. If the husband make several feoffments of severall parcells, and dyeth, and the one feoffee assigne dower to the wife of parcell of land in satisfaction of all the dower which she ought to have in the land of the other feoffees, the other feoffees shall take no benefit of this assignment, because they are strangers thereunto, and cannot plead the same⁽³⁾. But in that case if the husband dyeth seized of other lands in fee simple, and the same descend to his heire, and the heire endoweth the wife of certaine of those lands in full satisfaction of all the dower that she ought to have aswell in the lands of the feoffees, as in his owne lands, this assignment is good, and the several feoffees shall take advantage of it⁽⁴⁾. And therefore if the wife bring a writ of dower against any of them, they may vouch the heire; and he may pleade the assignment which he himselfe hath made in safety of himselfe, lest they should recover in value against him, [d] so as there is a privity in this respect betweene the heire and the feoffees, and by this meanes the same may be pleaded by the heire that made it⁽⁵⁾. And so it is adjudged in our bookes, which is a notable case for many purposes.

Fiftly, If assignment be made [e] by any disseisor, abator, intruder, or any wrong doer, of lands or tenements, if they came to that estate by collusion and covin betweene the widow and them, albeit the widow hath just cause of action, and the assignment be indifferently made after judgement by the sherife of an equall third part, yet shall the disseisee, &c. avoyd it, for covin in this case shall suffocate the right that appertained to her, and so the wrongfull manner shall avoyd the matter that is lawfull⁽⁶⁾.

Sixtly, An assignment by [f] a disseisor, abator, intruder, &c. if there be no covin, is good, unlesse it be prejudiciall to the disseisee, &c. As if the husband [g] infeoffeth the younger sonne with warranty, the eldest sonne disseise the yongest sonne, and endow the widow, in this case the yonger sonne shall avoyd this assignment⁽⁸⁾, for otherwise he shall lose his warrantie: but a disseisor, abator, intruder, &c. cannot assigne a rent out of the land to her for her dower, to bind the disseisee, &c.

Sevently, No assignment can be made, but by such as have a freehold⁽⁹⁾, (as hath beene said) or against whom a writ of dower doth lie, and therefore [h] an assignment by a gardian in focage is voyd⁽¹⁰⁾, but a gardian in chivalry may assigne dower⁽¹¹⁾, as shall be said hereafter, because a writ of dower lieth against him, and not against a gardian in focage.

Eightly, And before the gardian in chivalry enter⁽¹²⁾, the heir within age [i] may assigne dower, for the gardian may waive the wardship. And so briefly have you heard, of what, by whom, and to whom the assignment must be made⁽¹³⁾. But there needeth neither livery of seisin, nor writing, to any assignment of dower, because it is due of common right.

Sect. 40.

DOWMENT ex assensu Patris est lou le pier est seise de tenements en fee, et son firs et heire apparent, quant il est espouse, endowe sa feme al huys del monasterie ou del Esglise, de parcel de terres ou tenements son pier de assent son pier, et assigne la quantitie et les parcells. En ceo case apres le mort le firs, after the death of the

Dowment by assent of the father is, where the father is seised of tenements in fee, and his sonne and heire apparent, when he is married, endoweth his wife at the monastery or church doore, of parcel of his fathers lands or tenements with the assent of his father, and assignes the quantity and parcells. In this case after the death of the

LOU le pier est seise de tenements

en fee. Tenant for life of a carve of land, the reversion to the father in fee, the sonne and heire apparent of the father endoweth his wife of this carve, by the assent of the father, the tenant for life dieth, the husband dieth, the reversion was a tenement in the father, and yet this is no good endowment *ex assensu patris*, because the father at the time of the assent had but a reversion expectant upon a freehold, whereof he could not have endowed his owne wife⁽¹⁴⁾; and albeit the tenant for life died, living the husband, yet, *quod initio non valet, tractu temporis non convalescet*

(9. Co. 18. Mo. 26.)

[d] 33. E. 3. tit. Judgm. 254.
8. E. 3. 69. 17. E. 3. 58. b. 3. E. 3.
tit. Dower 76. 3. E. 3. Vouch. 196.
See the second part of the Institut.
W. 1. cap. 49.
[e] 25. Ass. p. 1. 44. Ass. 29.
44. E. 3. 46. 27. Ass. 74. 11. H. 4.
60. 15. E. 4. 4. 19. H. 8. 12.
Lit. 83. 151. (2. Co. 67. 1. Ro.
Ab. 549. 1. Sid. 21. Post. 357.
1. Co. 78. 6. Co. 58. a. 5. Co. 30. b.)
[f] 12. Ass. p. 20. 21. E. 3. 12.
[g] 3. E. 3. tit. Dower 77. 16. E.
2. tit. dower Statham. (Post. 357.)

[h] 31. E. 1. Dower 151. 29. Ass.
68. 15. E. 3. Dower 69. (6. Co. 57.)

[i] 7. R. 2. admesurement. 4.
F.N.B. 148. f. (Post. 38. b.)

Brit. ca. 109. Fleta lib. 5. ca. 22.
23. Bract. lib. 5. 305. 6. E. 3. 34.
F.N.B. 150. (1. Ro. Ab. 677.)

(1. Sid. 3. Post. 36. b.)

(1) This case of assignment of dower by one of two or more jointenants must be understood to be, where the husband has been solely seized during the coverture, and afterwards conveys or devises the land to two jointly and dies; for the wife of a jointenant is not dowerable. See post sect. 45.

(2) 9. E. 3. 38. Husband and wife are jointenants of land, of which the wife of I. S. is dowerable: the husband alone assigns: it is good, and shall bind the wife. 7. H. 6. 33. Hal. MSS. See Perk. Sect. 399. and Keilw. 128. b.

(3) Vid. the statute of Westminster 1. cap. 48. 4. E. 3. 42. M. 8. Jac. C. B. n. 15. D. D. adjudged accordingly in Throgmorton's case. Hal. MSS.—However, Mr. Perkins seems to think, that such an assignment by one feoffee may be pleaded in bar of dower by the other feoffees. Perk. sect. 402.

(4) 31. E. 3. Scire facias 99. Hal. MSS.

(5) Vid. if the heir by receipt shall have the plea. Kelw. 128. Hal. MSS.

(6) See further on this subject Hugh. on Orig. Wr. 199.

(7) 3. E. 3. 1. 50. E. 3. 7. 8. Hal. MSS.

(8) 3. E. 3. 18. By Herle, the assignment shall bar in such a case. Hal. MSS.

(9) Acc. Perk. 404.

(10) A quære is made of this in 1. Ro. Abr. 682.

(11) And yet guardian in chivalry had only a chattel interest. See post 38. b. where it is explained why a dower might be brought against him.

(12) But not after entry of the guardian. 9. H. 6. 6. Hal. MSS.

(13) See further as to assignment of dower post 39. b. Perk. sect. 393. to 423. Hugh. on Orig. Wr. 194. and 198. New Abr. Dower D. and Vin. Abr. Dower S. to A. 2.

(14) S. p. acc. Perk. 445.

valescet. And for the most part, dower *ad osium ecclesie*, and *ex assensu patris*, ensue the nature of a dower at the common law. And for these the wife may have a writ of dower, albeit they be certaine, as for the third part at the common law (2).

Et son firs et heire

apparent. It must be such a sonne and heire apparent, as must continue an heire apparent, and therefore the yongest sonne and heire apparent cannot endow his wife *ex assensu patris*, of lands whereof the father is seised in fee of the nature of Borough English, because the father may have another sonne, and then the husband is not heire apparent: and it is in respect of the constant and perpetuall apparence, that the son and heire apparent may endow his wife of his father's lands. And so it is of lands in Gavelkind: [k] and this is the reason that dower *ex assensu fratris*, or *consanguinei*, is not good, for that albeit he is heire apparent at that time, yet for the common possibility that he may have issue, and every issue that the brother or cosin should have afterwards, shall exclude him, he is no such heire apparent as the law intendeth. [l] But an endowment *ex assensu matris*, is as good as *ex assensu patris*, because there is an apparence of a constant and perpetuall heire. And some have said, that if the father after his assent be attainted of treason or felony, that the wife in that case loseth her dower, because her husband doth not continue heire (3).

Quant il est espouse, endow sa feme.

[m] In this case, albeit the freehold and inheritance is in the father, yet in respect (as hath been said) of the constant and perpetuall apparence of the heire, the heire apparent doth endow, and the father doth but assent. And therefore where the father did endow the wife of his sonne and heire apparent, that endowment was holden void, because the husband in that case must endow, and the father assent.

And it is holden in 2.H.3. Dower 199(4). That if the heire apparent be within age, yet the endowment *ex assensu patris* is good. Note, Littleton in the case of dower *ad osium ecclesie*, doth put the husband of full age, but here of the dower *ex assensu patris*, he speaketh generally.

Et assigne le quantitie & les parcell.

So as both in dower *ad osium ecclesie*, & *ex assensu patris*, the certainty must be expressed. And therefore where books speake of a moiety, it is intended (as hath been said) of an halfe in certaine(5).

Apres la mort le firs sa feme entera. In this case after the death of the husband the wife shall enter, or have a writ of dower albeit the father be alive.

Que il covient al feme daver un fait provant sont assent a cel endowment.

Un fait.

A deed, *factum*, this word (deed) in the understanding of the common law is an instrument written in parchment or paper, [o] whereunto ten things are necessarily incident: viz. First, writing. Secondly, in parchment or paper. Thirdly, a person able to contract. Fourthly, by a sufficient name. Fifthly, a person able to be contracted with. Sixthly, by a sufficient name. Seventhly, a thing to be contracted for. Eighthly, apt words required by law. Ninthly, sealing. And tenthly, delivery. A deed cannot be written upon wood, leather, cloath, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered or corrupted.

If a deed [p] be alledged in *count* or *plea*, regularly it must be shewed to the court(6), to the end the court may judge whether there be apt words to make it a good contract according to the rule of law, whereof more shall be said in the chapter of conditions. But if *non est factum* be pleaded(7), because thereby the sealing, delivery, or other matter of fact is denied, it shall be tried by the country. Of deeds some be indented, and some be deeds poll. Of indented, some be bipartite, some tripartite, some quadripartite, &c. whereof more shall be said in the chapter of conditions. Also of deeds, some be inrolled, and some [q] be not inrolled; if it be inrolled according to the statute of 27. Hen. 8. cap. 10. it must be inrolled in parchment for the strength and continuance thereof, and not in paper, and so was it resolved in parliament by

[k] 8. H. 3. Dower 193. 9. H. 3. Dower 191. 11. H. 3. Dower F.N.B. 150. l. 29. E. 3. Dow. 134. [l] F.N.B. 150. e. Flet. l. 5. cap. 22. Bract. lib. 4. 305. Ambr. Gorge's case. 6. Co. 22.

[m] 2. H. 3. Dower 199. (Post. 38. a.) 6. E. 3. 34. 8. E. 2. Dower 154.

2. H. 3. Dower 199.

[n] 9. H. 3. Dower 190. F.N.B. 150. m.

8. E. 2. Dower 154.

[o] Bract. lib. 2. fo. 33. &c. & l. 5. fo. 396. Brit. fol. 34. 65. 66. 101. Flet. l. 3. ca. 14. & lib. 6. ca. 32. & lib. 3. c. 3. 4. 5. 6. (2. Co. 5. Post 229. a. 2. Ro. Abr. 21.) (5. Co. 74. 76.)

[p] 4. E. 2. Fines 116. 14. E. 2. Ley 79. 4. E. 2. Ley 78. 27. H. 6. 10. 27. H. 8. 22. F.N.B. 122. l. (5. Co. 18.)

[q] Brit. fol. 101. Bract. l. 2. fol. 33. Fleta lib. 3. ca. 14. (2. Inst. 673.)

(1) No reference to the Year Book, in L. and M. Roh. or P. It was first inserted in Redman's edition. See the observation on this addition to Littleton post 36. a.—(2) See acc. ante 34. b. n. 3.—(3) See Plowd. Quer. 181.—(4) This book is not to the purpose. Hal. MSS.—(5) Dower good of a moiety in common in the said book. Vid. ante. Hal. MSS. See acc. 9. H. 3. Dower 190. which is the book meant by lord Hale. See also ante 34. b. n. 1.—(6) Where a deed ought to be shewn. Vid. 12. H. 7. 12. 9. H. 7. 15. 9. E. 4. 53. 4. H. 7. 10. 14. H. 8. 18. 18. H. 8. 9. F. N. B. 210. E. in formdon. Dr. Leyfield's case 10. Rep. Where a thing cannot pass without deed in respect of the nature of the things, as herbage common in gross, &c. one ought to shew deed. So in respect of the quality of the lessor, as count or plea of demise of abbot with consent of convent T. 36. Eliz. Goffe and Thurston, mayor and commonalty P. 5. Jac. B. R. Garnons and Kenton, master and fellows of a college. P. 9. Jac. Lord Norris's case B. R. But yet count in ejectment of demise by husband and wife is good without shewing deed, though wife cannot demise without deed, as it seems. Dy. 91. when one declares on a deed, where it is not necessary. Count in ejectione firmæ on demise per scriptum indentatum without shewing, and yet good. M. 42. 43. El. B. R. Hall and Mather; and it seems, that defendant shall not have oyer. Count in debt for rent on demise of the reversion in scriptis hic in curia prolatis, yet the other shall not have oyer of the testament. 1651 Filston's case. A covenants with B to stand seised to the use of C his son: the son may plead this deed without shewing it, because the estate is executed by the statute. H. 11. Car. B. R. Crook n. 12. Stockman and Hampson. M. 5. Jac. C. B. So it seems, if it was with the party himself. M. 6. Jac. C. B. Debt on obligation by commissioners of bankrupt good without shewing deed. H. 6. Car. B. R. Crook n. 5. Gay and Fielder. Hal. MSS. See further on shewing of deeds and oyer in Com. Dig. Pleader O. P. Wilf. vol. 1. part 1. page 121. vol. 2. page 1. and Sheph. Touchst. 73. but most fully in Vin. Abr. Fairs, M. a. to M. a. 32.—(7) Where to plead non est factum. Dy. 112. In case of sigillum avulsium before issue, one may plead non est factum. 7. H. 6. 18. If a deed be suspicious by rasure or avulsion of seal, the party on oyer of deed may demur, and put it into the judgment of the court, or plead non est factum. T. 40. El. B. R. Rot. 202. Obligation with condition to save harmless against Tracy with a blank: a stranger after delivery fills up the blank with a christian name by consent of the obligor; yet adjudged to avoid the deed, because material. But if the addition is not material, as the addition of a county, and it be by a stranger, it doth not avoid the deed, though if by the party himself it doth avoid it. Vid. H. 43. Eliz.

by the judges in *anno* 23. Eliz. Now for the rest of the parts of a deed, you shall read thereof plentifully in our bookes, and in my Reports; which by this short instruction you shall easily understand (1).

Un fait de feoffement. It is properly called *Charta feoffamenti* (2), and yet if such a deed be denied, the plea is *non est factum*. So as of deeds some concerne the reatie, as here a deed of feoffement; some the personaltie, as a deed of gift of goods, obligations, bills, &c. And some mixt, whereof more shall be said in the chapter of releases.

If a man deliver a writing sealed, to the partie to whom it is made, as an escrow to be his deed upon certaine conditions, &c. this is an absolute deliverie of the deed, being made to the partie himself, for the deliverie is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed), and tradition is onely requisite, and then when the words are contrarie to the act which is the deliverie, the words are of none effect, *non quod dictum, sed quod factum est inspicitur*. And hereof though there hath been [r] variety of opinions, yet is the law now settled agreeable to judgements in former times, and so was it resolved by the whole court of Common Pleas (3). But it may be delivered to a stranger, as an escrowe, &c. because the bare act of deliverie to him without words worketh nothing (4). And this is the ancient diversitie [r] in our bookes, the record whereof I have seene agreeable with the reason of our old bookes (5). And as a deed may be delivered to the partie without words, so may a deed be delivered by words without any act of deliverie (6), as if the writing sealed lyeth upon the table, and the feoffor or obligor saith to the feoffee or obligee, goe and take up the said writing, it is sufficient for you, or it will serve the turne, or take it as my deed, or the like words, it is a sufficient delivery (7).

Of deeds and their distinctions you shall reade excellent matter in antiquitie. [t] *Cartarum, alia regia, alia privatarum; et regiarum, alia privata, alia communis, et alia universitatis. Privatarum, alia de puro feoffamento et simplici, alia de feoffamento conditionali five conventionali, alia de recognitione pura, vel conditionali, alia de quiete clamantia, alia de confirmatione, &c. Verba intentioni non e contra debent inservire.*

Carta non est [u] nisi vestimentum donationis. Carta non est nisi vestimentum orationis. Nemo tenetur armare adversarium suum contra se. Scriptum est instrumentum ad instruendum quod mens vult. Carta est legatus mentis. [w] Benignæ sunt faciendæ interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat. Nihil tam [x] conveniens est naturali æquitati, quam voluntatem domini volentis rem suam in alium transferre ratam habere.

*Re, verbis, scripto, consensu traditione
Fundura vestes sumere pacta solent.*

Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter est intelligendum. Verba debent intelligi secundum subjectam materiam. Carta de non ente non valet.

Note, the father may [a] make a deed to the wife of his sonne, and so is the law holden. for that the father's land by his assent is charged with a future freehold whereunto a deed is requisite; but to a dower *ad officium ecclesie* no deed is requisite. And here it is not well done (of him that made the addition to our author) to vouche 44. E. 3. fo. 45. because the author himselfe vouched it not, for if he [b] meant to have vouched authorities, he would have vouched more than one in this case, and those that [c] he vouched he would have cited truly, but this case is mistaken both in the yeare and in the leaf, for where it is cited in 44. E. 3. it is in 40. E. 3. and where he saith it is fo. 45. it is fo. 43.

An assignment of dower [*d*] either *ad officium ecclesie*, or *ex assensu patris*, may be made of more than a third part. But the ancient law was that no greater assignment could be made in those cases but of a third part, but lesse he might, as it appeareth in Glanvill.

(2. Rol. Ab. 26, 9. Co. 137.
Noy 50. 11. Cro. Jam. 85.)
35. Aff. Pl. 11. Tr. 29. H. 8.
Dyer. 95. (1. Cro. El. 835. Hob.
246. Dy. 34. b. N. Ben. 75.
1. And. 4. Cro. El. 884. 1. Raym.
197. Ow. 95. Dy. 192. b. Dal.
104.)

[r] Tr. 43. Eliz. inter Haukeſby
& Lacher in the King's Bench.
Hill. 12. J. R. in the Common
place. (5. Co. 119. b.)
[f] 13. H. 8. 19. H. 8. 8. 4. E.
3. 18. 13. H. 4. 8. (3. Co. 126. b.
1. Leon. 140. 2. Ro. Abr. 24.)

[r] Br. A. lib. 2. fol. 33. b. Fleta
lib. 3. cap. 14.

[u] Fleta lib. 6. ca. 28.
Brafton lib. 2. fo. 34.

[w] Bracton lib. 2, f. 94 95.
[x] Idem l. 2, fo. 18.

[y] Pl. Com. in Throgmorton's
case fol. 161. b.

[a] 3. E. 2. Dower 126. 8. E. 2.
Dower 154. 6. E. 3. 34-40. E. 3. 43.

[b] 11 H.3. Dower 186. 14. H.
3. Dower.

[c] 2. E. 2. Dower 125. Vid. Stat. Wallie anno 12. E. 1. fo. 18. in veteri magna carta. 47. H. 3.

[d] F.N.B. 150. p. Glanvil.
lib. 6, ca. 1. 2. 3.

Sect. 41.

ET si apres l'mort
le baron el enter,
et agree a ascun tiel
dower de les dits
dowers ad ostium
ecclesiæ, &c. *donque*

AND if after the death
of her husband
she entreth, and agree
to any such dower of
the said dowers at the
church doore, &c. then

EL est conclude a
clamer ascun au-
ter dower per la com-
mon ley. (8) Wherein a di-
versitie is to be observed be-
tween a dower *ad ostium ecclesiæ*,
or *ex assensu patris*, and a

Eliz. Cam. Scacc. the case of Fox and Markham. Vid. Noy fo. 112. n. 487. A B and C are bound jointly and severally: the seal of A is torn off; in debt against B he may plead non est factum. But if A B and C covenant severally, and the seal of A is torn off, it will not avoid against the others. 5. Rep. 23. Vide where by rasure of the deed the interest is lost. Where a thing may pass without deed, as in case of feoffment or lease, though the deed be rased, the interest continues. H. 10. Car. B. R. Crook n. 8. Miller and Man-couring. But if lease by abbot and convent be interlined by lessee, the interest is destroyed. H. 9. Eliz. rot. 1056. Bendl. Arden and Michell. Hal. MSS.—See further as to pleading non est factum to a deed Sheph. Touchst. 74. and Vin. Abr. Fairs. N. a. and as to rasure and alteration of deeds and breaking off seals Sheph. Touchst. 68. 69. Vin. Fairs. T. to Z. and Com. Dig. Fait. F.

(1) See further as to deeds, Perk. c. 2. ante 6. a. and n. 5. there. Sheph. Touchst. c. 4. Vin. Abr. tit. *Deeds* and also tit. *Faits*, Com. Dig. *Fait*.

(2) For the formal parts of a deed of feoffment, see ante 6. a.

(3) In *Mo. 697*, there is an opinion of some judges in 39. *Eliz.* to the contrary; but the authorities since are with lord Coke. See acc. *Mo. 642*. *Noy 6*. *Hob. 146*. *9. Co. 137*. *Sty. 251*. *6. Mod. 218*.

(4) See Dy. 167. b.

(5) Note, if dean and chapter seal a deed, it is their deed immediately; but if at the same time they make letter of attorney to deliver it, this is not their deed till delivery. T. 21. Jac. B. R. rot. 662. *Hayward and Fulcher*. Hal. MSS. As to the former point, see acc. Dav. 44. 2. Leon. 97. and Cro. Eliz. 167. and as to the latter point the case cited by lord Hale in W. Jo. 170. and Palm. 304. according to which the court was divided in opinion.

(6) *The obligor seals obligation, and throws it upon the table without other circumstances; this is not a delivery. But if he throws it towards the obligee, or if the obligee immediately takes it, and the obligor says nothing, it is a delivery.* M. 29. and 30. Eliz. Rot. 636. *Staunton and Chambers.* Hal. MSS.—See S. C. in Ow. 95. Cro. Eliz. 122. Dy. Ed. 1688. fo. 192. b. in marg.

(7) Trin. 3. Eliz. *Gibben* verf. *Tenant Bendl.* n. 140. Hal. MSS.—See S. C. in N. Bendl. 92. and Dy. 192.—See further as to the delivery of deeds. Sheph. Touchst. 57. Com. Dig. *Fait A.* 3. Vin. Abr. *Faits I.* and K.

(8) Vid. 32. *E. i. Dowder* 126, 127.—Hal. MSS.

(15) 1121.32-2: 1. DOWD, 1120: 1771-1121: 1135A

(Doc. Pla. 149.)
Vernon's case 4. Co. 1.
1. Mariae. Dyer 91. 31. E. 3.
Scire, fac. 99. 20. E. 4. 3.

(Dy. 248. a. 317. a.)

27. H. 8. cap. 10.

[a] 12. E. 2. Dower 158. 27. H.
8. cap. 10. versus finem.

(4. Co. 1. 3. Cro. Jam. 489.)

(1. Sid. 3.)

Leake & Randal's case, 4. Co. 4.

(3. Co. 25. 27.)

Vide Vernon's case ubi supra,
fo. 2. b.

Dyer 19. Eliz. 358.

Brit. cap. 102, 103.

joyniture or estate made to the wife in satisfaction of her dower, for one of those dowers being assented unto is a barre of the dower at the common law, but a joyniture was no barre of her dower at the common law. For a right or title that one hath to a freehold cannot be barred by acceptance of collateral satisfaction (1). But a woman cannot have a double dower, viz. *ad ostium ecclesie*, &c. and at the common law, for the wife of one husband can have but one dower. But since Littleton wrote, by the statute of 27. H. 8. if a joyniture be made to [a] the wife, according to the purview of that statute, it is a barre of her dower, so as the woman shall not have both joyniture and dower, and to the making of a perfect joyniture within that statute fixe things are to be observed. First, her joyniture by the first limitation is to take effect for her life in possession or profit presently after the decease of her husband. Secondly, that it be for the terme of her owne life, or greater estate. Thirdly, it must be made to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage.

Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of A for life, and then to the use of the wife for life in satisfaction of her dower, this is no joyniture within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of her husband. And albeit in that case A should die living the husband, and after the death of the husband the wife entred, yet this is no barre of her dower, but she shall have her dower also (2), because it is not within the said statute, and (as it hath been said) by the common law it was no barre of her dower (3). 2. It must be either in fee taile, or for terme of her owne life, for an estate for life or lives of one or many other, or to her for a hundred or a thousand yeares, &c. if she live so long, or without such limitation is no barre of her dower, albeit they be expressly made in satisfaction of her dower, *Causa qua supra* (4). 3. If an estate be made to others in fee simple, or for her life upon trust, so as the estate remaine in them, albeit it be for her benefit, and by her assent, and by expresse words to be in full satisfaction of her dower, yet is this no barre of her dower (5). The fourth is so plaine as it needeth not any example. 5. A devise by will cannot be averred to be in satisfaction of her dower, unless it be so expressed in the will (6). 6. If the joyniture be made before marriage, the wife cannot waive it and claime her dower at the common law, but if it be made after marriage, she may waive the same, and claime her dower (7). I have touched these points the more summarily because they are resolved at large with the reasons thereof in Vernon's case *ubi supra*. So as to comprehend all in few words, a joyniture (which in common understanding extendeth as well to a sole estate as to a joynit estate with her husband) is a competent livelihood of freehold for the wife of lands or tenements, &c. to take effect presently in possession or profit after decease of the husband for the life of the wife at the least, if she herselfe be not the cause of determination or forfeiture of it. Which see more at large in Vernon's case *ubi supra*. If a joyniture be made to a wife of lands before the coverture, and after the husband and wife alien by fine those lands so conveyed for her joyniture, she shall not be endowed of any of the other lands of her husband. But if the joyniture had been made after marriage, notwithstanding the alienation by the husband and wife thereof by fine, yet seeing her estate was originally waivable, and the time of her election came not till after the decease of her husband, she may claim her dower in the residue of her lands. But in the other case, the joyniture of the wife made before marriage was not waivable at all. Now as the dower *ad ostium ecclesie*, and *ex assensu patris*, is better for the wife, because in respect of the certainty she may enter, than the dower at the common law, where she is driven to her reall action, and therefore Britton calleth dower *ad ostium ecclesie*, and *ex assensu patris* establishment of dower by the husband and assignment of dower after his decease (for nothing that is uncertaine is established): so a joyniture (that hath the force of a barre of dower by the said act of 27. H. 8.) is, as hath been said, more sure and safe for the wife than either dower

ad

(1) *Rent granted by parol out of the same land, of which she is dowable, bars; not if out of other land.* 1. Mar. Dy. 91. *Sturge's case*. Hal. MSS.—See Cro. Eliz. 128. But though a collateral satisfaction is not pleadable at law in bar of dower, yet acceptance of a term of years, or of a sum of money, or of any other kind of collateral satisfaction, in lieu of dower, is a good bar in equity. See Lawrence and Lawrence 2. Vern. 365. and note that lord Somers's decree against the wife in that case, which was afterwards reversed by lord keeper Wright, and finally in the house of lords, was objected to, not on account of any doubt of dower's being barrable in equity by a collateral satisfaction, but merely because the devise to the wife was not expressed to be in satisfaction of dower. See further as to bar of dower in equity by collateral satisfaction. 1. Eq. Caf. Abr. *Dower B.* and 9. Mod. 152.

(2) T. 20. Jac. *Sherwell's case*. Hutt. 51. accord. Hal. MSS.

(3) But *quare* whether a court of equity will not confine her to one, and compell her to elect which she will have. See the references in note 1. *supra*. and the case of Visset and Longdon cited in Jordan and Savage New Abr. *Joyniture B.* 6.

(4) Vid. M. 29. and 30. Eliz. C. B. Rot. 334. *Devise to the wife for 7 years*. Hal. MSS.

(5) But though this may be true at law, yet it is now settled, that a trust estate, being equally certain and beneficial as what is required at law, or even an agreement to settle lands as a jointure, is a good equitable jointure in bar of dower. See the case of Jordan and Savage reported in New Abr. *Joyniture B.* 6.

(6) 10. Eliz. Dy. 266. Hal. MSS.—But though a devise cannot at law be averred to be in satisfaction of dower, if the will is silent, yet sometimes our courts of equity have been induced by special circumstances to consider such devises as a satisfaction; and it has therefore been decreed, that the wife should make her election to waive her dower and accept under the will, or to waive the will and take her dower. In Lawrence and Lawrence 1. Vern. 463. lord chancellor Somers made such a decree; because he inferred an intention to give in bar of dower, from the testator's having devised the residue of his whole estate to another. But this decree was reversed by lord keeper Wright, and the reversal was afterwards affirmed in the house of lords, and this is said to have settled the doctrine. 1. Eq. Caf. Abr. *Dower B.* pl. 2. and see acc. Prec. in Chanc. 133. Vin. Abr. *Devise T. c.* pl. 45. 2. Atk. 427. 3. Atk. 8. 436. See also the case of Broughton and Errington adjudged in Dom. Proc. 8th March 1773. However, notwithstanding the doctrine on which the case of Lawrence and Lawrence was finally decided, and the frequent recognition of that case, devises have been since frequently deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will. On this latter principle lord chancellor Northington is said to have decided for a satisfaction of dower in the case of Arnold and Kempstead, which was heard in July 1764, and lord chancellor Camden in the case of Villareal and lord Galway, which was heard soon after the former case.—(7) *Though she be within age ut videtur she can-*

not.

ad ostium ecclesie, or *ex assensu patris*, for besides it is as certaine as those others, and she may enter into it, after the death of her husband and not be driven to her action. She shall not be barred of her joynture albeit her husband comit treason or felonie, as she shall be both of her dower *ad ostium ecclesie* and *ex assensu patris* by the common law. But now at this day by the statutes of 1. E. 6. cap. 2. and 5. E. 6. cap. 11. a wife shall not lose any title of dower which to her was accrued, by the attainder of her husband by any manner of murder or other felony whatsoever. But [a] if the husband be attainted of high treason or petie treason she shall be [b] barred of her dower at this day, so long as that attaindrie standeth in force.

Bract. 311. lib. 4. Britton ca. 15.

1. E. 6. ca. 6. 5. E. 6. ca. 11. (Post. 40. b.)

[a] Stanford 195. b.

[b] Vid. in the chapter of Garanty. Sect.

Conclude, commeth of the [c] verbe *concludo*, which is derived of *con* and *claudo* to determine, to finish, to shut up, to estoppe or barre a man, to plead or claime any other thing; Vid. Estoppel.

[c] Pl. Com. 276. b. per Walsli. Vid. Sect. 693. 695. 667. 679.

Sect. 42.

ET nota, que nul feme serra endow ex assensu patris en le forme avantdit, mes lou sa baron est firs et heire apparant a son pier. Quere de ceux deux cas de dowment ad ostium Ecclesie, &c. si la feme al temps del mort sa baron, ne passe lage de ix. ans, si el avera dower ou non.

AND note, that no wife shall be endowed *ex assensu patris* in forme afore said, but where her husband is sonne and heire apparant to his father. *Quere* of these two cases of dowment *ad ostium ecclesie*, &c. if the wife, at the time of the death of her husband be not past the age of 9. yeares, whether she shall have dower or no.

NUL feme serra endowed, &c. Of this sufficient hath beene said before.

Quere de ceux deux cas de dowment ad ostium Ecclesie, &c. And it seemeth, that these dowers being made by assent, &c. that the same are good albeit the wife be within the age of nine yeares, for *Consensus tollit errorem*. But without question, a joynture made to her under or above the age of nine yeares, is good.

(Ante 33. a.)

Sect. 43.

ET nota, que en tous cas de lou le certainty appiert, queux terres ou tenements feme avera pur sa dower, la le feme poit entrer apres la mort sa la baron sans assignement de nul luy. Mes lou le certainty ne appiert, si come destre endow de la tierce part daver en severaltie, ou del moitie selonque le custome de tener

AND note, that in all cases, where the certainty appeareth what lands or tenements the wife shall have for her dower, there the wife may enter after the death of her husband without assignement of any. But where the certainty appeares not, as to be endowed of the 3. part, to have in severalty, or the moity according to the custom

ET nota, que en tous cas, &c.

In all cases, where the demand of the dower is certaine, as in case of dower *ad ostium Ecclesie* or *ex assensu patris*, there the wife after the death of the husband may enter (1). But where the demand is uncertaine, as in writs of dower at the common law, there albeit the thing it selfe be certain, yet shall she not take it without assignement. As if a woman bring a writ of dower of three shillings rent, albeit she ought to be endowed of one shilling, yet cannot she after judgment distrein for twelve pence before assignement (2), because the demand was un-

40. E. 3. 22. 43. 45. E. 3. 4. 20. E. 3. barre. 132. 8. E. 2. Entry 75.

(Ant. 34. b.)

not waived. Hal. MSS.—The important question, whether a jointure on an infant before marriage may be waived, was not quite settled till the case of Drury and Drury, which was heard before lord chancellor Northington in Hillary 1. Geo. 3. The points determined by lord Northington in that case were, 1. that the statute of 27. H. 8. which introduced jointures, extends to adult women only, infants not being particularly named; and therefore that notwithstanding a jointure on an infant, she may waive the jointure and elect to take dower: 2. that a covenant by the husband that his heirs, executors, or administrators shall pay the wife an annuity for her life in full for her jointure and in bar of dower, without expressing that it shall be charged on any particular lands or be secured out of lands generally, is not a good equitable jointure within the statute: 3. that a woman being an infant cannot by any contract previous to her marriage bar herself of a distributive share of her husband's personalty in case of his dying intestate. From this decree by lord Northington there was an appeal to the house of lords, and after hearing the judges *seriatim* on the question, whether a jointure on an infant could be waived, on which they were divided in opinion, the decree was wholly reversed. See the printed cases in the house of lords of the year 1762. Before Drury and Drury the only judicial opinions as to the effect of a jointure on an infant were Sir Joseph Jekyll's in *Cray* and *Willis* against its barring, and lord Hardwicke's in *Leys* and *Price* and in *Harvey* and *Ashley* to the contrary. See *Vin. Dower* Q. 4. pl. 18. Barnard. Ch. Rep. 117. and 3. Ark. 607.

(1) It seems, that though it be assigned, the freehold is not in her till entry. 9. E. 3. 5. Hal. MSS.

(2) But videtur, that after the third part set out by the sheriff she may enter immediately before the writ returned. Yet as to the damages the writ ought to be returned, because another judgment is to be given. M. 19. Jac. B. R. *Howard* versus *Carvendish*. Vid. 10. Eliz. Dy. 278. Hal. MSS.

taine. And so it is if two tenants in common be, and the wife of one of them bring a writ of dower to be endowed of a third part of a moitie, and have judgement to recover, yet cannot she enter without assignement, albeit the assignement cannot give her any certainty because her husband's state was incertain. See more of this before section 39.

en feveralte, en tielz casés ils covient que sa dower soit a luy assigne apres le mort del baron; pur ceo que non constet devant assignement, quel part des terres ou tenements el avera pur sa dower.

to hold in feveralte, in such casés it behoveth that her dower be assigned unto her after the death of her husband; because it doth not appeare before assignement, what part of the lands or tenements she shall have for her dower.

Sect. 44.

Of this sufficient hath beene said before, and that in this case the wife cannot enter without assignement.

MES si soient deux jointenants de certaine terre en fee, et lun alien ceo, que a luy affiert, a un autre en fee, que prent feme et puis devie; en ceo cas la feme pur sa dower avera le tierce part de la moitie que sa baron ad purchase, a tener en common (come sa part amountera) ovesque l'heire sa baron, et ovesque l'auter jointenant que ne aliena pas; pur ceo que en tiel cas sa dower ne poit estre assigne per metes et bounds.

BUT if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, and after dieth; in this case the wife for her dower shall have the third part of the moitie which her husband purchased, to hold in common (as her part amounteth) with the heire of her husband, and with the other jointenant, which did not alien; for that in this case her dower cannot be assigned by metes and bounds.

Sect. 45.

(1. Ro. Ab. 676.)

THE reason of this diversity is for that the jointenant, which surviveth, claimeth the land by the feoffment, and by survivorshippe, which is above the title of dower, and may plead the feoffment, made to himselfe without naming of his companion that died, as shall be said hereafter in his proper place; but tenants in common have several free-holds and inheritances, and their moities shall descend to their several heires, and therefore their wives shall be indowed.

ET est ascarvoir, que la feme ne servira my endow de terres ou tenements; que sa baron tient jointement ovesque un autre al temps de son morant; mes lou il tient en common, autrement est, come en le case prochain avantdit.

AND it is to be understood, that the wife shall not be endowed of lands or tenements, which her husband holdeth joyntly with another at the time of his death: but where he holdeth in common, otherwise it is, as in the case next abovesaid.

Sect.

Sect. 46.

ET est ascavoir, que si tenant en le taile endowa sa feme ad ostium Ecclesiæ, come est avant-dit, ceo servera pur petit ou rien al feme; pur ceo que apres la mort sa baron, l'issue en le taile puit entrer sur le possession la feme; et issint puit celuy en le reversion si ne soit issue en le taile en vie, &c.

AND it is be understood, that if tenant in taile endoweth his wife at the church doore, as is afore-said, this shall little or nothing at all availe the wife; for that after the decease of her husband, the issue in taile may enter upon her possession; and so may he in the reversion, if there be no issue in taile then alive.

an endowment is not to be made because it is

THE reason of this is, for that tenant in taile is restrained by the sayd statute of 13 E. 1. *de donis conditionalibus*.

And so did our author take the law in his learned reading. Here our author's reason is *à fine*, and therefore such

Vide Sect. 194.

to no end.

Sect. 47.

AUXY si home seisi enfee simple, esteant deins age, endowa sa feme al huiz del monasterie ou deglise, & devie, & sa feme enter, en ceo cas l'heire la baron luy puit ouster. Mes autrement est (come il semble) lou la pier est seisie en fee, & le fits deins age endow sa feme ex assensu patris, le pier donque esteant de plein age.

ALSO if a man seised in fee simple being within age, endoweth his wife at the monasterie or church doore, and dieth, and his wife enter, in this case the heire of the husband may out her. But otherwise it is, (as it seemeth) where the father is seised in fee, and the sonne within age endoweth his wife *ex assensu patris*, the father being then of full age.

not avoide it in respect of his infancy.

THE reason of this diversitie is for that in the first case the husband within age is seised, and therefore he being within age cannot by a voluntary act bind himself: otherwise it is, where he doth an act whereunto he is compellable by law, but in the latter case the father which giveth the assent, is seised of the freehold and inheritance, and the sonne therein hath nothing, and therefore his heire shall

Vid. 9. H. 3. tit. dower 197.

(Ante 34. a.)

Sect. 48.

AUXY il y ad un autre endowment, que est appelé dowment de la pluis beale. Et ceo est come en tiel case, que home seisie de xl. acres de terre, et il tient vint

ALSO there is another dower which is called dowment de la pluis beale. And this is in case where a man is seised of forty acres of land, and he holdeth twenty acres of

ET le Seignior de que le terre est tenu en chivalrie enter en les vint acres tenus de luy. For he is not possessed as a gardein against whom a writ of dower lieth, untill he doth enter. Of the wardship of the body he is possessed before seisure, because

(Ante 35.)

Vid. le statut. de bigamis cap. 3.

[a] 44. E. 3. 13. 4. H. 6. 11. Stanf. præf. 13. 6. E. 3. 15. 16. E. 3. breve 657. Temps E. 1. breve 863. 11. E. 3. breve 473. 45. E. 3. 5. 17. E. 3. 70. 1. H. 7. 17. 4. H. 7. 1. 4. H. 7. aid le Roy 31. 38. E. 3. 13. 9. H. 6. 6. b. 39. E. 3. 8. 8. E. 2. Dower 169. 8. E. 2. breve 809. 22. E. 4. Dower 16. (9. Co. 17.)

8. E. 3. 52.

8. E. 3. 15. & 31. 38. E. 3. 37. 47. E. 3. 9. b.

cause it is transitory, but he is not possessed of the land untill he enter because it is permanent. And therefore if he doth not enter, the heire within age may assigne dower as hath been said, and as it appeareth afterwards.

Si en tiel case el port breve de dower envers le gardein en chivalrie.

Albeit [a] the gardein in chivalrie or the grantee of the king of a wardship hath but a chattle during the minority of the heire, and the woman shall recover a freehold in her writ of dower, yet after the gardein as is afore said, hath entered into the land, that writ lieth against him, and not against the heire who is tenant of the freehold, because the law hath trusted the gardein to plead for the heire within age, and that is in his custody, and also for his own particular interest, and by this diversity all the bookes be reconciled (1). So likewise if the gardein die, the wife shall have a writ of dower against his executors, and if there be two executors, and one of them alone take the profits, the writ of dower shall be maintained against him only. If a man be possessed of the wardship of certaine land, either jointly with his wife or in the right of his wife, yet the writ of dower lieth against the husband onely. Gardein in focage shall not endow herselfe *de la plus beale* without judgement, as shall be said hereafter.

Le gardein en chivalrie poit pleader.

The authority of Littleton is direct that the gardein may plead this plea. But hereof ariseth two questions. First whether if the heire be vouched by the tenant in the writ of dower in the gard of the gardein (2), whether he coming in as vouchee may plead that plea. The second is, whether if the gardein in

acres de les dits xl. acres de terre dun per service de chivalrie, et les autres vint acres de terre dun auter en focage, et prent feme, et ont issue fits, et morust, son fits estant deins lage de xiiii. ans, et le seigniour, de que la terre est tenu en chivalrie, entre en les xx. acres tenus de luy, et eux ad come gardein en chivalrie durant le nonage lenfant, et la mere de lenfant enter en le remnant, et ceo occupie come gardein en focage: si en tiel case le feme port brieve de dower envers le gardein en chivalrie, destre endow de les tenements tenus per service de chivaler en le court le roy, ou en auter court, le gardein en chivalrie puit plede en tiel case tout cest matter et monstre coment la feme est gardein en focage, come devant est dit, et prie que serra adjudge per la court que le feme luy mesme endowera de le plus beale de les tenements que el ad come gardein en focage solongue le value de le tierce part

the said forty acres, of one by knight's service, and the other twenty acres of another in focage, and taketh wife, and hath issue a sonne, and dyeth, his sonne being within the age of fourteene yeeres, and the lord of whom the land is holden by knight's service entreth into the twenty acres holden of him, and holdeth them as gardein in chivalrie, during the nonage of the infant, and the mother of the infant, entreth into the residue, and occupieth it as gardein in focage. If in this case the wife bringeth a writ of dower against the garden in chivalry to be endowed of the tenements holden by knight's service, in the king's court, or other court, the gardein in chivalry may pleade in such case all this matter, and shew how the wife is gardein in focage, as afore said, and pray that it may be adjudged by the court, that the wife may endow her selfe *de le plus beale*, i. e. of the most faire of the tenements which she hath as gardein in fo-

(1) Nota Pasch. 1653: B. R. Ruled, 1. Grantee of wardship of the body cannot assign dower; but grantee or committee of wardship of land may, though it be by court of wards. 2. Yet court of wards cannot assign dower by commission, but it ought to be by writ de dote assignanda out of chancery. Accord. M. 35. 36. Eliz. C. B. case of Viscountess Bouden. 3. But lessee for years of land by the guardian cannot assign dower.—4. But if the king leases the land during minority of the heir rendering rent, whether he be a committee to assign dower dubitatur. Videtur quod non, but there ought to be dedimus vel committimus custodiam. 2. E. 3. 13. Husband of ward in right of his wife, and dower against the husband only. Nota H. 8. Jac. C. B. Nicholson and Gower. 1. After full age and before livery, dower lies against the heir, and cannot be assigned by the king. 2. Judgment in dower against the heir in wardship shall bind the heir, but not the guardian.—Hal. MSS.

(2) For voucher in wardship in dower.—1. If the heir be in wardship of guardian in chivalry, though he be in wardship of many, there ought to be voucher of all having the heir in wardship, because every one may make defence, and every one shall lose proportionably. But several writs lie against several guardians. 16. E. 3. Brieve 657.—2. If the heir be in wardship of one or many guardians in focage, one may vouch the heir in wardship or may vouch at large as it seems, and not as in wardship, because the guardian has the land only to the use of the infant.—3. If the heir be in wardship of the demandant in chivalry he ought to vouch in wardship of the demandant.

que el claime daver de les tenements tenus en chivalrie per sa briefe de dower. Et si la feme ceo ne puit dedire, donques le judgement serra fait, que le gardein en chivalrie tiendra les terres tenus de luy durant le nonage lenfant quit de la feme, &c (1).

age, after the value of the third part which she claimes by her writ of dower, to have the tenements holden by knights service. And if the wife cannot gainsay this, then the judgement shall be given, that the gardein in chivalry shall hold the lands holden of him during the nonage of the infant quit from the woman, &c.

focage have not sufficient, as if the land holden by service of chivalry be thirty acres, and the lands holden in focage but five acres, whether she shall be endowed by parcels, viz. to recover five acres against the gardein in chivalry, and to retaine five acres. And as to the first the gardein shall as well plead it, when he comes in as vouchee, as when he is tenant. And as to the second some say that the demandant in the writ of dower must have assets in her hands to the value of her dower, so as she shall not be partly endowed against the gardein, and partly

5. E. 3. 60. 2. E. 3. 31. Lib. intrat. Dower fol. 225. 2. 18. E. 3. 4. b.

retaine in her owne hands. And they say, that the judgement should be in part, that is, as to the land in focage in fevralty, and as to the land in chivalry to recover the third part, and compare it to the case in 8. E. 4. 3. that damages shall not be recovered, partly against the defendant in an appeale, and partly against the abettors, but entirely either against the one or the other. And Littleton here putteth his case that the gardein in focage hath assets in value, and seeing it is a dower against common right, they hold that she must be entirely endowed either by herselfe against common right, or against the gardein according to common right. But [a] yet by the booke in 25. E. 3. 52. b. and others it appeareth, that she may in this very case retaine for part, and recover against the gardein for part (2).

14. H. 7. 26. Keeble. (12. C. 125. 126.)

Gardein in chivalry [b] shall plead in barre of her dower, detainment, or eloigning of the body of the ward, because his marriage doth appertaine unto him: and if the heire come in [c] as vouchee, he shall plead the same plea. But he shall not plead detainment of the charters, [d] because the charters concerning the inheritance of the heire belong not to the gardein (3). The gardein in chivalry [e] may assigne dower of the lands and tenements he hath in ward, or if he assigne a rent out of those lands in allowance of her dower, it is good. If the gardein in chivalrie assigne too much for her dower, the heire shall have a writ of Admesurement by the common law (4). And so [f] if the heire within age assigne, before the gardein enter, to the wife too much in the dower, the gardein shall have a writ of Admesurement by the statute of West. 2. cap. 7. And if the heire within age, before the gardein enter into the land, assigne too much in dower, he himselfe shall have a writ of Admesurement at full age: and some have said, that in that case he may have it within age. [g] But if the heire (before the gardein enter) endow the wife of more than she ought, and the gardein assigne over his estate, his assignee shall have no writ of Admesurement, because it was a thing in action. Also the heire shall have an [h] Admesurement for the assignment in the life of his ancestor, by the common law, [i] and a writ of Admesurement lyeth upon an assignment in chancery.

[a] 25. E. 3. 52. b. 4. E. 2. tit. discessin. 10. Regist. judic. 26. Lib. intrat. 22. 16. E. 3. breve. 657. 20. E. 3. judgement 175. [b] 7. E. 3. 57. 8. E. 3. 71. (Doc. pla. 149.) [c] 17. E. 3. 58. [d] 10. E. 3. 50. 6. El D. 230. [e] 3. E. 3. Dow. 75. 8. Ed. 2. Dower 155. W. 2. cap. 7. (F.N.B. 148. 149. 2. Inst. 367.) [f] Bract. li. 4. 314. Reg. origin. 171. Flet. li. 5. ca. 22. 7. E. 2. tit. Admes. 13. F.N.B. 149.

[g] 7. R. 2. Admes. 4. F.N.B. 148. i.

[h] 7. R. 2. ub. su. F.N.B. 149. 2. [i] 7. R. 2. ub. sup. 12. H. 6. Admes. 9. F. N. B. 149. 25. E. 3. 51.

Donques le judgement serra fait que le gardein en chivalrie tiendra les terres tenus de luy durant le nonage lenfant, quit de la feme, &c.

Judgement. *Judicium quasi juris dictum*, the very voyce of law and right, and therefore, *judicium semper pro veritate accipitur*. The ancient words of judgement are very significant, *Consideratum est*, &c. because that judgement is ever given by the court upon due consideration had of the record before them: and in every judgement there ought to be three persons, *actor*, *reus*, and *judex*. Of judgements some be finall, and some not finall, whereof you shall read more hereafter. And now to returne to our author, it is materiall that these words (*et cetera*) be explained at large, viz. *Et quod prædicta A* (the demandant) *capit de terris hæred' prædicti in custodia sua existen' ad valentiam præd' 3. partis cum pertinent' tenend' nomine dotis sue pro præd' 3. parte superius per eam petit* (5). Now some are of opinion, that upon this judgement the demandant may not in any sort endow herselfe of the land, because she cannot do an act to herselfe, but she shall recoupe the third part of the profits upon her account, and be endowed against the heire at his full age (6). But observe what Litt. saith in the next section: but before you come to that, observe what priviledge the common law

(1. Ro. Abr. 201. Cro. C. 12. 442. post 108. a.)

22. E. 4. Dow. 16. 16. E. 3. Wall. 100. 45. E. 3. 6.

giveth demandant; but if he be in wardship of the demandant in focage, there it is in the election of the seoffee to vouch in wardship of the demandant. Registr. Judicial. 54. But he may plead in bar and pray that she shall be endowed de pluis beale as well as guardian in chivalry. 21. E. 3. 28. 25. E. 3. 21. — 4. But if A having 4 acres in focage and 2 acres in chivalry makes seoffment of 2 acres of focage with warranty and dies, the heir within age, and dower is brought by the wife of A against the seoffee, dubitatur, if he may vouch the heir in wardship of the guardian in chivalry only, or ought to vouch in wardship of the demandant and of guardian in chivalry, or if he shall only plead in bar that she may endow herselfe de pluis beale. But whether the voucher be in wardship of guardian in chivalry only, or of guardian in chivalry and demandant guardian in focage, the guardian shall turn all the loss on the demandant as it seems. Reg. Judic. 54. 21. E. 3. 28. 25. E. 3. 51. — Hal. MSS. There is an obscurity in the third part of this annotation by lord Hale, which the editor on translating found himselfe unable to remove. See further on the subject in Hugh. on Orig. Wr. 166.

(1) *Et que la feme poet endower lui meme de la pluis beale partie de les terres, qu'ele ad come gurdien en focage a le value, &c.* L. and M.

(2) Vid. 2. E. 3. Vouch. 273. 13. E. 3. Judgment 165. — Hal. MSS.

(3) Vid. 9. Rep. 15. b. Ann Bedingfield's case. — Hal. MSS. See further as to pleading detainment of charters. Hugh. Orig. Wr. 185. Vin. Abr. Dower L. M. and N.

(4) See further as to Admesurement of dower. Vin. Abr. Dower Q. a. and as to assignment in chancery, Hugh. Orig. Wr. 171. New Abr. Dower D. 3.

(5) 15. E. 3. Dower 69. — Hal. MSS.

(6) Where judgement shall be against heir and where against vouchee. — 1. Where the heir of the husband is vouched as having assets in the same county, and the demandant acknowledges it, judgement shall be for the demandant against the heir, and that the tenant shall go in peace if

giveth to the land holden by knights service, viz. that it shall not be dismembered, but the whole dower taken of the lands holden in socage, and the reason is, for that knights service is for the defence of the realm, which is *pro bono publico*, and therefore to be favoured.

Sect. 49.

ET nota, que apres tiel judgement done, la feme puit prendre ses vicines, et en leur presence endower luy mesme per metes et bonds de la pluis beale part de les tenements que el ad come gardein en socage⁽¹⁾, daver et tener a luy pur terme de sa vie; et tiel dower est appel dower de la pluis beale.

And the judgement, viz. *Tenend' nomine dotis*, proveth, that she may have it for terme of her life, for every dower is for terme of life.

AND note, that after such a judgement given, the wife may take her neighbours, and in their presence endow herselfe by metes and bonds, of the fairest part of the tenements which she hath as gardein in socage, to have and to hold to her for terme of her life; and this dower is called *dower de la pluis beale*.

Sect. 50.

15. E. 3. Dow. 69. 16. E. 3. tit. Wast. 100.

LOU le judgement est fait, &c. For without such a judgement, as appeareth before, gardeine in socage cannot endow herselfe, as likewise hath bin said before (3).

Braet. lib. 5. 329. F. N. B. 7. 3.

Ou en auter court. That is by writ of right of dower in the court of the heire, if he have any, or of the lord of whom the land is holden.

Et ceo est pur salvation del estate del gardein en chivalrie, durant le nonage de lenfant. For the heire (before the entre of the gardein) cannot plead the same plea, that the demandant should endow herselfe *de la pluis beale*. And the reason of this dower *de la pluis beale* to be all of the socage land, was for advancement of chivalrie for the defence of the realme (4).

ET nota, que tiel dowment ne puit este, mes lou le judgement est fait en le court le roy, ou en auter court, &c.⁽²⁾ et ceo est per salvation del estate del gardeine in chivalrie durant le nonage le enfant.

AND note, that such dowment cannot be, but where a judgement is given in the king's court, or in some other court, &c. and this is for the preservation of the estate of the gardein in chivalrie, during the nonage of the infant.

Sect. 51.

This is manifest of it selfe, and therefore needeth no explanation.

ET issint poyes veier cinque manners de dower, scilicet, dower per le common ley, dower per le custome (5), dower ad ostium ecclesie, dower ex assensu patris, et dower de la pluis beale.

AND so you may see five kinds of dower, viz. dower by the common law, dower by the custome, dower *ad ostium ecclesie*, dower *ex assensu patris*, and dower *de la pluis beale*.

Sect.

if he has assets in the same county, and if not judgment against the tenant and for him over in value. But if it is agreed, that he has not assets in the same county, but only in a foreign county, then judgment shall be against the tenant, and for him over in value. 6. E. 3. 11.—2. If he has assets for part in the same county, vide conditional judgment for that part. 2. E. 3. Vouch. 213. 25. E. 3. 52.—3. If the tenant vouches the heir of the husband having assets in the same county, and the voucher is counterpleaded, or if the demandant dedit the assets, &c. then it seems judgment shall be for demandant immediately against the tenant and for him over in value. But it seems, that the demandant may pray conditional judgment, if the heir counterpleads the assets with warranty. Quære and vide 16. E. 3. Vouch. 85. 3. E. 3. Judgment 165. 18. E. 3. 38. 55.—4. But if tenant vouch I. S. who vouches the heir of the husband having assets in the same county, still no judgment conditional shall be given. 18. E. 3. 36. Contra 2. E. 3. Vouch. 213.—Hal. MSS. See further Hugh. Orig. Wr. 163.

(1) A le valur de le tierce partie des tenementz que le gardeyn en chevalerie ad, &c. ad ceo. L. and M.—Roh.—P. and Red.

(2) Que la feme ceo puit faire. L. and M.—Roh.

(3) Dower *de la pluis beale*, being merely a consequence of tenures by knight's service, is virtually abolished by the statute, which converts such tenures into socage. See 12. Ch. 2. c. 24.

(4) Vid. 16. E. 3. 88. She may recoup the third part of the profits on her own account, ut videtur, without judgment. Hal. MSS.

(5) Besides the books cited ante 33. b. as to dower by custom, see Hugh. Orig. Wr. 160. Robinf. Gavelk. cap. 2. New Abr. Dower K. Vin. Abr. Copyhold H. e. Com. Dig. Copyhold K. 2.

Sect. 52.

ET memorandum, que en chescun case, lou home prent feme seisie de tiel estate de tenements, &c. issint que lissue, que il ad per son feme, poit per possibilitie enheriter mesmes les tenements de tiel estate que la feme ad come heire al feme, en tiel case apres le mort la feme il avera mesmes les tenements per le curtesie de Angleterre, et auterment nemy.

AND memorandum, that in everie case where a man taketh a wife seised of such an estate of tenements, &c. as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heire to the wife; in this case after the decease of the wife, he shall have the same tenements by the curtesie of England, but otherwise not.

Memorandum. This word doth ever betoken some excellent point of learning, which our author hath used in other places, as appeareth in the margin.

Sect. 234. 301. 315.

The matter hereof hath bin partly explained in the chapter of Tenant by the curtesie.

(Ante 29. b.)

If a man [a] taketh a wife seised of lands or tenements in fee, and hath issue, and after the wife is attainted of felony so as the issue cannot inherit to her, yet he shall be tenant by the curtesie, in respect of the issue which he had before the felonie, and which by possibilitie might then have inherited. But if the wife had been attainted of felonie before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesie (1).

[a] 21. E. 3. 9. 11. H. 7. 3. H. 7. 17. Stamford. 195. 27. E. 3. 77. 46. E. 4. Petit. 20. 26. Ass. p. 2. 13. H. 4. 8.

Come heire al feme.

This doth implice [b] a secret of law, for except the wife be actually seised, the heire shall not (as hath been said) make himselfe heire to the wife (2): and this is the reason that a man shall not be tenant by the curtesie of a seisin in law.

[b] 8. Co. 34. in Paine's case.

Sect. 53.

ET auxy en chescun case lou le feme prent baron seisie de tiel estate des tenements, &c. issint que si per possibilitie il puiroit happer, que si le feme avoit ascun issue per la baron, et que mesme lissue puiroit per possibilitie enheriter mesmes les tenements de tiel estate que le baron ad, come heire a le baron, de tiels tenements el avera sa dower, et auterment nemy. Car

AND also in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibilitie it may happen that the wife may have issue by her husband, and that the same issue may by possibilitie inherit the same tenements of such an estate as the husband hath, as heire to the husband, of such tenements she shall have her dower, and otherwise not. For

Issint que si per possibilitie il puit happer que le feme avoit ascun issue per son baron.

12. H. 4. 2. 7. H. 6. 11. 12.

Albeit the wife be a hundred yeares old, or that the husband at his death was but foure or seven yeares old (3), so as she had no possibilitie to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband, she shall be endowed, and that women in ancient times have had children at that age, whereunto no woman doth now attaine, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above threescore yeares old hath had a child, and *ideo non definitur in*

(1. Ro. Abr. 675)

(1) See ante 29. b. n. 4. and Vin. Abr. Curtesy. H.

(2) See 8. Co. 36. a. where 11. H. 4. 11. and 40. E. 3. 9. are cited to prove this doctrine. See also ante 11. b. where it is advanced as a general rule, that he, who claims by descent, must make himself heir to the person last actually seised. See further ante 14. b. 15. b. and n. 3. in 11. b. W. Jo. 361. and Blackst. Law Tr. 8vo ed, vol. 1. p. 180.

(3) See ante 33. a.

in jure. And for the husband's being of such tender yeares, he hath *habitu*, though he hath not *potentiam* at that time, and therefore his wife shall be endowed.

Et que mesme lissue puisse per possibilitie inheriter mesmes les tenements, &c.

A man seised of land in generall taile, taketh wife, and after is attainted of felony, before the said statute of 1. E. 6. the issue should have inherited, and yet the wife should not have bin endowed: for the statute of W. 2. ca. 1. relieveth the issue in taile, but not the wife in that case (1). But at this day, if the husband be attainted of felony, the wife shall be endowed, and yet the issue shall not inherit the lands which the father had in fee simple. If the wife clope from her husband, &c. she shall be barred of her dower, as hath beene said (2), and yet the issue shall inherit (3).

(Ante 37. a.)

(F. N. B. h. 150. Ante 32. a.)

si tenements sont dones a un home et a les heires que il engendra de corps sa feme, en tiel case la feme nad riens en les tenements, et le baron ad estate forsque come donee en especiall taile. Uncore si le baron devy sans issue, mesme la feme serra endow de mesmes les tenements, pur ceo que lissue, que el per possibilitie puisse aver per mesme le baron, puisse inheriter mesmes les tenements. Mes si la feme deviait, vivant sa baron, et puis le baron prist auter feme, et morust, sa second feme ne serra my endow en cest case, causa qua supra.

if tenements be given to a man, and to the heires which he shall beget of the bodie of his wife, in this case the wife hath nothing in the tenements, and the husband hath an estate but as donee in special taile. Yet if the husband die without issue, the same wife shall be endowed of the same tenements; because the issue, which she by possibilitie might have had by the same husband, might have inherited the same tenements. But if the wife dyeth, living her husband, and after the husband takes another wife and dieth his 2. wife shall not be indowed in this case for the reason aforesaid.

Sect. 54.

5. E. 3. Voucher 249. 8. E. 3. Ass. 293. 4. H. 6. 24. F. N. B. 149.

You may easily perceive by the context that this shaft came never out of Littleton's quiver of choice arrowes (4), and therefore I will leave it. Onely for students sake I will referre them to 5. E. 3. Voucher 249. 8. E. 3. Ass. 393. 4. H. 6. 24. F. N. B. 149.

NOTA si un home soit seisse de certaine terres et prist un feme, et puis aliena mesme la terre oue garrantie, et puis le feoffor et le feoffee deviont, et le feme de le feoffor port un action de dower envers le issue le feoffee, et il vouch lheire le feoffor, et pendant le vouch et nient termine, la feme le feoffee port son action de dower envers le heire le feoffee, et demaunda la tierce part de ceo

NOTE if a man be seised of certaine lands, and taketh wife, and after alieneth the same land with warrantie, and after the feoffor and feoffee dye, and the wife of the feoffor bring an action of dower against the issue of the feoffee, and he vouch the heire of the feoffor, and hanging the vouch and undetermined, the wife of the feoffee brings her action of dower against the heire of the feoffee,

(1) 12. H. 4. 3. by Hankford.—Hal. MSS. See further as to loss of dower by the husband's offences ante 37. a. Post 392. b. Hugh. Orig. Wr. 156. and Vin. Abr. Dower Q. 6.

(2) See ante 32. a.

(3) See another instance, where the issue shall inherit and yet the wife shall not be endowed, in Perk. sect. 317.

(4) Section 54. is neither in the edition by L. and M. nor in the Roh. edition. It appears to have been first added in the edition by P.

de que sa baron fuit seifie, et ne voile demaunder le tierce part del eux deux parts de que sa baron fuit seifie; fuit adjudge, que el navera judgement tanque lauter plee fuit determine.

feoffee, and demand the third part of that whereof her husband was seised, and will not demand the third part of these two parts of which her husband was seised; it was adjudged, that she should have no judgement untill such time as the other plea were determined.

Sect. 55. (1)

ET nota que Vavifour dit, que si un home soit seifie de terre et fait felonie, et puis alien, et puis est attaint, la feme avera bone action de dower envers le feoffee: mes si soit eschete al roy, ou al seignior, el navera breve de dower, et sic vide diversitatem, et quære inde legem.

AND note, Vavifour saith, that if a man be seised of land and committeth felony, and after alieneth, and after is attaint, the wife shall have a good action of dower against the feoffee: but if it be escheated to the king, or to the lord, she shall not have a writ of dower. And so see the difference, and inquire what the law is herein.

THIS is also of the new addition, *et expressa est hæc opinio*; for it is cleare in law, that the wife at the common law should not have been endowed against the feoffee. For to deterre and retaine men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony. 1. He shall lose his life and that by an infamous death of hanging betweene heaven and the earth, as unworthy in respect of his offence of either. 2. His wife, that is a part of himselfe, (*et erunt animæ duæ in carne una*) shall lose her dower. 3. His blood is corrupted, and his children

Vide Sect. 746. Vide Britton; cap. 109. l. 1. Bracton title Evidens, l. 4. fo. 397. 30. 311. Stanf. pl. cor. 194. 195.

Britton fol. 15. cap. 5.

(Post 392. b.)

Vide Sect. 746.

(1. Leon. 3.)

M. 3. & 4. Ph. & Mar. Ro. 760. in com. banco. 8. E. 3. 20. 12. H. 4. 30.

Bracton lib. 4. fol. 311.

Vide Sect. 746. Britton cap. de Homicide, fo. 15. Bracton lib. 4. fol. 308. & Fleta ubi supra, & Britton ubi supra.

cannot be heires to him, and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4. He shall forfeit all his lands and tenements; And 5. all his goods and chattels, and all this is included by the law in the judgement, *Quod suspendatur per collum*. But this is not intended of all felonies, but of felony by stealing of goods above the value of xii. pence, and not of *petit larceny* under the value (2). So as the woman shall lose her dower as well against the feoffee as against the lord by escheat. And so it was resolved in a writ of dower brought by Mary Gates late wife of John Gates, who after the coverture had infeoffed Wiseman in fee, and after committed high treason, and was thereof attainted, that the wife should not be indowed against the feoffee, and in that case it was resolved, that so it was at the common law in case of felony (3). And it is to be understood, that the wife shall not only lose her reasonable dower at the common law for the felony of her husband, but also her dower *ad osium ecclesiæ*, and *ex assensu patris* (4), for felony done after the dower assigned, and dower by custome also (5). And the reason of all this is yeelded by Littleton himselfe in the chapter of Warranties, section 746. to the end that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath been said) shall be endowed by force of the statutes in that case provided.

And it appeareth by Britton, *Que fem de homicide ne teigne nul dower de tenants que lour fuit assigne per lour barons*, so as the wife of a felon attainted by the common law was disabled to recover dower *ad osium ecclesiæ*, and *ex assensu patris*, as well as her reasonable dower which the common law gave her. See in Bracton many barres of dower as the law was then held.

CHAP.

(1) Sect. 55. is not in L. and M. nor in Roh. but is in P. and the subsequent editions.—(2) But outlawry in trespass doth not bar. 3. E. 3. 7. 41. Hal. MSS.—(3) S. C. acc. Dy. 140. b. and N. Bendl. 55. But Dyer observes, yet nota that the land aliened before the treason committed was not subject to any forfeiture or escheat; and adds, that Brown serjeant fuit valde iratus propter iudicium prædictum. Also in Sav. 54. there is a case of attainder of the husband for treason, in which two judges for the reason mentioned in Dyer were inclined to Vavifour's opinion; but the case of Sir John Gates's wife being cited, the court held that the demandant was not intitled to dower. In this latter case the wife afterwards had dower; but then it was allowed to her on account of the reversal of her husband's attainder. See 3. Inst. 315.—(4) Here lord Coke expressly makes dower *ex assensu patris*, as well as the dowers at common law and *ad osium ecclesiæ*, liable to be defeated at common law by the husband's treason or felony. Ante 37. a. But some have inclined to think, that the 5. & 6. E. 6. c. 11. which so far repeals the 1. E. 6. c. 2. and revives the common law as to take away the wife's dower in case of treason by the husband, doth not extend to dower *ex assensu patris*. This will appear from the following extract from a valuable manuscript, which has been already cited.—It seems that dower *ex assensu patris* shall not be lost by the statute of 5. E. 6. by attainder of the husband for treason; for the wife is in by the father and not by the husband, and if action be brought for the land, it shall be against the husband and wife. Contra of dower *ad osium ecclesiæ*. Quære tamen of the former case *ex assensu patris*. MSS. Comment. on Littl. pen. Edit.—In Plowden's Queries 181, a like question is started as to the effect of the husband's attainder of felony on dower *ex assensu patris* before the 1. E. 6. c. 2. changed the common law, and saved the wife's dower; but Mr. Plowden argues against the wife. See further ante 35. b. where lord Coke mentions, that according to some opinions the wife lost dower *ex assensu patris*, if after assent the father was attainted of treason or felony.—(5) In Winch 27. there is a loose note of a case, in which, notwithstanding the 1. E. 6. c. 2. for preserving dower in cases of treason or felony by the husband, Winch inclined to think, that attainder of the husband for felony prevented the wife's dower, where the wife of a copyholder for life was dowable by custom. But the reasons of this opinion, which seems strange, do not appear.

CHAP. 6. Sect. 56.

Tenant a terme de vie.

OU pur terme de vie dun auter **T**ENANT pur terme de vie **T**ENANT for term of life is, *est, lou home lessa terres ou tenements a un auter pur terme de vie le lessé, ou pur terme de vie dun auter home, en tiel casé le lessé en tenant a terme de vie. Mes per common parlance celuy que tient pur terme de sa vie demesne, est appel tenant pur terme de sa vie, et cestuy que tient pur terme dauter vie, est appel tenant pur term dauter vie.* where a man letteth lands or tenements to another for terme of the life of the lessee, or for terme of the life of another man. In this case the lessee is tenant for terme of life. But by common speech he which holdeth for terme of his owne life, is called tenant for terme of his life, and he which holdeth for terme of another's life, is called tenant for terme of another man's life.

(Cro. Ja. 200. 554.)
Braet. lib. 2. ca. 5. & ca. 9. fol. 26. Fleta lib. 3. ca. 12. Britton fol. 83. Braet. lib. 4. fo. 170. Vide Sect. 381.

[a] Vide le Deane de Worcester. case, 6. Co. 37. 27. Aff. 31. 39. E. 3. 1. 27. H. 6. Recognizance. Stattham pl. ultimo. 38. H. 6. 27. Braet. lib. 2. fo. 9. Britton fo. 84. 85. (Vaugh. 189. 390. Cro. El. 407.)

[b] 27. Aff. p. 31. & Pl. com. fo. 28. b. in Colthorff's case tit. Barre 303. (Cro. Jam. 201. Mo. 394. Cro. Eliz. 57. Mo. 664. Cro. Jam. 282.)

[c] Littleton 167. 17. H. 4. 42. 47. E. 3. 48. 39. E. 3. 25. 7. H. 4. 46. 8. H. 4. 15. Dier S. E. 112. 253. (2. Ro. Abr. 150. 151. 3. Ro. Abr. 844. 1. Leon. 126. Post 239. 2.)

[d] Braet. lib. 4. fo. 222. 231. 232. & vid. fo. 136. 157. Fleta lib. 4. ca. 19. 25. 26. 27. S. E. 3. 54. 55. 21. E. 3. 41. 48. E. 3. 31. 7. E. 4. 28. 21. H. 6. 46. 10. E. 4. 3. F. N. B. 180. 4. Co. 86. 87. in Luttrell's case.

(11. Co. 46.)

Vide Sect. 381.

Roffe's case, 5. Co. 13. (5. Co. 9. b.)

And therefore no man shall gain the king's land by priority of entry. There can be no occupant of any thing that lyeth in grant (3), and that cannot passe without deed, because every occupant must claime by a *que estate* and averre the life of *Ce' que vie* (4). It were [c] good to prevent the incertainty of the estate of the occupant to adde these words, (to have and to hold to him and his heires during the life of *Ce' que vie*) and this shall prevent the occupant, and yet the lessee may assigne it to whom he will, or if he hath already an estate for another man's life without these words, then it were good for him to assigne his estate to divers men and their heires during the life of *Ce' que vie* (5).

Note that [d] to every tenant for life, the law as incident to his estate without provision of the party giveth him three kinde of *estovers*, (that is) *boufbote* which is twofold, viz. *estoverium edificandi et arandi*, ploughbote that is *estoverium arandi*, and lastly, *haybote*, and that is *estoverium claudendi*, and these estovers must be reasonable, *estoveria rationabilia*. And these the lessee may take upon the land demised without any assignement, unlesse he be restrayned by speciall covenant (6), for *modus et conventio vincunt legem*. Note in the Saxon tongue, and *estovers* in the French in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. *Estovers* commeth of the French word *eslover*. And the same estovers that tenant for life may have, tenant for years shall have.

You have perceived, that our author divides tenant for life into two branches, viz. into tenant for terme of his own life, and into tenant for terme of another man's life: to this may be added a third, viz. into an estate both for terme of his owne life, and for terme of another man's life.

As if a lease be made to A to have to him for terme of his own life, and the lives of B and C, for the lessee in this case hath but one freehold, which hath this limitation, during his owne life, and during the lives of two others. And herein is a diversity to be observed between several estates in several degrees, and one estate with several limitations. For in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not. As if A be tenant for life, the remainder or reversion to B for life, A may surrender to B for

(1) Who shall be occupant.—A makes lease to B for one hundred years, and afterwards ousts him and makes lease to C for the life of D, B re-enters, C dies: B shall not be occupant against his will, for so his term would be drowned. H. 6. Jac. C. B. Karolin's case. 1. *essee for another's life makes lessee at will, who continues in possession after the death of his lessor: he is an occupant. If A lessee for another's life makes lessee for years, who is possessed, and A dies, it seems that lessee for years shall be occupant against his own will, though he doth not enter; but if the lessee for years makes lease at will, and then A dies, lessee at will shall be occupant, though he claims to the use of the lessee for years, or though lessee for years enters on lessee at will and claims to be occupant. But riding over the ground to hunt or harok doth not make an occupant.* Vid. Dy. 328. H. 15. Jac. B. R. Rot. 356. Stellicorn and Hayes, and M. 10. Jac. Bullr. n. 6. Chamberlain and Erwer. A lessee for life of B makes lessee to C for 20 years, rendering 5 l. C makes lease to D for 10 years, rendering 3 l. A dies: D is occupant, yet he shall pay the rent of 3 l. to C and C shall pay the rent of 5 l. to D, for D's term is prevented from merging by the intervention reversion in C, but D has the freehold in reversion expectant on C's term and the rent incident to it. Hal. MSS.—See Stellicorn and Hayes in 2. Ro. Rep. 123. and Cro. Jam. 554. and Chamberlain and Erwer in 2. Bullr. 11. 2. Ro. Abr. 151. E. pl. 3. 4. and Palm. 42.—(2) In some books it is asserted, that there cannot be an occupant of estates created by law, without distinguishing between a general and a special occupant. Cro. Eliz. 58. 1. Bullr. 135. 2. Ro. Rep. 123. Probably the assertion was meant to be confined to the former, for as to the latter the authorities seem decisive in favour of the heir's taking as special occupant if named in granting over curtesy or any other estate created by law. See 27. Aff. pl. 31. Plowd. 28. and 556. and Palm. 32. But even the doctrine against general occupancy of estates created by law comes merely from persons arguing as counsel, who neither explain why it should not be, nor cite any authorities except 15. E. 3. Fitzh. Abr. *Scire facias* pl. 17. which appears foreign to the purpose.—(3) Lord Hale adds, *nor of a copyhold*. Hal. MSS.—See acc. 2. L. Raym. 1000. and the reason why in 6. Mod. 66. As to things lying in grant, lord Coke in mentioning them must be understood to mean general occupancy only, for he writes in another place, that if heirs are named in the grant of a rent *pur autre vie*, they shall take, though formerly this was doubted. See Post 388. Dy. 186. ed. 1689. in marg. 1. Bullr. 155. Mo. 625. 664. and Godb. 172.—(4) Vid. M. 44. 45. Eliz. B. R. Salter's case. Rent granted to one, his executors and administrators *pur autre vie*, and the grantee dies; it shall not go to the administrator as special occupant, but determines by the death unless there has been an assignment. Hal. MSS. See S. C. in Cro. Eliz. 901. Noy 46. Yelv. 9. and Mo. 664. See also S. P. acc. 2. Ro. Abr. 151. G. pl. 3. However some have thought that executors and administrators if named in the grant might take an estate *pur autre vie*, though a freehold, even before the 29. Ch. 2. c. 3. and 14. G. 2. c. 20. by which they are now intitled. See 3. Atk. 466. The authority relied on is Dy. 328. b.—(5) The title by general occupancy is now universally prevented by the 29. Ch. 2. c. 3. f. 12. and the 14. G. 2. c. 20. f. 9. The first statute enacts, that estates *pur autre vie* shall be deviseable, and if not devised chargeable in the hands of the heir as assets by descent, where the estate falls on him as special occupant; and if he is not intitled as such, shall go to the grantee's executors or administrators and be assets. On this statute a doubt arose, whether it operated further than by making such estates deviseable and assets for debts; and in one case it was adjudged, that the administrator took the surplus of such estates after payment of debts, if not devised, for his own benefit as in the place of a general occupant. See 12. Mod. 103. This gave occasion to the second statute, which expressly makes the surplus in case of intestacy distributable as personal estate. See further as to occupancy 2. Blackst. Comment. 258. an elaborate argument by lord chief justice Vaughan Vaugh. 187. Vin. Abr. *Occupancy and Estates* R. a. 3. Com. Dig. *Estates* F. and New Abr. *Estate for life* B.—(6) But *affirmative covenants* do not restrain. 28. H. 8. Dy. 19.—Hal. MSS.

for the estate of B for terme of his own life is higher than an estate for another man's life: (Ante 31. b. post 273. b.) and therefore if tenant for life infeoffe him in the remainder for life, this is a surrender, and no forfeiture. And albeit an estate for terme of a man's own life be but one freehold, yet may several freeholds in certaine cases be derived out of the same, whereof our bookes are very plentiful, and wherewith you may disport your selves for a time. As if tenant for life maketh a lease by deed, or without deed, to him in the remainder, or reversion, in taile or in fee, for the term of the life of him in the rem. or reversion, and after he in the remainder taketh wife and dieth, his wife shall not be endowed, for tenant for life shall enjoy the land again, for forfeiture it cannot be, for he in the rem. was party, and surrender it cannot be, for that his whole estate was not given (1).

The heire maketh a lease for life, reserving a rent, against whom the wife recovereth her dower and dieth, the lessee shall have the land againe for his life, and the rent is revived. 7. H. 5. 4.

So it is, if tenant for life take husband and by deed indented they make a lease to him in the reversion for the life of the husband, reserving a rent, this is neither forfeiture, nor absolute surrender, for the cause aforesaid, and the reservation is good. 29. Aff. p. 64.

B seised of lands in fee, taketh to wife If. and infeoffe C in fee, who takes Alice to wife: C dieth, Alice is endowed; B dieth, If. recovereth dower against Alice and dieth, Alice shall enjoy the land againe during her life (2). 8. E. 2. Aff. 393. 45. E. 3. 13.

A and [a] B joyntenants, A for life, and B in fee, joyne in a lease for life (3), A hath a reversion, and shall joyne in an action of wast (4). [a] 2. H. 5. 7. 13. H. 7. 15. 18. E. 2. l. r. 8. 5. F. N. B. 59. f.

Tenant for [b] life, and he in the reversion joyne in a lease for life, it is said, that they shall joyne in an action of wast, and that the lessee for life shall recover the place wasted, and he in reversion, damages (5). [b] 27. H. 8. 13. 13. H. 7. 15. 22. H. 6. 24. 17. E. 3. 9. b.

If a man grant [c] an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quam diu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house, or so long as he pay x l. &c. or untill the grantee be promoted to a benefice, or for any like incertaine time, which time, as Bracton saith, is *tempus indeterminatum*: in all these cases, if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other thing that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall alledge the lease, and conclude, that by force thereof he was seised generally for terme of his life (6). [c] 37. H. 6. 27. 26. E. 3. 69, 14. E. 2. Grant. 92. 3. E. 3. 15. 14. H. 8. 13.

If a man make a lease of a mannor, that at the time of the lease made is worth xx l. *per annum*, (6. Co. 35. b.) to another until c. l. be paid, in this case because the annuall profits of the mannor are incertain, he hath an estate for life, if livery be made determinable upon the levying of the c. l. (7) But if a man grant a rent of xx l. *per annum* untill c. l. be paid, there he hath an estate for five yeares, for there it is certaine, and depends upon no incertainty. And yet in some cases a man shall have an incertaine interest in lands or tenements, and yet neither an estate for life, for yeares, or at will (8). As if a man by his will in writing, devise his lands to his executors for payment of debts, and untill his debts be paid; in this case the executors have but a chattell, and an incertaine interest in the land untill his debts be paid; for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid, but being a chattell, it shall go to the executors of executors for the payment of his debts: and so note a diversity betweene a devise and a conveyance at the common law in his life time. And tenant by statute merchant, by statute staple, and by *Elegit*, have incertaine interests in lands or tenements, and yet they have but chattells, and no freehold, whose estates are created by divers acts of parliament, whereof more shall be said hereafter. And so have gardians in chivalry which hold over for single or double value incertaine interests, and yet but chattells. 33. Aff. p. 2. (Plow. 273.)

If one grant lands or tenements, reversions, remainder, rents, advowsons, commons, or the like, and expresse or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life (9). The same law is of a declaration of a use (10). A man may have an estate for terme of life determinable at will; as if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for terme of his life, this is determinable upon the determination of the office. 8. Co. 94. b. Manning's case. 3. H. 7. 13. 27. H. 8. 5. 14. H. 8. 13. 21. Aff. p. 8.

A, tenant in fee simple makes a lease of lands to B, to have and to hold to B for terme of life, without mentioning for whose life it shall be, it shall be deemed for terme of the life of the lessee, for it shall be taken most strongly against the lessor, and as hath beene said, an estate for a man's owne life is higher than for the life of another (11). But if tenant in taile make such a lease without expresse for whose life, this shall be taken but for the life of the lessor, for two reasons. Vide sect. 381. (1. Ro. Abr. 346.)

First, when the construction of any act is left to the law, the law which abhorreth injury and wrong will never so construe it, as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong is wrought. And it is a generall rule, that whensoever the words of a deed, or of the parties without deed may have a double intendment, and the one standeth with law and right, (Post 183.)

(1) 1. E. 3. 15. Vid. 41. Aff. 2. A tenant for life, remainder to B in tail, remainder to C in fee; A enfeoffs E and his wife and their heirs; B dies without issue; now there is a forfeiture, and C may enter. Hal. MSS.

(2) Hic fol. 21. Hal. MSS.

(3) 13. E. 4. 4. Dy. 237. So of a gift in tail. 38. E. 3. 7. Hal. MSS.

(4) And the writ ought to be ad exheredationem B. 13. E. 2. Brief 835. Hal. MSS.

(5) 3. H. 7. 9. P. 43. Eliz. C. B. D. D. n. 4. But if the lease be without deed it is a surrender. 10. H. 7. 3. 1. Rep. Bredon's case. Hal. MSS.

(6) A leases to B till A makes I. S. bailly of his manor: adjudged a freehold. H. 37. El. Butler and Ridgely. Vid. 1. Rep. Bredon's case rent granted to A for life if B or C shall so long live. But if there be an estate with such conditional limitation, it ought to be pleaded with the limitation, and continuance should be averred; for otherwise it fails. Vid. Dy. 192. Hal. MSS.

(7) But feoffment to the use of A for life, remainder to the use of B his executors and assigns till ten pounds should be levied out of the profits, ruled to be a chattell. Hal. MSS.

(8) Plowd. Comment. 273. Hal. MSS.

(9) Hic. sect. 283. But if termor for years devises his house generally without shewing what estate, the whole term passes. 14. Eliz. Dy. 307. Hal. MSS.

(10) 21. H. 8. 5. by Shelly. Hal. MSS.

(11) Vid. 8. E. 3. 3. A lessee for life makes lease to B and C, on condition that if they die leaving A, then the land shall revert to A without determining any estate certain in the grant. All the estate passes under the condition, for in præcipe A was not received on default of B and C. Hal. MSS.

4. E. 2. Wast. 11. 17. E. 3. 7.
(Mo. 358. 363. Post. 276. a.)

right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken.

Secondly, The law more respecteth a lesser estate by right, than a larger estate by wrong; as if tenant for life in remainder disseise tenant for life, now he hath a fee simple; but if tenant for life die, now is his wrongfull estate in fee by judgment in law changed to a rightfull estate for life.

19. H. 6. 7. H. 4. 32. 6. E. 3.
17. 7. E. 3. 66. 18. E. 3. 60.
23. E. 3. c. 1. &c. 11. H. 4. 44.
38. E. 3. 23. 24.

If a man retaine a servant generally without expressing any time, the law shall construe it to be for one yeare, for that retainer is according to law. Vide 23. E. 3. cap. 1. &c. (1). To shut up this point it hath been adjudged, that where tenant in taile made a lease to another for terme of life generally, and after released to the lessee and his heires, albeit betweene the tenant in taile and him a fee simple passed, yet after the death of the lessee the entry of the issue in taile was lawfull; which could not be, if it had been a lease for the life of the lessee, for then by the release it had beene a discontinuance executed (2). But let us now returne to Littleton.

Sect. 57.

THIS and the rest that follow in this chapter concerning the description of feoffor and feoffee, donor, and donee, and lessor and lessee are evident.

Et est ascavoir que il y ad le feoffor, et le feoffee, &c. Vide sect. 2.

Where a light touch is given who may purchase. Now somewhat is to be said, who have ability to enfeoffe, &c. and may be a feoffor, donor, lessor, &c. Whosoever is disabled by the common law to take, is disabled to infeoffe, &c. But many that have capacite to take, have no ability to infeoffe, &c. As men attainted of treason, felony, or of a *præmunire*, aliens borne, the king's villaines, traitors, felons, &c. he that hath offended against the statutes of *præmunire*, after the offences committed (3) if attainders ensue, ideots, madmen, a man deafe, dumbe, and blinde from his nativity, a feme covert, an infant (4), a man by duress: for the feoffments, &c. of these may be avoyded. But an hereticke, though he be convicted of heresie, a leper removed by the king's writ from the society of men, bairds, a man deafe, dumbe, or blinde, so that he hath understanding and sound memory, albeit he expresse his intention by signes, villaine of a common

ET en ascavoir que il y ad le feoffor et le feoffee, donor et le donee, le lessor et le lessee. Le feoffor est properment lou home enfeoffa un auter en ascuns terres ou tenements en fee simple, celui que fist le feoffment est appel feoffour, et celui a que le feoffment est fait, est appel feoffee. Et le donour est properment lou un home done certaine terres ou tenements a un auter en le taile, celui que fist le done est appel le donour, et celui a que le done est fait est appel le donee. Et le lessor est properment lou un home lessa a un auter certaine terres ou tenements pur terme de vie, ou pur terme des ans, ou a tener a volunt, celui que fist le leas est appel les-

AND it is to be understood, that there is feoffor and feoffee, donor and donee, lessor and lessee. Feoffor is properly where a man enfeoffes another in any lands or tenements in fee simple, he which maketh the feoffment is called the feoffor, and he to whom the feoffment is made, is called the feoffee. And the donor is properly where a man giveth certaine lands or tenements to another in taile, he which maketh the gift is called the donor, and he to whom the gift is made is called the donee. And the lessor is properly where a man letteth to another lands or tenements for terme of life or for terme of years, or to hold at will, he which maketh the lease is called lessor,

Brañon lib. 5. fo. 415. Britton fo. 88. Fleta lib. 3. ca. 3. & lib. 6. ca. 39. 40.

2. H. 5. ca. 7. which is repealed, Doct. and Stud. lib. 2. ca. 29.

(1) Mr. Barrington calls this a *supposed* statute, because the intervention of the commons is not mentioned; and the introductory part seems to justify the observation; for the title is like that of an ordinance of the king in council, the words being that the king *cum praelatis nobilibus et peritis et aliis sibi assidentibus deliberationem habuit et tractatum; de quorum unanimi consilio ordinavit*. See Observat. on Ant. Stat. 2d ed. 206. However the 23. E. 3. appears to have been always treated as a statute, and Fitzherbert, in his commentary upon the writ founded upon it, calls it by that name. Fitzh. Nat. Br. 167. B.

(2) That is, if the lease was for the life of the lessee it would be a discontinuance for life, and the tenant in tail would thereby raise in himself a new reversion in fee, and the release, by passing such new reversion in fee to the discontinuee, would merge his estate for life and make it a fee executed; which enlargement of the estate for life would proportionably enlarge the discontinuance for life, and so make it a discontinuance in fee as much as if the first conveyance by the tenant in tail had been for that estate. See further on this subject Post sect. 620.

(3) As to conveyances made by felons or by offenders against the statutes of *præmunire* between indictment and attainder, see W. Jo. 217. Cro. Cha. 172. and Will. vol. 1. part 2. page 219.

(4) There is an important difference between the deeds of femes covert and infants. Those of the former are always void; but those of the latter are sometimes void, and sometimes only voidable. As to the distinction between *void* and *voidable* in the case of deeds by infants, see a case in Burr. 4. part 3. vol. 1794, in which the court held a conveyance by lease and release by an infant to be voidable only. See further Post sect. 259.

for, et celui, a que le leas est fait, est appellee. Et chef-cun, que ad estate en ascun terres ou tenements pur terme de sa vie ou pur terme dauter vie, est appellee tenant de franktenement, et nul autre de meindre estate poit aver franktenement: mes ceux de greinder estate ont franktenement; car cestuy en fee simple ad franktenement, et celui en le taile ad &c. franktenement, &c.

and hee, to whom the lease is made, is called lessee. And every one, which hath an estate in any land or tenements for term of his owne or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in taile hath a freehold, &c.

person before entrie, or the like may infeoffe, &c.

[a] All feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by the deane and chapter, by any of the colledges or halls in either of the Universities, or elsewhere, deans and chapters, master or gardian of any hospital, parson, vicar, or any other having spirituall or ecclesiastical living, are also to be avoyded, [b] and all the said bodies politique or corporate, are by the statutes of the realm disabled to make any conveyances to the king, or to any other, as it hath been adjudged: which statutes have bin made since Littleton wrote (1).

It is provided [c] by the statute of *Magna Charta*, *quod nullus liber homo det de cetero amplius alicui de terra sua, quam ut de residuo terræ suæ possit sufficient' fieri domino fe-*

[a] 32. H. 8. cap. 28. 1. El. not printed. 13. El. ca. 10. 14. El. ca. 11. 18. El. ca. 20. 1. J. cap. 3.

[b] 4. Co. 76. 120. 5. Co. 6. 14. 6. Co. 37. 11. Co. 67. Magdalen Colledge case. Vide Leif. de W. 2. ca. 41.

[c] *Magna Charta* cap. 32. Mirror cap. 5. Sect. 2. Glanvil lib. 7. ca. 1. Bract. lib. 1. Brit. 88. &c. Fleta lib. 3. cap. 3.

[d] Vide an excellent declaration hereof interadjudicat' coram Rege. Trin. E. f. fol. 2. in Thelau. Nott. & Derb.

[e] Bract. lib. 1. 10. H. 7 fol. 10. b. 33. E. 3. Avowry 255. Stamford, p. 29. 8. E. 4. 12.

Mirror cap. 5. Sect. 2. Fleta lib. 3. cap. 3.

[f] 26. Ass. p. 37. 20. Ass. p. 17. 20. E. 3. Avowry 126. 34. E. 3. c. 15. Vide Stamford. 29. 30. Matt. Paris. Wallingham 37. 39.

Vide 5. H. 3. Mordanc. 53. *Magna Charta* there vouched, which was the charter of King John, for it was cited before 9. H. 3.

odi servitium ei debitum quod pertinet ad feudum illud. Upon which act I have heard great question [d] made, whether the feoffment made against that statute were voydable or no, and some have said that the statute intended not to avoyd the feoffment, but implicate to direct the tenure, *viz.* that the tenant should not infeoffe another of parcell to hold of the chief lord (that is of the next lord) but to hold of himselfe, and then the lord may distreine in everie part for his whole service without any prejudice unto him. But this opinion is against [e] the authoritie of our bookes, and against the said statute of *Magna Charta*. For first it is agreed in 10. H. 7. that as well before the statute as after, a tenant which held two acres might have aliened one of the acres to hold of him, and notwithstanding the lord might have distrained in which of the acres he would for his whole services: and reason teacheth that before that statute a tenant could not have aliened parcell to hold of the chiefe lord; for the feignory of the lord was entire, for the which the lord might distreine in the whole or in any part, and which the tenant by his owne act cannot divide to the prejudice of the lord to barre him to distreine in any part for his services, as he should doe, if he should infeoffe another of parcell to hold of the chiefe lord. But the tenant might have made a feoffment of the whole to hold of the chiefe lord, for there no prejudice infused to the lord (2). Others have said, and they said truly, that the intention of the statute was that the tenant could not alien parcell (which might turn to the prejudice of the lord) without his assent, and this appeareth cleerly by the mirror. And by this statute the king tooke benefit to have a fine for his licence, before which statute no fine for alienation was due to the king. For it is [f] adjudged that for an alienation in time of Henry the second, no fine was due, and it appeareth in our bookes, that if an alienation had bene made before 20. H. 3. no fine was due to the king for alienation (3). Now it is to be observed, that oftentimes for the better understanding of our bookes, the advised reader must take light from historie and chronicles especially for distinction of times. And therefore Matthew Paris (who in his chronicle reciteth *Magna Charta*) (4) testifieth that king Henry the third by evill counsell (and especially, as the truth was, of Hubert de Burgo then chiefe justice) sought to avoyde the great charter first granted by his father king John, and afterward granted and confirmed by himselfe in the ninth of Henry the third, for that as he said king John did grant it by duces, and that he himselfe was within age when he granted and confirmed it. But forasmuch as afterwards the said king Henry the third in the twentieth yeare of his raigne, at what time he was nine and twentie yeare old, did grant and confirme the said great charter, for that cause to put out all scruples in the twentieth yeare of Henry the third named, albeit in law the king's charter granted in the ninth yeare of Henry the third, was of force and validitie notwithstanding his nonage, for that, in judgement of law the king, as king, cannot be said to be a minor

(1) And in case of corporation aggregate, as dean and chapter, the lease is void against the dean who makes the lease. M. 13. Car. B. R. Lloyd and Gregory. But it is otherwise in the case of a sole corporation, for there it is void only against the successor. M. 44. Eliz. C. B. Saunders's case. Hal. MSS.—See the observation on the case of Lloyd and Gregory Post 45. a. As to conveyances by corporations before the restraining statutes, see Post 44. a. and 103. a.—(2) This assertion has been controverted, as repugnant to the feudal notions of alienation, and inconsistent with any reasonable construction of the statute *quia emptores terrarum*. Wright's Ten. 155. Dalrymple. Hist. Feud. Prop. 80. and Sulliv. Lect. 418. In fact the history of our law with respect to the powers of alienation before the statute of *quia emptores terrarum* is very much involved in obscurity. See Bract. lib. 2. cap. 19. where the author inquires, *si ille, cui datum est, rem datam ulterius dare possit*. See also Bract. lib. 2. cap. 5. and Staundf. Prærog. cap. 7.—(3) Nota, for seizure of serjanties aliened without licence, it seems that it was the ancient law. Vid. Roger Hoveden 783. *It was one of the articles inter capitula coronæ R. 1. de serjantiis alienatis and so it still continues*. Claus. 7. Johann. m. 11. *precept to seize serjanties theinagia et dengagia tent. de honore Lancaster alienat. post primam coronation. H. 2. Vid. T. 7. E. 1. Coram rege Gilbertus de Clare comes Gloucester impeached for alienation made to his father. Vid. 24. E. 3. 71. special custom to alienate without licence. Videtur per Rot. Parl. 29. E. 3. n. 18. quod other tenures than serjanties the prerogative began in the time of Edward the First. Nota it seems, that the statute of *quia emptores* takes away licences and pardons of alienations in case of tenure of a subject. Yet see 14. H. 4. 4. recordare longum for custom of the honor of Gloucester and Rot. Parl. 38. H. 6. n. 29. pro ducatu Cornubiæ ubi facta a custome. Rot. Parl. 8. E. 2. m. 7. in scedula pendente dorso. "Accord est et assensu per archevesques evesques abbes priores countes et barons et autres du realme le roy summons a Westminster octab. Hill. 8. E. 2. que eux desoremes nul fine de mandront ne prendront des frankhomes, pur entrer terres et tenements que sont de leur fee, issint totes voyes que per tiel feoffments ils ne soient pas eloignes ds leur services ne leur services dedits." Hal. MSS. From lord Hale's observing, that the crown's right of seizure for alienation of serjanties without licence still continues, it seems, that his note on the subject was written before the 12. Cha. 2. c. 24. which converts tenures by knight service into socage and takes away fines of alienation. See Post. 43. b. n. 2.—(4) Nota pro carta de libertatibus.—Carta regis Johann. proclamata 19. Junii 17. Johana. apud Runimede*

Lib 1. Cap. 7. Of Tenant for yearès. Sect. 58.

20. Aff. Pl. 17. by Skipwith.

Britt. fo. 28. 88. 186. 187. 245. 247. Prer. Regis ca. 7. Fleta lib. 6. cap. 29. acc. 20. E. 3. Aff. 122. 29. Aff. pl. 19. 14. E. 3. quare imp. 45. 14. H. 4. 2. 3. 9. E. 3. fo. 26. 1. E. 3. c. 12. 34. E. 3. ca. 15. 2. Co. 81. 82. in Seignior Cromwell's case.

Regist. int. les breves de onerand' pro rata portione.

(Plowd. 561. b. 562.)
Bracton lib. 4. fo. 224. Britton cap. 32. & 47. Bracton lib. 4. fo. 22. Regist. Judic. 68. 73.

28. Aff. p. 7. W. 2. ca. 18. Stat. de mercatoribus an. 13. E. 1. 27. E. 3. ca. 9. 23. H. 8. ca. 6. F. N. B. 178. (Ante 42. a.)

nor, for when the royall bodie politique of the king doth meete with the naturall capacity in one person, the whole bodie shall have the qualitie of the royall politique, which is the greater and more worthy, and wherein is no minoritie (1). For, *omne majus trahit ad se quod est minus*. And it is to be observed, that no record can be found, that either a licence of alienation was sued, or pardon for alienation was obtained for an alienation without licence at any time before the twentieth yeare of Henry the third, and it is holden in the twentieth of Edward the third, that a licence for alienation grew by this statute.

Now in the case of a common person it was the common opinion, that if the tenant had aliened any parcell contrary to the said act, that he himselfe was bound by his owne act, but that his heire might have avoyded it; and in the king's case many held the same opinion. For Britton saith, *Ne counts, ne barons, ne chevaller, ne serjeants, que teignent en chiefe de nous ne purr' my dismember nous fees sans licence: que nous ne puissent per droit engettre les purchasors, &c.* And herewith agreeth Fleta, and our bookes. But now by the statute 1. E. 3. cap. 12. & 34. E. 3. cap. 15. although the king's tenant in chiefe or by grand serjantie doe alien all or any part without licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1. E. 3. that complaint was made that land holden of the king in *Capite*, being aliened, without licence was seized as forfeited. And in the case of a common person, the statute of 18. E. 1. *De quia emptores terrarum* hath made it cleare, for this hath in effect as to the common perions taken away the said statute of Magna Charta cap. 32. for thereby it is provided, *Quod liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita quod feoffatus teneat, &c. de capitali domino*. And herein are divers notable points to be observed. First, that this word *liceat* proveth that the tenant could not, or at least wayes was in danger to alien parcell of his tenancy, &c. upon the said act of Magna Charta. Secondly, that upon the testiment of the whole, the tenant shall hold of the chiefe lord. Thirdly, that the tenant might infeoffe one of part to hold *pro perticula* of the chiefe lord. But this act (the king being not named) doth not take away the king's fine due to him by the statute of Magna Charta (2).

Franktenement. Here it appeareth that tenant in fee, tenant in taile, and tenant for life are said to have a franktenement, a freehold, so called, because it doth distinguish it from termes of yeares, chattels upon incertaine interests, lands in villenage or customary, or copyhold lands. *Liberum autem tenementum dicitur ad differentiam villenagii, et villanorum qui tenent villenagium quia non habent actionem nec assisam, &c. item quod sit suum et non alienum, hoc est si teneat nomine alieno ut firmarius et ad terminum vel sicut creditor ad wadium*. And note that tenant by statute merchant, statute staple, or elegit, are said to hold land *ut liberum tenementum* untill their debt be paid, and yet in troth they (as hath beene said) have no freehold, but a chattle, which shall go to the executors, and the executors also if they be ousted shall have an assise. But (ut) is similitudinary, because they shall by the statutes have an assise as tenant of the freehold shall have, and to that respect hath a similitude of a freehold, but *nullum simile est idem*.

CHAP. 7. Sect. 58.

Tenant for terme of yeares.

LOU home lessa **TENANT** pur **TENANT** for terme
terres, &c. lessa terme dans est, of yeares is;
and lease is [a] derived of the lou home lessa ter- where a man letteth
Saxon word *leapum*, or *leasum*, res ou tenements a lands or tenements
for that the lessee commeth in un auter pur terme to another for terme
by lawfull meanes; [b] and *dimittere* is in French *lasser* to de certaine ans, so- of certaine yeares,
depart with or forgoe. longue le number after the number of
When Littleton wrote, many persons might make leases for yeares, or for life, or des ans que est accord perenter le less- yeares that is accorded between the
for

[a] Mirror cap. 2. Sect. 17.
Bracton lib. 2. cap. 26. & lib. 4. fol. 220. Fleta lib. 3. cap. 12. & lib. 5. cap. 34.
[b] For the word (dimitto) see Sect. 531.

mede Pat. 17. Johann. m. 33. dorso. Carta de libertatibus sub H. 3. magna scilicet de libertatibus, et minor sive de foresta, proclamantur 8. Maii 9. H. 3. prima pars claus. 9. H. 3. m. 14. dorso interrupt. et cancell. Math. Paris sub anno 1227. pag. 336. but afterwards confirmed by H. 3. Rex confirmat "omnes libertates, &c. contentas in cartis quas fecimus cum minoris ætatis essemus tam in magna carta quam in carta de foresta." Cart. 21. H. 3. n. 4. confirmatur per stat. Marlbr. cap. 5. et tunc primum devenit statutum, viz. 52. H. 3. Hal. MSS.—See a most accurate history of the *magna carta* of king John and of that Hen. 3. in the introductory discourse to Mr. Justice Blackstone's valuable edition of the charters.

(1) See this subject considered at large in the case of the dutchy of Lancaster Plowd. 214. and in *Willion and Berkley*. Plowd. 234.

(2) Fines for alienation are taken away as well from the king as from all others by the 12. Cha. 2. chap. 24. But the statute saves fines for alienation due by the customs of particular manors, other than fines for alienation of lands holden of the king *in capite*.—See further on the subject of alienation 2. Inst. 65. 501. Vin. Abr. tit. *alienation*. Sulliv. Lect. page 259. and 418. and the books cited in fol. 43. a. note 2.

for et le leſſee. Et quant le leſſee entrer per force del leas, donque il eſt tenant pur terme des ans; et ſi le leſſor en tiel caſe reſerve a luy un annuall rent ſur tiel leas, il poit eſlier a diſtraine pur le rent en les tenements leſſes, ou il poit aver un action de debt pur les arrerages enverz le leſſee. Mes in tiel caſe il covient, que le leſſor ſoit ſeiſie de meſmes les tenements al temps del leas, car il eſt bone plee pur le leſſee adire, que le leſſor navoit riens en les tenements al temps de le leas, ſinon que le leas ſoit fait per fait endent, en quel caſe tiel plee donque ne giſt en le bouch le leſſee a pleader.

leſſor and the leſſee, and when the leſſee entreth by force of the leaſe, then is he tenant for tearme of yeares; and if the leſſor in ſuch caſe reſerve to him a yearely rent upon ſuch leaſe, he may chuſe for to diſtraine for the rent in the tenements letten, or elſe he may have an action of debt for the arrerages againſt the leſſee. But in ſuch caſe it behooveth, that the leſſor be ſeiſed in the ſame tenements at the time of his leaſe for it is a good plee for the leſſee to ſay, that the leſſor had nothing in the tenements at the time of the leaſe, except the leaſe be made by deed indented, in which caſe ſuch plee lieth not for the leſſee to plead.

lives at their will and pleaſure, which now cannot make them firme in law. And ſome perſons may now make leaſes for yeares, or for life or lives (obſerving due incidents) firme and good in law, who of themſelves could not ſo doe when Littleton wrote, and this by force of divers acts of parliament [c] as namely 32. H. 8. 1. Eliz. 13. Eliz. 18. Eliz. and 1. Jac. Regis, of which ſtatutes one is enabling, and the reſt are diſabling. When Littleton wrote, biſhoppes with the confirmation of the deane and chapter, maſter and fellowes of any college, deanes and chapters, maſter or gardian of any hoſpitall, and his brethren, parſon or vicar with the conſent of the patrone and ordinary, archdeacon, prebend, or any other body politique ſpirituell and eccleſiaſticall (*Concurrentibus hiis quæ in jure requiruntur*) might have made leaſes for lives or yeares without limitation or ſtint. And ſo might they have made gifts in tailles or ſtates in fee at their will and pleaſure, whereupon not onely great decay of divine ſervice, but dilapidations and other inconveniences enſued, and therefore they were diſabled and reſtrained by the ſayd acts of 1. Eliz. 13. Eliz. and 3. Jac. Regis to make any ſtate or conveyance to the

[c] 32. H. 8. ca. 28. 1. Eliz. not printed but in the abridgement. 13. Eliz. cap. 10. 18. Eliz. cap. 6. 1. Jac. cap. 3.

5. Co. 14. caſe de eccleſiaſtical perſons. 11. Co. 66. Magdalen Colledge caſe. Leveſque de Sarrum's caſe. 10. Co. 60. 61. (1. Sid. 162.)

(5. Co. 15.)

(Cro. Char. 16. 47. 50. 10. Co. 58. Pollexf. 134. 4. Mod. 16. Finch 191. 192. 193. Cro. Cha. 48. Cro. Jac. 173.)

king at all, or to the ſubject; but there is excepted out of the reſtraint or diſability, leaſes for three lives, or one and twenty yeares, with ſuch reſervation of rent, and with ſuch other provisions and limitations as hereafter ſhall appeare. Alſo they may make grants of ancient offices of neceſſity with ancient fees, *Concurrentibus hiis quæ in jure requiruntur*, for thoſe grants are not within the ſtatute of 32. H. 8. but by conſtruction, they are not reſtrained by the ſtatutes of 1. Eliz. or 13. Eliz. becauſe theſe ancient offices be of neceſſity, and with the ancient fees, and ſo no diminution of revenue (1).

There be three kinds of perſons that at this day may make leaſes for three lives, &c. in ſuch ſort as hereafter is expreſſed, which could not ſo doe when Littleton wrote, viz. firſt, any perſon ſeiſed of an eſtate taile in his owne right. Secondly, any perſon ſeiſed of an eſtate in fee ſimple in the right of his church. Thirdly, any huſband and wife ſeiſed of any eſtate of inheritance in fee ſimple or fee taile in the right of his wife, or jointly with his wife before the coverture or after, viz. the tenant in taile, by deed to binde his iſſues in taile, but not the reversion or remainder, the biſhop, &c. by deed without the deane and chapter to bind his ſucceſſors, the huſband and wife by deed to bind the wife and her and their heires (2), and theſe are made good by the ſtatute of 32. H. 8. which inableth them thereunto. But to the making good of ſuch leaſes by the ſaid ſtatute, there are nine things neceſſarily to be obſerved belonging to them all, and ſome other to ſome of them in particular.

Firſt, the leaſe muſt be made by deed indented, and not by deed poll, or by paroll (3).

5. Co. 6. Seig. Mountjoye's caſe. (3. Lev. 438. Cro. Ja. 94. 458.)

Secondly, it muſt be made to begin from the day of the making thereof, or from the making thereof (4).

Thirdly,

(1) Vid. 29. Eliz. Caſe of the biſhop of Cheſter, who had antiently uſed to have a counſel who had a fee. This grantable by the biſhop with conſent of dean and chapter. Nota, though it be not an office of time of which, &c. yet grantable, if of neceſſity, as in the caſe of the biſhop of Glouceſter founded within time of memory. M. 1. Car. C. B. Crook n. 8. Cook and Young. Vide that it is holden, that though it be a new office, yet if neceſſary and the fee is reaſonable, being confirmed it ſhall bind the ſucceſſor; and vide the grant of antient office and fee, with the addition of a new fee, which notwithstanding ſeems good, becauſe the office is antient. M. 2. Car. C. B. Crook n. 7. Gee's caſe. If it has been uſual to grant an antient office to one only, a grant to two is not good. But if it has been once granted to two or granted in reversion before the ſtatute 1. Eliz. then it ſhall be intended to have been uſually ſo granted, and ſuch grant to two or in reversion ſhall bind the ſucceſſor. T. 8. Car. B. R. Crook n. 2. Walker and Lamb. M. 8. Car. B. R. Crook n. 19. Young and Steele concerning the official and commiſſary of the biſhop of Lincoln and the regiſter of the biſhop of Rocheſter. Hal. MSS. Ley 75. is contrary to Gee's caſe cited by lord Hale.—See further as to the grant of offices by eccleſiaſtical perſons, New Abr. Offices D. See alſo in Burr. part 4. vol. 1. page 219. the caſe of Sir John Trelawney and the biſhop of Wincheſter, in which the court held, that an office and fee which exiſted before the 1ſt. of Eliz. are not within the reſtraint of that ſtatute, but that they may be granted as before the ſtatute, and that the utility or neceſſity of the office is not more material ſince than it was before.

(2) Quoad leaſes by huſband and wife. Huſband and wife ſeiſed to them and the heires of the body of the huſband make leaſe for three lives, rendering the antient rent; huſband dies: this ſhall not bind the wife. Adjudged, becauſe the ſtatute ſpeaks of the wife's inheritance. H. 14. Eliz. C. B. n. 5. D. D. Huſband and wife jointly ſeiſed by purchaſe to them and their heires; the huſband alone during the coverture makes leaſe, rendering the antient rent: dubitatur if it ſhall bind the wife, becauſe the proviſo, which requires the wife's joining, ſpeaks only of huſband ſeiſed in right of his wife. *Finitur per compositionem*. M. 1. Car. C. B. Crook n. 15. Smith and Trindon. Hal. MSS.

(3) See New Abr. Leaſes E. 2.

(4) Vid. 7. Eliz. Dy. 246. Leaſe for 20 years to begin at next Michaelmas ſeems good. Hal. MSS.—See further as to the time when ſuch leaſes ſhould begin, and the difference between from the day of making and from the making. New Abr. Leaſes E. rule 2. and Poſt 47. b.

Lib. 1. Cap. 7. Of Tenant for yeares. Sect 58.

5. Co. 2. Elmer's case.

(Cro. Cha. 95. Cro. Ja. 112. 173.)

[d] 5. Co. 3. Jewel's case. 17. E. 3. 75. 9. Aff. 24. 14. E. 3. Scire facias 22. 10. H. 6. 2. 3. H. 6. 21. (1. Sid. 316. 317. 416. Cro. Eliz. 708.)

[e] 6. Co. 37. Deane and Chapter of Worcester's case.

5. Co. 6. Seignior Mountjoye's case.

(Cro. Jam. 76.)

6. Co. 37. 38. Deane and Chapter of Worcester's case.

5. Co. 5. Seignior Mountjoye's case. 6. Co. 37.

Lord Mountjoye's case ubi supra.

(Cro. Cha. 16. 17.)

Deane and Chapter of Worcester's case ubi supra.
Deane and Chapter of Worcester's case ubi supra.

3. E. 6. 1. Mar. tit. leases. Bro. 62. (Finch 191.)

Thirdly, if there be an old lease in being, it must be surrendered (1) or expired, or ended within a year of the making of the lease, and the surrender must be absolute and not conditionall.

Fourthly, there must not be a double lease in being at one time, as if a lease for yeares be made according to the statute, he in the reversion cannot expulse the lessee, and make a lease for life or lives according to the statute, nor *à converso*; for the words of the statute be, to make a lease for three lives, or one and twenty yeares, so as one or the other may be made, and not both (2).

Fifthly, it must not exceed three lives, or one and twenty yeares, from the making of it, but it may be for a lesser terme of fewer lives.

Sixthly, it must be of lands, tenements, or hereditaments, manurable or corporeall, which are necessary to be letten, and whereout a rent by law may be reserved, and not [d] of things that lye in grant, as advowsons, faires, markets, franchises, and the like whereout a rent cannot be reserved (3).

Seventhly, it must be of lands or tenements which have most commonly beene letten to farme, or occupied by the farmers thereof by the space of 20 yeares next before the lease made, so as if it be letten for 11 yeares at one or severall times within those 20 yeares it is sufficient. A grant [e] by copy of court roll in fee for life or yeares is a sufficient letting to farme within this statute, for he is but tenant at will according to the custome, and so it is of a lease at will by the common law, but those lettings to farme must be made by some feised of an estate of inheritance, and not by a gardian in chivalry, tenant by the curtesie, tenant in dower, or the like (4).

Eighthly, that upon every such lease there be reserved yearly during the same lease due and payable to the lessors, their heires and successors, &c. so much yearly farme or rent, or more, as hath beene most accustomedly yeilded or paid for the lands, &c. within twenty yeares next before such lease made (5). Hereby first it appeareth (as hath beene said) that nothing can be demised by authority of this act, but that whereout a rent may be lawfully reserved. Secondly, that where not onely a yearly rent was formerly reserved, but things not annuall, as heriots, or any fine or other profit at or upon the death of the farmor, yet if the yearly rent be reserved upon a lease made by force of this statute, it sufficeth by the expresse words of the act. Thirdly, if he reserve more then the accustomed rent it is good also by the expresse letter of the act; but if twenty acres of land have beene accustomedly letten, and a lease is made of those twenty, and of one acre which was not accustomedly letten, reserving the accustomedly yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the act, for that the accustomed rent is not reserved, seeing part was not accustomedly letten, and the rent issueth out of the whole. Fourthly, if tenant in taile let part of the land accustomedly letten, and reserve a rent *pro rata*, or more, this is good, for that is in substance the accustomed rent. Fifthly, if two coparceners be tenants in taile of twenty acres every one of equall value, and accustomedly letten, and they make partition, so as each have ten acres, they may make leases of their severall parts each of them, reserving the halfe of the accustomed rent. Sixthly, if the accustomed rent had beene payable at foure daies or feasts of the yeare, yet if it be reserved yearly payable at one feast, it is sufficient, for the words of the statute be, reserved yearly.

Ninthly, nor to any lease to be made without impeachment of waste. Therefore if a lease be made for life, the remainder for life, &c. this is not warranted by the statute, because it is dishonourable of waste. But if a lease be made to one during three lives, this is good, for the occupant, if any happen, shall be punished for waste (6). The words of the statute be (feised in the right of his church) yet a bishop that is feised *jure episcopatus*, a deane of his sole possessions in *jure decanatus*, an archdeacon in *jure archidiaconatus*, a prebendary and the like are within the statute, for every of them generally is feised in *jure ecclesie* (7).

But a parson and vicar are excepted out of the statute of 32. H. 8. and therefore if either of them make a lease for three lives, &c. of lands accustomedly letten, reserving the accustomed rent, it must be also confirmed by the patron and ordinary, because it is excepted out of 32. H. 8. (8). and not restrained by the statutes of *primo* or 13. Eliz. And what hath beene said concerning a lease for three lives, doth hold a lease for one and twenty yeares.

Thus much shall suffice to have spoken of the inabling statute of 32. H. 8. the better to inable the reader to understand both this and that which followes. Now to speake somewhat of the disabling statutes of 1. Eliz. and 13. Eliz. (9). the words of the exception out of the restraint and disability of 1. Eliz. are, *Other than for the terme of twenty one yeares, or three lives, from such time as any such grant or assurance shall be given, whereupon the old and accustomed yearly rent, or more, shall be reserved*: And to that effect is the exception in the statute of 13. Eliz. First, it is to be understood that neither of these disabling acts, nor any other, do in any sort alter or change the inabling statute of 32. H. 8. but leaveth it for a pattern in many things for leases to be made by others. Secondly, it is to be knowne, that no lease made according to the exception of 1. Eliz. or 13. Eliz. and not warranted by the statute of 32. H. 8. if it be made by

(1) *Feme covert tenant for life; reversion in tail; husband surrenders; tenant in tail leases for three lives; the wife dies. Adjudged, that this is a good lease to bind the issue.* Sydenham and Cops cited by Popham. Mo. 783. Hal. MSS.—(2) M. 29. 30. Eliz. *Clench v. 38. Grindal's case.* Hal. MSS.—See S. C. 4. Leon. 78. 1. And. 65. and Mo. 107. and the observations upon it in New Abr. *Leases E. rule 3*—(3) But if tithes have been usually lett to farm, they cannot be leased for life to bind the successor; but they may be leased for 21 years, rendering the antient rent, and it shall bind the successor. Mo. 778. T. 2. Jac. B. R. *Adjudged in Denny's case, and the rent goes with the reversion.* Nota, it was the case of the precentor of Paul's. Hal. MSS.—See New Abr. *Leases E. rule 5* where many authorities are cited to prove this difference between leasing tithes for life and for years, and that in the latter case the lease will bind the successor because he may have debt for the rent, which will not lie for him on a freehold lease. But the distinction is no longer of any importance; for the 5. G. 3. c. 17. makes leases of tithes and other incorporeal hereditaments by ecclesiastical persons, whether for lives or for years, as good as if the leases were of corporeal hereditaments, and gives action of debt to the successor for rent reserved on freehold leases.—(4) *Lease by the king during vacancy of bishoprick will not enable.* P. 19. Jac. B. R. *Denny's case.* Vid. Dy. 271. Hal. MSS.—(5) 6. Rep. 37. T. 3. Jac. Crook n. 6. Hal. MSS. See Cro. Jam. 76.—(6) *Prebend makes lease for years, reserving the running of a cult, rendering rent.* A new lease, rendering the same rent, without reserving the running of a cult, adjudged good; because quoad this it is neither reservation nor exception. But if lease be of a manor except the woods rendering rent, and after the expiration of it there is a new lease rendering the same rent without such exception, the second lease is bad. T. 18. Jac. B. R. *case of precentor of Paul's.* Hal. MSS.—(7) Vid. for leases by bishop tenant in tail, &c.—*A feised in tail of a manor, of which three acres parcel of the demelnes had been usually demised at 5 s. rent, and the residue not, demises the three acres and also the manor habendum for 21 years, rendering for the three acres and all other the premises therewith demised 5 s. and for the manor 5 s. This is good to bind the issue for the three acres, but not for the residue.* H. 37. Eliz. *Tanfield and Rogers*—*The bishop of G. feised of a manor, of which one tenement was usually demised for life at 5 s. rent and the manor usually at 10 s. rent, makes lease of the tenement for three lives, rendering 5 s. and afterwards leases the whole manor for three lives to another rendering rent, and dies.* Ruled 1. That the reversion of the tenement passes by the lease of the manor. 2. And therefore that the lease of the manor quoad the tenement shall not bind the successor, because then there would be six lives in being for the tenement, and the lessee would be dishonourable of waste. 3. It seems, that the lease of the manor is also voidable, because the rent issues also out of the tenement. (Quare of this, for here the rent as well for the tenement as for the manor is reserved on the second lease, so that though the tenement should be evicted the entire rent for the manor would continue.) 4. But it was agreed, that the lease of a copyhold manor usually demised, or of a manor consisting of demelnes copyholds and services usually demised, is good to bind the successor. 5. The lease is only voidable by the successor; and therefore if he accepts the rent, it is good against him. M. 20. Jac. C. B. *Bishop of Gloucester against Wood*, M. 5. Car. C. B. *Sheir and Penter on lease by the bishop of Exeter.* Hal. MSS.—(8) *Prebend simple or prebend with office, as is precentor, is enabled by the statute 32. H. 8.* *Adjudged Bro. Leases 62.* M. 36. 37. Eliz. *Watson and Major.* T. 18. Jac. *case of precentor of Paul's.* Hal. MSS.—(9) Nota, these disabling statutes extend

by a bishop, or any sole corporation, but it must be confirmed by the deanes and chapters, (Cro. Eliz. 874.) or others that have interest, as hath been said in the case of the parson and vicar, but examples doe illustrate. If a bishop make a lease for 21 yeares; and all those yeares being spent saving three or more; yet may the bishop make a new lease to another for twenty one yeares, to begin from the making, according to the exception of the statute, but not a lease for life or lives, as hath beene said, and this concurrent lease hath been resolved to be good (1), as well upon the exception of 1. Eliz. in the case of bishops, as upon 13. Eliz. (2) which extend to spirituall and ecclesiasticall corporations, aggregate of many, as deanes and chapters, &c. which 32. H. 8. did not: but in the case of the concurrent lease, in the case of the bishop it must be confirmed. Also the exception of 1. Eliz. and 13. Eliz. doth differ from the statute of 32. H. 8. for the leases for yeares to be made according to the exceptions of the statutes of 1. and 13. Eliz. must begin from the making, and not from the day of the making, but by force of 32. H. 8. from the day of the making. And although the statutes of the first or thirteenth of Eliz. doe not appoint the lease to be made by writing, yet must it therein and in the other eight properties or qualities before mentioned and required by 32. H. 8. follow the patterne thereof (the concurrent lease onely except). (3) Although the exception in 1. and 13. Eliz. concerning the accustomed rent is more generall then that of 32. H. 8. and there is not any provision for leases made dispunishable of waste, &c. yet must the patterne of 32. H. 8. be followed: for leases without impeachment of waste made by such spirituall and ecclesiasticall persons are unreasonable and causes of dilapidations. Thus much have I thought good to lead the studious reader by the hand, and to conduct him in the right way, and to put all these things together upon consideration had of all the statutes, which otherwise might have *prima facie* seemed to him a diffuse and darke laborinth. And albeit it be provided by the said acts of 1. and 13. Eliz. that all grants, &c. leases, &c. made, &c. (other then leases for three lives, or one and twenty yeares according to those acts) should be utterly voyd and of none effect, to all intents, constructions and purposes, yet grants, or leases, &c. not warranted by those acts are not voyd, but good against the lessor, if it be a sole corporation: or so long as the deane or other head of the corporation remaine, if it be a corporation aggregate of many (4): for the statute was made in benefit of the successor (5). But let us now returne to our author.

(Cro. Eliz. 874.)

(1. And. 65.)

(1. Leon. 59.)

3. Co. 59. 60. Lincolne Colledge case. p. 39. Eliz. Inter Hunt and Singleton ibidem.

Home lesse. Here Littleton putteth this case where one letteth, &c. It is therefore necessary to be seen what the law is where divers joyne in a lease. If the tenant of the land, and a stranger which hath nothing in the land joyne in a lease for yeares by deed indented of one and the self-same land, this is the lease of the tenant onely, and the confirmation of the stranger, and yet the lease as to the stranger workes by conclusion (6).

(2. Ro. Ab. 64.)

Vide sect. 146. 11. H. 4. 1. 3. E. 4. 2. 27. H. 8. 16.

If two severall tenants of severall lands, joyne in a lease for yeares by deed indented, these be severall leases and severall confirmations of each of them, from whom no interest passeth, and worke not by way of conclusion in any sort, because severall interests passe from them (7). B tenant for life of C, and he in the remainder or reversion in fee, having severall estates in the one and the same land, joyne in a lease for yeares by deed indented, this demise shall worke in this sort, during the life of C it is the lease of B, and confirmation of him in the reversion or remainder, and after the decease of C it is the lease of him in the reversion or remainder, and the confirmation of B; for seeing the lessors have severall estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let, and not to be the lease onely of tenant for life, and the confirmation of him in the remainder or reversion, neither is there any conclusion in this case, as shall be said hereafter. Tenant for life and he in the remainder in fee, made a lease for yeares by deed indented, the lessee was ejected, and brought an *ejectione firmæ*, and declared upon a demise made by tenant for life and him in remainder, and upon not guilty pleaded, this speciall matter was found, and that tenant for life was living, and it was adjudged [a] against the pl^r, for during the life of the tenant (as hath been said) it is the lease of the tenant for life, and therefore during his life he ought to have declared of a lease made by him, and after his decease he ought to declare of a lease made by him in remainder (8). [b] And the deed indented could be no estoppel in this case, because there passed an interest from them both. And whensoever any interest passeth from the party, there can be no estoppel against him, and [c] so it was adjudged. Hereby you shall understand your bookes the better which treat of those matters, and accordingly it was adjudged that where tenant in taile and he in the remainder in fee joynd in a grant of a rent charge by deed in fee, and after tenant in taile died without issue, the grantee distrained and avowed by force of a graunt from him in the remainder, and upon *non concessit*, the jury found the speciall matter, and it was adjudged for the avowant; for every one granted according to his estate and interest.

(1. Ro. Abr. 877. Mo. 72. 1. Leon. 177. Cro. El. 701. 6. Co. 15. Treport's case. Doc. Pl. 93.)

[a] 27. H. 8. f. 13. a. 13. H. 7. 14. 2. H. 5. 7. 1. Co. 76. Breton's case. [Post. 502. b.]

[b] Mich. 36. & 37. Eliz. in the King's Bench. Vide Mich. 6. & 7. Eliz. Dier 234. 235.

[c] Hill. 44. Eliz. Rot. 1459 in Communi Banco inter Ellice & Cowne.

Leases for lives or yeares are of three natures, some be good in law; some be voydable by entry,

extend only to their own possessions. The archdeacon of Ely 12. Eliz. makes lease for 30 yeares, which after the statute 13. Eliz. is confirmed by the bishop and dean and chapter. Ruled, that this is a good lease to bind the successor, though after the statute 1. Eliz. and though confirmed after the statute 13. Eliz. H. 37. Eliz. Rot. 881. Sir Edward Denny's case. Hal. MSS.

(1) Accordingly adjudged, though the concurring lease was to commence a *datu indenturæ*. T. 21. Eliz. Rot. 124. Fox and Collier. M. 22. 23. Eliz. C. B. Rot. 2409. Scot and Brewster. H. 22. Jac. B. R. Rot. 11. Evans and Ascu adjudged T. 3. Car. P. 35. Eliz. W. 14. Southcot's case. Hal. MSS.—(2) Nota, the statute 13. Eliz. chap. 10. *quoad tenements in cities is altered by the statute 14. Eliz. chap. 11. which permits leases of them for 40 yeares; and therefore it has been ruled, that covenants for renewing leases of messuages in cities are not prohibited by the statute 13. Eliz. chap. 11. which only restrains leases against the statute of 13. Eliz. Hob. case 352. Crane and Taylor. Hal. MSS. See Hob. 269.—(3) H. 44. Eliz. C. B. n. 14. D. D. Bishop of Hereford against Scory. Adjudged accordingly, where the land had not been usually demised. Hal. MSS.—(4) Nota, lease for three lives by bishop, not warranted by the statute, is not voidable against himself, but shall bind him. M. 44. 45. Eliz. C. B. D. D. n. 32. Saunders's case. And it is not void, but only voidable against the successor, for if he accepts the rent the lease is good against him. M. 8. Car. C. B. Crook n. 21. Owen and App-Rees. But lease by A dean of B and his chapter not warranted is void immediately against A himself. Adjudged so, because the corporation is aggregate. M. 13. Car. B. R. Lloyd and Gregory. Hal. MSS.—The case of Lloyd and Gregory is reported in Cro. Cha. 501. W. Jo. 405. 1. Ro. Abr. 728. and 2. Ro. Abr. 495. But none of these books mention the point to which lord Hale cites the case. See New Abr. Leases H. where several authorities besides that of lord Coke are cited to shew, that a lease by a corporation aggregate, though not warranted by the statutes, is good for the time of the person who was head of the corporation when the lease was made. See also ante 43. a. n. 1.—(5) See further as to leases by tenants in tail, husband and wife, and ecclesiastical persons in Vin. Abr. tit. Estates and tit. Confirmation, and New Abr. tit. Leases; which title in the latter book is generally attributed to lord chief baron Gilbert, and comprises a most copious and excellent treatise on a very difficult and extensive subject.—(6) 2. H. 5. 7. by Affr. Hal. MSS.—(7) And therefore where the declaration in *ejectment* was of a joint demise of A and B, and on the evidence it appeared, that they were tenants in common, the plaintiff failed. M. 3. Jac. Blakasper's case. Noy n. 43. Hal. MSS. See Noy 13.—(8) Intratur H. 34. Eliz. Rot. 72. King and Brny.—Hal. MSS.*

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 58.

(3. Co. 64. b.)

[d] 32. H. 8. cap. 28.

(Flow. 264. b. Cro. Ja. 173)

[e] 33. H. 8. Dier 3. Co. 59.
60. in Lincoln Co ledge case,
Hant's case vouched.
(1. Ro. Abr. 848.)

Pl. Com. Wroteff, 198. 33. H. 8.
tit. exposition des parols 44. 8. Co.
145. in Davenport's case (5. Co.
7. 1. Co. 154. 274. 1. Ro. 849.)

[f] 1. Co. 154. in the Rector
of Chedington's case.

[g] Vide Sect. 531.

[h] Register F. N. B. 270. e.

[i] 8. H. 6. 34.

[k] 14. H. 8. 14. 3. Mar. leases Br.
67. 2. Mar. ibid. 67. Say and
Fuller's case. Pl. com. 273. and
Welden's case ibid. 4. H. 6. 12.
21. H. 7. 38. Vid le case del e-
vesque de Bathe. 6. Co. 34. 35.
Bract. lib. 2. cap. 9. Vid. 1. Co.
155. 156. Rector de Cheding-
ton's case.
(1. Ro. Ab. 848. 849.)

Bract. lib. 2. cap. 9. See resolved
Hill 26. Eliz. Rot. 935. in com.
Banco.

Pl. com. Say and Fuller's case.
Mirror ca. 2. sect. 17. & cap. 5.
sect. 1.

entry, and some voyd without entry. Of such as be good in law, some be good at the com-
mon law as made by tenant in fee, whereof Littleton here putteth his case, some by act of par-
liament, as tenant in taile, a bishop seised in fee in the right of his church alone without his
chapter, a man seised in fee simple or fee taile in the right of his wife together with his wife,
(as hath beene said) may by deed indented make leases for 21 yeares or three lives in such
manner and forme as hath beene said and by the statute [d] is limited, all which were voydable
by the common law when Littleton wrote, and now are made good by parliament.

An infant seised of land holden in socage, may by custome make a lease at his age of 15
yeares, and shall binde him, which lease was voydable by the common law; (1) voydable, some
by the common law, after the death of the leasor as of tenant in taile a bishop, &c. or
after the death of the husband (intended of leases not warranted by the said statute of 32. H.
8.) Some voydable by act of parliament, as by a bishop though it be confirmed by deane and
chapter, if it be not warranted by the statute of 32. H. 8. and so of a deane and chapter after
the death of the deane; some voydable at times by the lessor himselfe or his heires, as by an
infant and the like. Some voyde *in futuro*, and some voyde *in presenti*. *In futuro*, as if a te-
nant in taile make a lease for yeares and die without issue, it is voyde, as to them in reversion
or remainder, though it be made [e] according to the said statute. If a prebend, parson or
vicar make a lease for yeares, it is voyde by death; if it be not according to the statutes. O-
therwise it is of a lease for life, for that is voidable, *et sic de similibus*.

Some voyde *in presenti*, as if one make a lease for so many yeares as he shall live, this is voyde
in presenti for the incertainty. *Et sic in similibus*, whereof Littleton himselfe will teach you
next and immediately, and I know you would now gladly heare him.

Pur terme. *Pro termino, terminus* in the understanding of the law doth not onely sig-
nifie the limits and limitation of time, but also the estate and interest that passeth for that time.
As if a man make a lease for twenty one yeares, and after make a lease to begin *a fine et expi-*
ratione prædicti termini 21 annorum dimissit, and after the first lease is surrendered, the second
lease shall begin presently, but if it had beene to begin *Post finem et expirationem prædicti 21*
annorum, in that case although the first terme had beene surrendered, yet the second lease
should not begin till after the 21 yeares be ended by effluxion of time, and so note the diver-
sities betweene the terme for 21 yeares, and 21 yeares; and [f] herewith agreeth the lord
Paget's case.

[g] Words to make a lease be, demise, grant, to searme let, betake, and whatsoever word
amounteth to a grant may serve to make a lease. In the king's case [h] this word *Committo*
doth amount sometime to a grant, as when he saith *Committimus W. de B. officium senescallie*,
&c. *quamdum nobis placuerit*, and by that word also he may make a lease: and [i] therefore à
fortiori a common person by that word may doe the same.

De certaine ans. For regularly in every lease for yeares the terme must have a
certaine beginning, and a certaine end, and herewith [k] agreeth Bracton, *terminus annorum*
certus debet esse et determinatus. And Littleton is here to be understood, first, that the yeares
must be certaine when the lease is to take effect in interest or possession. For before it takes
effect in possession or interest, it may depend upon an incertainty, *viz.* upon a possible contin-
gent before it begin in possession or interest, or upon a limitation or condition subsequent. Se-
condly, albeit there appeare no certainty of yeares in the lease, yet if by reference to a certai-
nty it may be made certaine it sufficeth, *Quia id certum est quod certum reddi potest*. For example
of the first. If A seised of lands in fee grant to B, that when B payes to A xx shillings, that
from thenceforth he shall have and occupie the land for 21 yeares, and after B payes the xx shil-
lings, this is a good lease for 21 yeares from thenceforth. For the second, if A lease his
land to B for so many yeares as B hath in the mannor of Dale, and B hath then a terme in the
manner of Dale for 10 yeares, this is a good lease by A to B of the land of A for 10 yeares. If
the parson of D make a lease of his glebe for so many yeares as he shall be parson there, this
cannot be made certaine by any meanes, for nothing is more uncertaine then the time of
death, *Terminus vite est incertus, et licet nihil certius sit morte, nihil tamen incertius est hora mor-*
tis (2). But if he make a lease for three yeares, and so from three yeares to three yeares, so long
as he shall be parson, this is a good lease for 6 yeares, if he continue parson so long, first for
three yeares, and after that for three yeares; and for the residue uncertaine (3).

If a man maketh a lease to I. S. for so many yeares as I. N. shall name, this at the beginning
is uncertaine, but when I. N. hath named the yeares, then it is a good lease for so many yeares.

A man maketh a lease for 21 yeares if I. S. live so long, this is a good lease for yeares, and yet
is certaine in incertainty, for the life of I. S. is uncertaine. See many excellent cases concerning
this matter put in the said case of the bishop of Bath and Wells. By the ancient law of
England for many respects a man could not have made a lease above 40 yeares at the most, for
then

(1) Heretofore some made a difference between leases by infants with reservation of rent and those without, and thought that
the former were only voidable, but that the latter were absolutely void. New Abr. *Leases B.* But in a late case this distinction was
denied, and it was said, that leases whether with or without rent, if made by deed, are voidable only. Burr. 4. part v. 3. page
1806.

(2) But if livery is made on such a lease, perhaps it may be sufficient to pass a freehold to the lessee during the life or in-
cumbency of the lessor. See New Abr. tit. *Leases L. 2.*

(3) But vid. *Noy fol. 143. n. 635.* *Lease from three years to three years till the expiration of ten years shall be a lease for nine years,*
and the law rejects the last year, because not computed by three.—Hal. MSS. See New Abr. tit. *Leases L. 3.* page 433.

then was it said that by long leases many were prejudiced, and many times men disinherited, but that ancient law is antiquated (1).

In the eye of the law any estate for life being, as Littleton hath said, an estate of freehold, against whom *à præcipe quod reddat* doth lye, is an higher and greater estate then a lease for yeares, though it be for a thousand or more, which never are without suspicion of fraud, and they were the lesse valuable, for that at the common law they were subject unto, and under the power of the tenant of the freehold, the learning whereof standeth thus, and is worthy to be knowne. When Littleton wrote, if a man had made a lease for yeares by writing, and he that had the freehold had suffered himselfe to be impleaded in a reall action by collusion to bar the lessee of his terme, and made default, &c. the statute of Glouc^r gave the lessee for yeares some remedy by way of receipt, and a triall whether the demandant did move the plea by good right or collusion, and if it were found by collusion, then the termor should enjoy his tearme, and the execution of the judgement should stay untill after the tearme ended (2). But this statute extended not to 5 cases. First, if the lease were without writing, for the words of this act are, (so that the termor may have recovery by writ of covenant.) 2. It extended not but to a recovery by default (3). 3. The termor could not be relieved by this statute, unless he knew of the recovery, and were received, &c. 4. By the better opinion of bookes, it extended not to tenants by statute merchant, statute staple, or *elegit*. 5. Not to gardian. [1] But now the statute of 21. H. 8. doth give remedy in all the said cases saving the case of the gardian, and giveth them power to falsifie all manner of recoveries had against the tenants of the freehold upon fained and untrue titles, &c. Now the [m] statute saith, that it was a doubt before that statute whether a termor for yeares might falsifie or no: but yet it seemeth by the better opinion of bookes in so great variety, that he having but a chattell, was not able by the common law to falsifie a covenous recovery of the freehold, because he could not have the thing that was recovered (4).

11. Co. 33.

[1] 21. H. 8. ca. 15.

[m] That a termor might falsifie at the Common Law Vid. 10. E. 3. Aff. 82. 21. E. 3. 1. 7. H. 7. 11. b. 1. H. 7. 9. b. Pl. Com. 83. 10. E. 3. 46. 19. E. 3. re- scit 112. That he could not. 30. H. 6. Fauver recovery 9. 43. Aff. 41. 26. H. 8. 2. 9. E. 4. 38. F. N. B. 198. E. 14. H. 8. 4. 9. Co. fo. 135. Alcoughe's case. [n] 7. H. 4. 12. 33. H. 8. Dier 52.

[n] And Thirning and Hankford doe hold that a gardian is not within the statute of Glouc^r. If two coparceners be, and one of them let her part to another for yeares, and after upon a writ of partition brought against the lessor too little is allotted to the lessor, it is holden by some that the lessee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition shall remaine firme and stable. But if there be two coparceners of three acres of land, every one of equal value, and the one coparcener letteth her part, and make after partition, and one acre is allotted onely to the lessor, the lessee is not bound hereby, but he may enter and take the profits of another halfe acre, for that of right belongs unto him (5). Thus much have I thought good to set downe, for it sufficeth not to know what the law is in these cases, unless he understand the reason and cause thereof.

And albeit (as hath beene said) a lease for yeares must have a certaine beginning, and a certaine end, yet the continuance thereof may be incertaine, for the same may cease and revive againe in divers cases (6). As if tenant in taile make a lease for yeares reserving xx. shillings, and after take a wife and dye without issue, now as to him in the reversion the lease is meerly void; but if he indow the wife of tenant in taile of the land, (as she may be though the estate taile be determined) now is the lease as to the tenant in dower (who is in of the state of her husband) [a] revived againe as against her, for as to her the estate taile continueth, for she shall be attendant for the third part of the rent services, and yet they were extinct by act in law. So it is if tenant in taile make a lease for yeares *ut supra*, and dyeth without issue, his wife enseint with a sonne, he in the reversion enter, against him the lease is void, but after the sonne be borne the lease is good, if it be made according to the [b] statute, and otherwise is voydable.

(7. Co. 9. a. 1. Ro. Ab. 842.)

[a] 10. E. 3. 26. 34. Aff. 15. 23. E. 3. Dower 130. (7. Co. 3. b.)

[b] 32. H. 8. ca. 28.

The king made a gift in taile of the mannor of Eastfarleigh in Kent, to W to hold by knights service; W made a lease to A for thirty six yeares, reserving thirteene pound rent; W died, his son and heire of full age. All this was found by office. As to the king this lease is not of force, for he shall have his *primer seisin*, as of lands in possession, but after livery, the lessee may enter; and if the issue in taile accept the rent, the lease shall binde him, for the king's *primer seisin* shall not take away the election of the issue in taile, for it may be that the rent was better then the land: [c] and so it was adjudged in Awlten's case, as I had it of the report of master Edmond Plowden, a grave and learned apprentice of law.

(1. Ro. Ab. 842.)

[c] Pasch. 2. & 3. Ph. & Mar in an information of In- trusion in the Exchequer against Austen. Vid Dier pasch. 2. & 3. Ph. & Mar. 115. 13. Eliz. ca. 10.

[d] 6. E. 6. Dier 72. (Cro. Car. 552.) 17. E. 3. 52. 17. Aff. p. 17. 2. R. 3. 20. 9. H. 6. 33. (Hob. 7.)

(Hob. 225. 10. Co. 43.)

If tenant in fee take wife, and make a lease for yeares, and dieth, the wife is endowed, she shall avoid the lease, but after her decease the lease shall be in force againe. But if the patron grant the next avoydance, and after parson, patron, and ordinary, before the statute, [d] had made a lease of the glebe for yeares, and after the parson dieth, and the grantee of the next avoydance had presented a clerke to the church, who is admitted, instituted, and inducted, and dieth within the terme; the patron presents a new clarke, and he is admitted, instituted, and inducted, albeit he commeth in under the patron that was party to the lease, yet because the last incumbent, who had the whole state in him, avoyded the lease, it shall not revive againe, no more than if a feme covert levy a fine alone, if the husband enter and avoyd the fine, and dye, the whole estate is so avoyded as it shall not binde the wife after his death (7).

It

(1) See 2. Blackst. Comment. 5th edit. p. 142. It is there observed, that it appears by Mr. Madox's collection of ancient instruments in his *Formulare Anglicanum*, that the law against leases for more than 40 years, if it ever existed, was soon antiquated; and several instances of leases for a longer term, as early as the reign of Richard the Second, are referred to.

(2) *Yet videtur, that the recoveror shall have wast.* 27. H. 8. 7. Keilw. 108. But *reversioner being received in default of tenant for life, no judgment against tenant for life, if a good bar pleaded.* Hal. MSS.

(3) *Or reddition.* 16. H. 7. 5. 21. H. 7. 25. 5. H. 7. 39. 8. H. 7. 6. 12. H. 8. 7. 27. H. 8. 7. 11. E. 4. 10. or on nihil dicit, or disclaimer. 9. E. 4. 37. by Danby, or on default of the vouchee at the grand cape or sequatur sub periculo. 9. E. 4. 38. Hal. MSS.

(4) Vid. 27. H. 8. 7. 21. H. 7. 25. Grantee of rent-charge for years might falsify recovery against terre tenant. Hal. MSS.

(5) Vid. 24. E. 3. 54. If parceners be of two acres, and one leases one acre, which on writ of partition is allotted to the other, the lease is wholly avoided. Hal. MSS.

(6) Vid. 7. Rep. the earl of Bedford's case. Hal. MSS.

(7) Adjudged accordingly Cro. Cha. Plowden v. Oldford 582. But in Hill. 10. Eliz. C. B. E. 233. adjudged, that the lease revived. Polydore Virgil's case. Hal. MSS.

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 58.

2. E. 3. 8. per Scroope;
(1. Ro. Ab. 240. 247.)

Pl. Com. 437. a.
(1. Ro. Ab. 831. 842. 843. 1.
Sid. 260. 261.)

(1. Ro. Ab. 403. Cro. Car. 110.
400.)

V. Sect. 454. 455.

(Cro. Ja. 60. 5. Co. 124.)

V. Sect. 665. more fully of this
matter. (Hob. 3.)

(1. Ro. Abr. 344. 345. Plow. 191.)

Hil. 17. El. in the king's Bench.
(Post. 351. 10. Co. 51. Hutt. 17.)

37. Aff. p. 11. Pl. Com. 418. b.
(1. Ro. Rep. 359.)

5. Co. 1. Clayton's case. 12.
Eliz. Dyer 286.
(2. Ro. Ab. 520. Cro. Ja. 135.
Post. 255. a.)
14. El. Dy. 307. 5.
El. Dy. 218.
(1. Ro. Ab. 849. 850. Cro.
Cha. 78.)

2. Co. 3. Goddard's case.

[a] Pl. Com. 148. 3. E. 6. tit.
Leases Br. 62. 3. El. Dy. 195.
1 Mar. Dyer. 116. (Cro. Car.
400. 2 Ro. Ab. 52. 1. Ro. Ab.
849. 1. Sid. 460.)

If a woman be endowed of an advowson which is appropriated, and she present, and her incumbent is admitted, instituted, and inducted, albeit the incumbent dye, yet is the appropriation wholly dissolved, because the incumbent, which came in by presentation, had the whole state in him, and so was it adjudged, as the case is to be intended (1).

Tenant in taile make a lease for forty yeares, reserving a rent, to commence ten yeares after; tenant in taile dye, the issue enter and enfeoffe A, ten yeares expire, the lessee enter, if A accept the rent, the lease is good, for he shall have the same election that the issue in taile had, either to make it good, or to avoid it, so as it could not be precisely affirmed, whether by the entry of the issue this executory lease was avoided, but it dependeth incertainly upon the will of the feoffee (2). But now I know you are desirous to heare Littleton, who is speaking to you.

Et quant le lessee enter per force del lease, donques il est tenant pur terme des ans. And true it is, that to many purposes he is not tenant for yeares until he enter: as a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion, before entry; vide Sect. 567. But the lessee before entry hath an interest, *interesse termini* grantable to another. vide Sect. 319. And albeit the lessor dye before the lessee enters, yet the lessee may enter into the lands, as our author himselfe holdeth in this chapter. And so if the lessee dyeth before he entred, yet his executors or administrators may enter, because he presently by the lease hath an interest in him: and if it be made to two, and one dye before entry, his interest shall survive. *Vid. Sect. 281.*

He that hath a lease for yeares, hath it either in his owne right, whereof Littleton hath here spoken, or in another's right, and that in divers manners, as a man may have a terme for yeares in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife: but of this in another place more fully.

If a man be possessed of a terme of forty yeares in the right of his wife, and maketh a lease for twenty yeares, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion; for that the wife was not party to the lease (3). So note, a disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a summe of money to his executors, &c. the husband die, the condition is broken, the executors enter, this is a disposition of the terme, and the wife is barred thereof, for the whole interest was passed away (4).

If a lease be made to a baron and feme for terme of their lives, the remainder to the executors of the survivor of them, the husband grant away this terme and dieth, this shall not barr the wife, for that the wife had but a possibility, and no interest.

If the husband and wife be ejected of a terme in the right of his wife, and the husband bring an *ejectione firmæ* in his owne name (5), and have judgement to recover, this is an alteration of the terme, and vesteth it in the husband (6).

If a lease for yeares be made to a bishop and his successors, yet his executors or administrators shall have it *in antea dicitur*, for regularly no chattell can goe in succession in a case of a sole corporation, no more then if a lease be made to a man and his heires it can goe to his heires. But let us returne to Littleton (7).

Touching the time of the beginning of a lease for yeares, it is to be observed, that if a lease be made by indenture, bearing date 26 Maii, &c. to have and to hold for twenty one yeares, from the date, or from the day of the date (8), it shall begin on the twenty seventh day of May (9). If the lease beare date the twenty sixth day of May, &c. to have and to hold from the making hereof, or from henceforth, it shall begin on the day in which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth take their first effect. But if it be *à die consecrationis*, then it shall begin on the next day after the deliverie. If the *habendum* be for the terme of twenty one yeares, without mentioning when it shall begin, it shall begin from the deliverie, for there the words take effect, as is aforesaid. If an indenture of lease beare date, which is void or impossible, as the thirtieth day of Februarie, or the fortieth of March, if in this case the terme be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all. [a] And so it is, if a man by his indenture of lease, either recite a lease which is not, or is void, or misrecite a lease in point materiall which is in effect, to have and to hold from the ending of the former lease, this lease shall begin in course of time from the delivery thereof (10).

Et si le lessor en tiel case reserve a luy un annuel rent sur tiel lease, il poet eslier a distreyner pur le rent, ou il poet aver action de debt pur les arerages.

Reserve

(1) *Vid. 21. E. 3. Grants 58. Appropriation without licence, and ea de causa it seems a disappropriation. Hal. MSS.*—(2) But if it was lease in present by tenant in tail, and the issue before entry levies fines, the lessee shall not avoid the lease, for the lease was only avoidable, and the land passes in degree of reversion. *Vid. Dy. 51. 7. Rep. 9. Earl of Bedford's case. Hal. MSS.*—(3) *Vid. tamen one Evans's case, in which it was adjudged that the wife shall have the rent. Cited by Houghton. 16. Jac. Quære and vid. 7. H. 6. 2. T. 16. Jac. Blaxton and Heath. 2. Poph. n. 38. Hal. MSS. By 2. Poph. lord Hale means the additional cases at the end of Popham's Reports. See Poph. 125. For Blaxton and Heath, see Poph. 145.*—(4) *If part of a term be granted by husband on condition, it seems that the condition is gone by his death. Quære. A ward changes the property of such a term. Dy. 183. Hal. MSS. See the case in Marg. Dy. 183.*—(5) *Vide. Husband of wife termor may have petition of right alone. 37. Aff. pl. 11. If husband is guardian in right of his wife, dower lies against the husband alone; for there can be no voucher there against the ward's right. 2. E. 3. 13. 15. 47. E. 3. 9. Hal. MSS.*—(6) *Vid. 50. E. 3. Judgment for husband in quare impedit for the wife's advowson; the husband dies; the wife presents. Hal. MSS.*—(7) *Hic fol. 9. a. Hal. MSS.*—(8) *Vid. for date and day of the date hic fol. 6. a. and the note there. Hal. MSS. In fol. 6. a. lord Hale gives the following note. Date and day of the date the same in point of computation. 5. Rep. But in point of interest date is taken inclusive, day of the date exclusive in many cases. T. 9. Jac. B. R. Buller. n. 177. A on the second of August 1. Jam. makes an obligation to B, and afterwards on the same day B releases all actions usque datum scripti: the obligation is discharged, because date is delivery. Otherwise, if it had been to the day of the date. T. 9. Car. B. R. Rooke and Richards. Condition of obligation to stand to an award, so that it be made within four days after the date: a good award may be made the same day; and so it seems, if it be day of the date. M. 1653. Street's case. Stiles 382. Obligation dated 2. January; release dated 1. January of all actions usque diem hujus presentis temporis, but delivered 3. January: præsens tempus is the date, and so the obligation stood. P. 7. Jac. Hal. MSS. See further as to the difference between date and day of the date. Com. Dig. Estates G. 8. Bargain and Sale. B. 8. Temps A. and Vin. Abr. Estate Z. a. Time A. and Will. vol. 1. part 2. page 165. and the next note.*—(9) *Vid. for commencement of lease, M. 10. Jac. Rot. 75. Hob. case 32. Moor and Musgrave. A by indenture dated 4. May 10. Jac. to hold from the feast of the annunciation last past for the term of 21 years next ensuing the date hereof fully to be complete and ended. In ejection plaintiff counts on this lease, as a lease to hold from the feast for 21 years ex tunc prox. sequent. and agreed to be good. But see T. 24. Car. B. R. Cornish and Carwsey. Lease by indenture of 25. of March 15. Car. to have and to hold from and after the day of the date of these presents for the term and time of seven years from henceforth next and immediately ensuing, shall commence in computation from the delivery, and in point of interest from the date. Stiles 118. Hal. MSS.*—(10) *For misrecital a lease shall commence immediately. 6. Rep.*

Reserve a luy an annual rent, &c. First it appeareth [b] here by Littleton that a rent must be reserved out of lands or tenements, whereunto the lessor may have resort or recourse to disreine, as Littleton here also faith, and therefore a rent cannot be reserved by a common person (1) out of any incorporeall inheritance, as advowsons, commons, offices, corrodie, mulcture or a mill, tythes, sayres, markets, liberties, priviledges, franchises, and the like. [c] But if the lease be made of them by deed (2) for yeares, it may be good by way of contract to have an action of debt, but disreine the lessor cannot. Neither shall it passe with the grant of the reversion for that it is no rent incident to the reversion (3). But if any rent be reserved in such case upon a lease for life, it is utterly void, for that in that case no action of debt doth lie (4). But if a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may disreine the cattell upon the land (5): and so a reversion, or a remainder of lands or tenements may be granted reserving a rent; for the apparent possibility that it may come in possession (6), and they are tenements within the words of Littleton.

[a] It appeareth by Littleton, that *reservando* is an apt word of reserving a rent, and so is *reddendo*, *solvendo*, *faciendo*, *inveniundo*, *dummodo*, and the like (7).

[b] And note a diversity between an exception (which is ever of part of the thing granted and of a thing *in esse*) for which, *exceptis, salvo, prater*, and the like be apt words; and a reservation which is alwaies of a thing not *in esse*, but newly created or reserved out of the land or tenement demised. [c] *Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinet semper cum eo est et semper fuit.* [d] But out of a generall a part may be excepted, as out of a manor, an acre, *ex verbo generali aliquid excipitur*, and not a part of a certainty, as out of twenty acres one.

It is further to be observed that the lessor cannot reserve to any other but to himselfe, for Littleton faith, *reserve a luy*, reserve to himselfe. [e] If two joyntenants be, and they make a lease for yeares by paroll, or deed poll reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone by way of conclusion.

[f] Littleton here is putting of a case, and not making a lease, for then he would not reserve the rent to him, but to him and his heires, for otherwise the rent shall determine by his death, if he die within the terme (8). [g] But if he reserve a rent generally without shewing to whom shall goe, it shall go to his heires. If he reserve a rent to him and his assignes, yet the rent shall determine by his death, because the reservation is good but during his life. So it is if he reserve a rent to him and his executors it shall end by his death, because the heire hath the reversion, and the rent was incident to the reversion (9). So if a man warrant land to B and his assignes, the assignee must vouch during the life of B, for the warranty continues but only during the life of B, for the warranty is but for life, for want of words of inheritance. But if the warranty be to B, his heires and assignes, so as he hath an inheritance therein, then his assignee shall vouch after his decease. So if the rent be reserved to the lessor, his heires and assignes, so as it be incident to the inheritance, then shall all the assignees of the reversion enjoy the same.

Annual rent. So it is if the rent be reserved every two or three or more yeares (10). Of rents Littleton doth excellently treat hereafter in his chapter of rents, and therefore in this place thus much shall suffice.

A distreyner pur le rent. Here it is necessary to be seene of what things a distresse may be taken for a rent, and how the distresse ought to be demeaned. [b] First it must be of a thing, whereof a valuable propertie is in some body, and therefore dogs, bucks, does (11), conies, and the like that are *feræ naturæ* (12) cannot be distreyned. Secondly, altho' it be of valuable propertie as a horse, &c. yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time priviledged and cannot be distreyned (13). [c] 3. Valuable things shall not be distreined for rent for benefit and maintenance of trades, which by consequent are for the common-wealth, and are there by authority of law, as a horse in a smith's shop shall not be distreyned for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor the materials in the weaver's shop for making of cloth, nor cloth or garments in a taylor's shop (14), nor sacks of corne or meale in a mill, nor in a market, nor any thing distrayned for damage feasant, for it is in custody of law, and the like.

[k] 4. Nothing shall be distrayned for rent, that cannot be rendered againe in as good plight as it was at the time of the distresse taken (15), as sheaves or shokes of corne or the like cannot be distrayned for rent (16), but for damage feasant they may be distreyned (17). But charretts or carts with corne may be distreyned for rent, for they may be safely restored.

[l] 5. Beasts belonging to the plow (18), *averia caruæ*, shall not be distreyned (which is the ancient common law of England, for no man shall be distreined by the utensils or instruments of his trade or profession, as the axe of the carpenter, or the bookes of a scholler) while goods

[b] 7. Co. 23. But's case. 10. Co. 59. 60. (Cro. Ia. 173. Post 142. a. 144. a. 5. Co. 3. 2. Saund. 303. 2. Ro. Abr. 446. 5. Co. Mountjoy's case. Noy 60.)

[c] 30. Aff. p. 5. 12. Aff. 20. 20. H. 4. 10. 1. H. 4. 1. 2. 3. 11. H. 4. 82. 19. E. 2. Fines 126. 44. E. 3. 45. 9. Aff. 24. 26. Aff. 60. 14. E. 3. Scir. fac. 122. 5. E. 3. 68. 17. E. 3. 75. 11. H. 4. 40. 3. H. 6. 21. 45. 10. H. 6. 12. 21. H. 6. 11. 5. H. 7. 39. 21. H. 7. 19. 17. E. 2. Ex. 112. 23. El. Dyer 377.

[d] 40. E. 3. 47. 8. E. 3. 67. 21. E. 4. 62. 3. H. 6. 45. 31. Aff. p. 30. 3. Aff. 9. 26. Aff. 66. 32. E. 3. Br. 291. 8. E. 4. 8. 10. El. Dy. 276. Pl. Com. en Browning and Beestons's case fo. 131. 132. &c.

[e] 50. E. 3. 12. 13. Aff. 9. 38. E. 3. 10. 21. E. 3. 4. 34. Aff. 11. 29. E. 3. 14. 3. H. 6. 45. 10. H. 6. 8. 41. 31. H. 6. 1. 35. H. 6. 34. 17. Aff. 14. H. 8. 1. 44. E. 3. 43. Pl. Com. 367. [f] Bract. h. 2. f. 32. b. & f. 249. [g] 9. El. Dy. 264. 38. H. 6. 138. 14. H. 8. 1. 22. E. 3. 8. 2. E. 3. 56. 5. E. 3. 66. 34. Aff. 11. [h] 5. E. 4. 4. 14. E. 3. bre. 282. 8. Co. 70. 71.

[i] Vid. Sect. 314. 215. 216. &c. 10. E. 4. 18. 11. E. 3. Aff. 86. 27. H. 8. 19. 21. H. 7. 25. 30. H. 8. Dy. 45. [j] Mich. 5. Ja. in repl. inter Wood & Edwin Bank le roy. Hil. 33. El. Rot. 1431. in bank le roy inter Richmond and Butcher. (Post 215. b. 2. Ro. Ab. 450. 12. Co. 35. 2. Ro. Ab. 743.)

Vid. for this word Distresse Sect. 136. [b] 14. H. 8. 25. 2. E. 2. tit. Distress 6. R. 2. Reicous 11. 7. E. 3. Avowr. 199. 15. E. 2. Avowr. 2. (1. Ro. Ab. 666. Cro. El. 552.)

[i] 22. E. 4. 49. b. 7. H. 7. 1 b. 22. E. 4. 36. 4. E. 6. tit. Dist. Br. 74 (Cro. El. 596. Noy 181.)

[k] 18. E. 3. 4. a. 11. H. 7. 14. a. 21. H. 7. 39. b. 22. E. 4. 50. b. 2. H. 4. 15. (1. Ro. Abr. 667.)

[l] Okeham 38 39. Bra. lib. 4. f. 217. F. N. B. 60. a. Reg. 57. Flit. lib. 2. ca. 41. Mirr. ca. 2. Sect. 15. 16. 4. E. 3. 1. 29. E. 3. 17.

6. Rep. bishop of Bath's case.—The earl of Oxford by deed dated 10. Feb. 27. H. 8. demises to A for 21 years; and afterwards by indenture, reciting that he by indenture dated 10. Feb. 28. H. 8. had demised to A for 21 years, demises the same land to B habendum for 31 years from and after the expiration surrender or forfeiture of the said lease. It was ruled, that B's lease should commence in computation immediately, because A's lease was misrecited. H. 10. Car. B. R. Crook n. 8. Miller and Manwaringe. But if in case of such a misrecital, the habendum be from and after the demise and indenture made to A, and it is not said the said demise then the second lease shall commence after the true lease notwithstanding the misrecital. M. 1. & 2. P. & M. Rot. 648. Mount and Hodyken Bendl. n. 71. Hal. MSS.—See Cro. Cha. 397. and N. Bendl. 38. See further as to the commencement of leases and the effect of misrecitals in that respect, Sheph. Touchst. 272. New Abr. Leases L. and Vin. Abr. Estate Z. a. and Grant R. 4.

(1) Lord Coke confines the rule to common persons, because the king may reserve rent out of an incorporeal inheritance; the reason of which is, that he by his prerogative can distrain on all the lands of his lessee. 4. New Abr. 192. & 339.—(2) The case of a lease by deed is put, because in general things incorporeal will not pass without deed. Post 48. a. 49. a. 169. a. and ante 9. a.—(3) 12. H. 4. 17. Vid. supra fol. 44. b. the case of the precentor of Paul's, according to which rent on lease for years of tithes is incident to the reversion. Hal. MSS. See ante 44. b. n. 3.—(4) That the common law did not allow debt for rent on freehold leases whilst they continued is certain, though the reason is not quite so clear. See 3. Blackst. 233. It has been accounted for by suggesting, that the remedies by *cessavit* and distress were deemed sufficient securities for the rent and services. See Gilb. on Rents 93. and Gilb. on the Action of Debt in his Cas. in L. and Eq. 370. But it may be proper to observe, that the *cessavit* seems to have been first given by the 6. E. 1. c. 4. though the lord's right of seizing the land for subtraction of services, which continued till it was taken away by the 52. H. 3. c. 22. was a remedy in some respects similar, and furnishes occasion for the same observation. See 2. Inst. 295. and Wright's Ten. 197. Note that the 8. Ann. c. 14. now gives debt for rent on a lease for life; on which statute Mr. Serjeant Hawkins queries, whether it doth not extend to leases of incorporeal hereditaments. Hawk. Abr. of Co. Litt. 73.—(5) *Quære how assise shall be brought in case of herbage.* 17. E. 3. 75. Hal. MSS.—(6) And after the particular estate determined, distress may be made for all arrears. 10. E. 4. 3. Hal. MSS.—(7) *Lease for years by indenture, and lesser covenants to pay 5 l. a year; this is a reservation.* Dy. 276. H. 6. Car. B. R. Crook n. 1. Drake and Munday. But if there be *reddendo rent* and the lessee covenants to pay two capons, there it seems to be only covenant. M. 40. 41. Eliz. Bruerton's case. Hal. MSS. See Cro. Cha. 207. and Hardr. 326.—(8) *Rent, reserved to him and his assigns during the term, or to him his executors and assigns during the term, determines by the lessor's death.* T. 2. Car. B. R. Noy n. 412. 12. Co. n. 20. and Hil. 32. Eliz. Richmond's case. Hal. MSS.—See Noy 96. 12. Co. 35. and Cro. Eliz. 217.—But notwithstanding the cases here cited by lord Hale, it was adjudged, whilst he was chief justice of the King's Bench, that the words during the term are of themselves sufficient to carry the rent to the heir, if the lessor is seized in fee, and he concurred in the judgment. See the case of Sacheverell and Frogatt East. 23. Cha. 2. in 2. Saund. 367.—(9) *Rendering rent to him his heirs executors and administrators good, and it shall go to the heir.* Drake's case supra. *Rendering rent to him or his successors good, and the successor shall have it.* 5 Rep. Hal. MSS.—(10) See further as to reservation of rent Vin. Abr. title *Reservation*, and Gilb. Treat. on Rents.—(11) But deer kept in a private inclosure may be distrayned. See 3. Blackst. Com. 8 where the case of Davis v. Powell C. B. Hil. 11. G. 2. is cited.—(12) Some have thought, that a horse, on which

Lib. i. Cap. 7. Of Tenant for yeares. Sect. 58.

[m] 21. H. 7. 26. 3. E. 3. Aff. 46. 9.
 [n] 7. H. 7. 1. b. 10. H. 7. 21. 11. H. 7. 4. a. 15. H. 7. 17. 18. E. 2. avowrie. 219. 6. E. 4. 22. E. 4. 49. 4. E. 3. distres. 18. 27. E. 3. 80. 2. H. 4. 16. (2. Leon. 7. Doct. and Stud. lib. 2. c. 27.)
 [o] Marlebr. cap. 4. W. 1. cap. 16. 2. & 3. Ph. & Mar. cap. 13. Fleta lib. 2. cap. 20. 6. H. 3. axowrie 242. 30. Aff. 38. 1. H. 6. 9. 22. E. 4. 11. F. N. B. 89. Doct. and Stud. lib. 2. cap. 27. 5. H. 7. fol. 9.
 [p] 33. H. 8. tit. distres. Br. 65. (1. Ro. Abr. 673.)
 [q] 4. E. 6. tit. distres. 74. F. N. B. 100. E. (Post 160. b.)

[r] 3. E. 3. tit. transf. 11.

[s] 34. H. 6. 18.

[t] Regist. F. N. B. 100. 107.

(Doct. and Stud. lib. 2. cap. 9.)

(1. Ro. Ab. 601. Post 292. b.)

[u] 7. H. 6. 13. 4. Co. 49. 3. Co. 16. 34. E. 1. tit. Avowrie 233. 32. H. 8. Br. relieve 11. F. N. B. 82. 83. Glanvil lib. 9. cap. 35. Fleta lib. 2. cap. 40. and lib. 3. cap. 14. Bracton lib. 2. fol. 36. W. 1. cap. 35. 25. E. 3. cap. 11. Britton fol. 57. & 70. (Post 3. a. 1. Ro. Abr. 596.)

[x] 45. E. 3. 7. 20. E. 4. 10. 34. H. 6. 48. 35. H. 6. 34. 9. H. 6. 35. 11. H. 4. 22.
 [y] 2. E. 2. Estop. 253. 39. E. 3. 13. Pl. Com. 434. 18. E. 3. 16. 15. E. 3. Estop. 236. 14. H. 4. 32. (Mo. 20.)

[z] 14. H. 6. 23. 8. H. 4. 7.

[a] Resolve. Pasch. 2. Eliz. in Communi Banco. (Cro. Cha. 110.)

[b] Mich. 31. & 32. Eliz. in Communi Banco adjudge in London's case.

[c] 38. H. 6. 24. 30. E. 3. 21.

(1) At common law corn growing could not be distrained, because it adheres to the freehold. 1. Ro. Abr. 666. H. pl. 4. But now by the 11. G. 2. c. 19. landlords are empowered to distrain all sorts of corn, grafs, or other product growing on the estate demised, and to cut and gather them when ripe.—(2) If they escape for want of inclosure by him who ought to repair, they are not distrainable. Alf. 14. Eliz. Dy. 317. The lord cannot distrain beasts which escape, when they are gone out of the land, though they are within view. Vid. 41. E. 3. 26. 14. H. 7. 8. 20. H. 7. 10. 15. H. 7. 17. 2. E. 4. 6. Hal. MSS. See the next note.—(3) This doctrine has been objected to as too general; and several distinctions are taken, the sum of which seems to be, that if a stranger's beasts escape into another's land by default of the owner of the beasts, as by breaking the fences, they may be distrained for rent immediately without being levant or couchant; but that if they escape there by default of the tenant of the land, as for want of his keeping a sufficient fence, then they cannot be distrained for rent or service of any kind till they have been levant and couchant, nor afterwards by a landlord for rent on a lease, unless on notice the owner of the beasts neglects to remove them, tho' it is said, that such notice is not necessary where the distress is by the lord of the fee for an ancient rent or by the grantee of a rent-charge. See this subject argued upon at large in the case of Kimp and Cruves 2. Lutw. 1573.—(4) And now by the 11. G. 2. c. 19. f. 10. persons distraining for rent may impound the distress on any convenient part of the land chargeable with the rent.—(5) Vid. 30. E. 26. where defendant pleads, that he found the cattle sans nul manner de fermeture ne ferrure n'autre engine. Hal. MSS.—(6) For one cannot distrain the same day the rent grows due; but it must be the day after. 21. H. 6. 40. Vid. 14. H. 4. 31. Hal. MSS. By the 8. An. c. 14. rent may be distrained for after determination of the lease in the same manner as before, if the distress is made within six kalendar months afterwards, and during the continuance of the landlord's title and the possession of the tenant from whom the arrears are due.—(7) See further as to distress 3. Blackst. Comment. 6. & 145. and in the several abridgments titles *Distress* and *Replevin*, and also Gilbert's Treatise on the Law of Replevins. See also 2. W. & M. c. 5. 8. An. c. 14. 4. G. 2. c. 28. & 11. G. 2. c. 19. These statutes have made great alterations in the ancient law of distress, particularly by empowering persons, who distrain for rent of any kind, to sell the distress for payment of the rent in arrear, if the tenant or owner fails to replevy with sufficient security within five days after taking of the distress and giving the tenant notice of the cause. This improvement of the remedy by distress was first introduced by the 2. W. & M. c. 5. with respect to rents due on demise or contract, and afterwards by the 4. G. 2. c. 28. was extended to rents-secck, rents of allise, and chief rents. Before these two statutes, the remedy by distress was very imperfect; for the distress was merely taken *nomine pæne* to compel satisfaction, and could not be sold or used for the profit of the person distraining, except in case of the king and in some few other instances. Most of the other changes, made by the statutes since lord Coke's time, have been incidentally hinted at in the preceding notes.—(8) See New Abr. *Debt* B. and Vin. Abr. *Debt* O.—(9) Nota this diversity. In pleading a lease, one ought to say, that the lessor was seised and demised; but in count in debt for rent it is good without alledging seisin. 20. E. 3. Barr. 132. 21. H. 7. 32. Hal. MSS.—(10) 13. E. 3. 16. Brief 747. Dy. 122. Martyn and Hardy. Hal. MSS.—(11) Et videtur, that by the purchase of the land, that is turned into a lease in interest, which before was purely an estoppel. Vid. tamen P. 3. Car. C. B. Crook. 2. Ibbam and Morris. Hal. MSS. See Cro. Cha. 109.—(12) Vid. 4. H. 6. 7. If disseisee makes lease for years by indenture to disseisor, he shall not have assise during this lease. Hal. MSS.—(13) 30. E. 3. 21. Vid. 14. H. 6. 22. per curiam. But if it be estoppel by matter of record, as by fine, &c. it continues after. 2. E. 4. Hal. MSS.

one is riding, may be distrained for *damage feasant*. 2. Keb. 596. 1. Sid. 440. But the opinion was extrajudicial, and may be questioned;

or other beasts, which Bracton calls *animalia* (or *catalla*) *otiosa*, may be distrained. [m] 6. Furnaces, caudrons or the like fixed to the freehold, or the doores or windowes of a house, or the like, cannot be distrained (1). [n] Lastly, beasts that escape (2) may be distrained for rent, tho' they have not been levant and couchant (3). [o] Note that he that distraines any thing that hath life, must impound them in a lawfull pownd within three miles in the same county, and that is either overt or open, in a pinfold made for such purposes, or in his owne close, or in the close of another by his consent (4). And it is therefore called open, because the owner may give his cattle meat and drinke without trespassse to any other, and then the cattle must be sustained at the perill of the owner. [p] Or it is a pownd covert or close, as to impound the cattle in some part of his house, and then the cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore. But if the distress be of utensils of household, or such like dead goods which may take harme by wet or weather, or be stolne away, there he must impound them in a house or other pownd covert within three miles within the same county, for if he impound them in a pownd overt he must answer for them.

[q] If the distress be taken of goods without cause, the owner may make rescous; but if they be distrained without cause, and impounded, the owner cannot breake the pownd and take them out, because they are then in the custody of the law.

[r] But if a man distraine cattle for damage *feasant*, and put them in the pownd, and the owner that had common there make fresh suite, and find the doore unlocked (5), he may justifie the taking away of the cattle in a *parco fracto*. [s] If the owner breake the pownd, and take away his goods, the partie distraining may have his action *de parco fracto*, and he may also take his goods that were distrained wherefoever he find them, and impound them againe.

It is called a writ *de parco fracto* of these words in the writ [t] *Parcum illum vi et armis frangit*. And the forme thereof appears in the Register and F. N. B.

But it is to be observed that for the rent due the last day of the terme, the lessor cannot distraine because the terme is ended (6), and therefore some use to reserve the last halfe yeare's rent, at the feast of the nativite of Saint John Baptist before the end of the terme, so as if the rent be not then paid, he may distraine betweene that and Michaelmasse following (7).

Action de debt. Note a diversitie betweene a rent reserved upon a lease for yeares, reserving a yearely rent: the lessor may have severall actions of debt for every yeare's rent. But upon a bond or contract for payment of several summes, no action of debt lieth till the last day be past (8). But otherwise it is of a recognizance, which see at large and the reason thereof cap. Releases Sect. 512. 513. [u] Note that the lord shall not have an action of debt for relieve or for escuage due unto him, because he hath other remedie; but his executors or administrators shall have an action therefor, because it is now become as a flower false from the stocke, and they have no other remedy. Neither shall the lord have an action of debt for aid, *par file marrier*, or *faire fitz Chivaler*, for the cause aforesaid.

Mes en tiel case il covient, que le lessor soit seisie (y) de mesmes les tenements al temps del lease, car est bone plea pur le lessor a dire, que le lessor navoit riens en les tenements al temps del lease. And the reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*, and therefore if the lessor hath nothing in the land, the lessee hath not *quid pro quo*, nor any thing for which he should pay any rent. And in that case he may also plead, that the lessor *non dimisit*, and give in evidence the other matter (10).

Si [x] non que le lease soit per fait indent, &c. If the lease be made by deed indented, then are both parties concluded, [y] but if it be by deed poll the lessee is not estopped to say that the lessor had nothing at the time of the lease made. A, lessee for the life of B, makes a lease for yeares by deed indented, and after purchase the reversion in fee. B dieth, A shall avoid his owne lease, for he may confesse and avoid the lease which took effect in point of interest, and determined by the death of B. But if A had nothing in the land, and make a lease for yeares by deed indented, and after purchase the land, the lessor is as well concluded, as the lessee to say that the lessor had nothing in the land (11), and here it worketh only upon the conclusion, and the lessor cannot confesse and avoid as he might in the other case. [z] If a man take a lease of his owne land by deed indented reserving a rent, the lessee is concluded. [a] But if a man take a lease of the herbage of his owne land by deed indented, this is no conclusion, to say that the lessor had nothing in the land, because it was not made of the land itselfe: [b] but if a man take a lease for yeares of his owne land by deed indented, the estoppel doth not continue after the terme ended (12). For by the making of the lease, the estoppel doth grow, and consequently by the end of the lease, the estoppel determineth (13), [c] and that part

part of the indenture which belonged to the lessee, doth after the terme ended belong to the (Post. 229. a.) lessor, which should not be if the estoppel continued.

Sect. 59.

ET est ascavoir, que en lease pur terme de ans, per fait ou sans fait il ne besoigne ascun liverie de seisin destre fait al lessee, mes il poit entrer quant il voet per force de mesme le lease. Mes des feoffments faits en pais, ou dones en le taile, ou lease pur term de vie, en tiels cases ou franktenement passera, si ceo soit per fait ou sauns fait, il covient aver un liverie de seisin.

AND it is to be understood, that in a lease for yeares by deed or without deed (1), there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease. But of feoffments made in the country, or gifts in taile, or lease for terme of life, in such cases where a freehold shall passe, if it be by deed, or without deed, it behoveth to have livery of seisin.

LIVERIE de seisin.

(2) *Traditio*, or *deliberatio seisinæ* is a solemnity, that the law requireth for the passing of a freehold of lands or tenements by delivery of seisin thereof. [b] *Intervenire debet solennitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis* (3).

And there be two kinds of livery of seisin, *viz.* a livery in [c] deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, &c. *per hostium et per baspam et annulum vel per fustem vel baculum, &c.*

A feised of an house in fee, and being in the house, [d] saith to B, I demise to you

18. E. 3. fo. 16. 41. E. 3. 17. 40. Aff. 10. 2. Aff. 1. 2. E. 3. 4. 41. E. 3. Feoff. 51. Pl. Com. 25. a. & 303. b. Vide Sect. 66. (Post 216.)

[b] Bract. lib. 2. ca. 15.

[c] Bract. lib. 2. ca. 15. & 18. Brit. ca. 33. in fine fo. 87. Flet. lib. 3. cap. 15.

[d] 6. Co. 26. Sharp's case.

[e] See of this more Sect. 60. (2. Ro. Ab. 7.)

41. E. 3. 17. b. 41. Aff. p. 10. 38. Aff. p. 2. 38. E. 3. 11. 39. Aff. p. 12. 26. Aff. 39. 27. Aff. p. 61. 18. E. 3. 16. 6. Co. 26. Sharp's case. (Post. 37. Cro. Jam. 80.)

43. E. 3. tit. Feoff. 51. 35. H. 8. Feoff. Br. (9. Co. 136. b. 1. Leon. 207.)

50. E. 3. Rot. Parlo nu. 30.

(Post 50. a.) 13. E. 3. Estop. 177.

Ibidem. (2. Co. 246. Post 212.)

7. E. 4. 25. 29. Aff. 40. 10. Aff. 19. 43. Aff. 20.

liver

this house for terme of my life; this is a good beginning to limit the state, but here wanteth livery (4). A livery in deed may be done two manner of wayes, by a solemn act and words, as by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of the land, and with [e] these or the like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the doore, haspe, branch, twigge, or turfe: and the feoffor saying, here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the forme and effect of this deed. Or by words without any ceremony or act (5), as the feoffor being at the house doore, or within the house, here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed, *et sic de similibus*, or, enter you into this house or land, and have and enjoy it according to the deed; or, enter into the house or land, and God give you joy, or, I am content you shall enjoy this land according to the deed, or the like. For if words may amount to a livery within the view, much more it shall upon the land (6). But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed: but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery; and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good, and so hath it been resolved by all the judges, and so of the like.

If divers parcels of land be conteyned in a deed, and the feoffor delivers seisin of one parcel according to the deed, all the parcels doe passe, albeit he saith not (in name of all, &c.) because the deeth containeth all. And so if there be divers feoffees, and he make livery to one according to the deed, the land passeth to all the feoffees (7), and yet the plainer way is to say (in the name of the whole, or of all the feoffees (8).)

If a man make a charter in fee, and deliver seisin for life *secundum formam cartæ*, the whole fee simple shall passe, for it shall be taken most strongly against the feoffor. Note that these words (*secundum formam cartæ*) are understood according to the quantitie and quality of the effectuell estate contained in the deed. If a man make a lease for yeares by deed, and de-

(1) As to the distinction at common law between hereditaments lying in livery, which might be passed for any estate without deed or even writing, and those lying in grant, which could be transferred by deed only, and the alteration of our ancient law by the 29. Ch. 2. c. 3. which requires a deed or writing in most cases, see *infra* n. 3. ante 9. a. and Post 49. a. 121. b. 169. a. — (2) For the origin and history of the transfer of lands by livery of seisin, see 2. Blackst. Comment. 311. Mad. Formul. Anglic. Dissert. 9. and Spelm. Gloss. and Du Fresn. Gloss. voce *investitura*. — (3) But since the introduction of uses and trusts and the statute of 27. H. 8. for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use. Before the statute of uses equitable estates of freehold might be created through the medium of trusts without livery, and by the operation of the statute legal estates of freehold may now be created in the same way. Those who framed the statute of uses evidently foresaw, that it would render livery unnecessary to the passing of a freehold, and that a freehold of such things as do not lie in grant would become transferrable by *parol* only without any solemnity whatever. To prevent the inconveniences, which might arise from a mode of conveyance so uncertain in the proof and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture inrolled. See 27. H. 8. c. 16. The objects of this provision evidently were, first to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances by substituting the more effectual notoriety of inrollment for the more ancient one of livery. But the latter part of this provision, which if it had not been evaded would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from the omission to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our courts of equity, because these were still left at liberty to compel the execution of trusts of the freehold though created without deed or writing. The inconveniences from this insufficiency of the statute of inrollments are now in some measure prevented by the 29. Ch. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See Post 121. b. — (4) 9. Rep. 13. *Thoroughgood's case*. Hal. MSS. — (5) 43. Aff. 10. 18. H. 6. 16. *A makes charter of feoffment to A, and B being on the land A says, I am content you shall have this house and land according to the deed made to you; it is not livery, because it imports only assent and is future*. H. 6. Jac. *Munnd's case*. Ley n. 3. Hal. MSS. See Ley 2. — (6) But Cro. Jam. 80. and Ley 2. seem contra. — (7) But if it be without deed nothing passes to the others. Dy. 14. 35. Hal. MSS. — (8) 15. E. 4. 18. 18. E. 4. 12. 18. H. 6. 9. 22. H. 6. 1. 40. E. 3. 40. Hal. MSS.

questioned; for 1. Ro. Abr. 664. A. pl. 4. and the case of 7. E. 3. Fitzh. Abr. Avowry 199. are directly contra. See also n. 17. *infra*, and Cro. Eliz. 549. 596. Some also have inclined to think, that horses drawing a cart loaded with corn, though one be riding in the cart, may be distrained for rent, and for that purpose may be severed from the cart, if the person distraining doth not chuse to take the cart with the corn as well as the horses, all of which as it seems are equally liable to the distress. See 2. Keb. 529. 596. 1. Vent. 36. and 1. Sid. 422. 440. in which latter book the reporter makes a query, whether the man's being

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 59.

(Hob. 171. Plow. 155. 197. 1. Sid. 82. 2. Ro. Ab. 7. 1. Co. 127. 129. Cro. Ja. 376.) Mich. 33. & 34. Eliz. in the King's Bench inter Hogge & Croffe for lands in London. Vid. Pl. Com. 395.
* See more of this Sect. 66. 11. H. 4. 71. 19. Aff. 9. 19. H. 8. 9. b. (2. Ro. Ab. 8. Post. 359. 2. Sid. 61.)

Bridgewater's case.
(Ante 4. b. Post. 190. b.)

Vid. Sect. 7.

38. E. 3. 11. 38. Aff. p. 2. 43. Aff. p. 20. Temps H. 8. Tit. Feoffments Br. 70. 18. E. 3. 16. b. 28. H. 8. F. 18. 9. E. 4. 39. per Moyle. Bract. lib. 2. cap. 18. & lib. 4. fo. 225 a.
(1. Co. 156. Post. 253. a.)

[a] 9. E. 4. 30. 38. E. 3. 11.
[b] 9. E. 4. 28. 40. 5. H. 7. 9. 3. H. 6. tit. Pleint. 1.
11. H. 4. 32. 11. E. 3. Aff. 86.
[c] 38. Aff. p. 23.

[d] Hill. 37. Eliz. Rot. 620. in com. Banco, inter Browne & Terry adjud.
Dyer 16. Eliz. 234.
3. Eliz. Dyer 131.
(6. Co. 26.)

3. Co. 35. inter Jennings & Bragge.

(2. Co. 31. b. 3. Co. 35. b.)

(2. Ro. Ab. 4. Dy. 33. a. Mc. 11.)

2. Co. 31. 32. Bettisworth's case.

liver seisin according to the forme and effect of the deed; yet he hath but an estate for yeares, and the liverie is void as Littleton saith. So if A by deed give land to B, to have and to hold after the death of A to B and his heires, this is a void deed, because he cannot reserve to himselfe a particular estate, and construction must be made upon the whole deed, and if livery be made according to the forme and effect of the deed, the livery also is void, because the livery referreth to a deed that hath no effect in law, and therefore it cannot worke *secundum formam et effectum cartæ* (1). And so it was adjudged, *et sic de similibus*. * And it is to be observed that neither the feoffor being absent, can make livery, nor the feoffee being absent can take livery, but by warrant of attorney, by deed, and not by parol, because it concerneth matter of freehold (2).

Vide Sect. 1. in Bridgewater's case, where a man hath a moveable estate for inheritance, for example there put, in 13 acres: the question is where livery shall be made. First, if they be parcel of a manor, they may passe by the name of the manor, but if they be in gross then the charter of feoffment must be of 13 acres, lying and being in the meadow of 80 acres, generally without bounding or describing of the same in certaintie, and liverie of the seisin of any 13 acres allotted to the feoffee for a yeare *secundum formam cartæ* is a good livery to passe the content of 13 acres wheresoever the same lie in that meadow. In the second case where one entire manor is separate and divided, as is aforesaid, there is no question but the livery must be made of that manor, but in the other case where two manors are separate, and divided *alternis vicibus*, there the charter of feoffment must be made of both, and liverie in that manor which he is seised of in any one yeare *secundum formam cartæ*, and the next yeare in the other *secundum formam cartæ*: for there are two distinct manors, and severall estates in them (3).

A livery in law is when the feoffor saith to the feoffee being in the view of the house or land, (I give you yonder land to you and your heires, and goe enter into the same, and take possession thereof accordingly,) and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment, for *signatio pro traditione habetur* (4). And herewith agreeth Bracton, *item dici poterit et assignari, quando res vendita vel donata sit in conspectu, quam venditor et donator dicit se tradere*: And in another place he saith, *in seisinâ per affectum et per aspectum*. But if either feoffor or the feoffee die before entry the livery is voyd (5). And livery within the view is good where there is no deed of feoffment. [a] And such a liverie is good albeit the land lie in another county. [b] A man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery. [c] A man maketh a charter of feoffment and delivers seisin within the view, the feoffee dares not enter for feare of death, but claimes the same, this shall vest the freehold and inheritance in him, albeit by the livery no estate passed to him, neither in deed, nor in law, so as such a claime shall serve, as well to vest a new estate and right in the feoffee, as in the common case to reveist an ancient estate and right in the disfeisee, &c. as shall be said hereafter more at large in the chapter of continuall claime. And so note a liverie in law shall be perfected and executed by an entry in law. [d] If a man be disfeised, and make a deed of feoffment, and a letter of attorney to enter and take possession, and after to make livery *secundum formam cartæ*, this is a good feoffment albeit he was out of possession at the time of the charter made (6), for the authority given by the letter of attorney is executory, and nothing passed by the delivery of the deed till livery of seisin was made. And in ancient letters of attorney power is given to others to take possession for the feoffor. But if a man be disfeised, and make a writing of a lease for yeares and deliver the deed, and after deliver it upon the ground, the second delivery is voyde, for the first delivery made it a deed, and for that the lease for yeares must take effect by the delivery of the deed, therefore the deed delivered when he was out of possession was voyde. But so it is not of a charter of feoffment, for that takes effect by the livery and seisin. But if the lessor had delivered it as an escrowe, to be delivered as his deed upon the ground, this had bene good.

A man makes a lease for yeares and after makes a deed of feoffment and delivers seisin, the lessee being in possession and not assenting to the feoffment, this livery is voyd, for albeit the feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a livery must be given of the possession also (7); but if the lessee be absent, and hath neither wife nor servants (though he hath cattell) upon the ground the liverie of seisin shall be good.

If a man be seised of an house, and of divers severall closes in one countie in fee, and makes a lease thereof for yeares, and afterward maketh a feoffment in fee of the same, and makes liverie of seisin in the closes, (the lessee or his wife or servants then being in the house) the livery is voyd for the whole: for the lessee cannot be upon every parcell of the land to him demised, for the preservation or continuance of his possession therein. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserve and continue his possession in the whole, from being ousted or dispossessed (8).

Note

(1) Charter of feoffment habendum a die datus. Ruled, 1. If livery be made the same day *secundum formam cartæ*, it is void. 2. If it was after the day by the feoffor himself, it is good. 3. If there be letter of attorney to deliver seisin in the deed, or it was at the same time, and it is delivered after the day, yet it is not good, because the authority was given at a time when it was a void charter. But 4. if letter of attorney be made after the day, and livery is made according to the deed, it is good. Hob. 314. Greenwood and Tiler. T. 3. Car. Owen and Price. C. B. H. 3. Jac. Rot. 216. B. R. Hennings and Paucharden. So there is a diversity between this and a grant of a reversion habendum from a day to come, for attornment after the day doth not aid the grant. 2. Rep. 55. Buckler's case. Hal. MSS.—See Cro. Jam. 563. and 153.—(2) Adjudged, that feoffee being absent cannot take livery, nor feoffor being absent make livery, by attorney by parol. T. 1659. Gregory and Badbourne. But a lease for yeares may be delivered by attorney by parol, as has been often adjudged. Hal. MSS.—(3) Vid. 8. E. 2. Feoffments 111. Livery by the lord of any part of the manor without going to it; but contra if not parcel. Hal. MSS.—(4) Nota the case of 38. Aff. 2. A makes feoffment to B within the view, and afterwards marries her, and afterwards claims to the use of the wife; it is a good execution of the livery. 38. E. 3. 11. Vid. 42. E. 3. Feoffments 54. Livery good, though the land is not within view. Hal. MSS.—(5) 1. Rep. Rect'or of Cheddington's case. Hal. MSS.—(6) H. 22. Car. B. R. Hinde's case, M. 4. Jac. B. R. Sparks and Darcy, 37. Eliz. Brown's case. Charter of feoffment of lands in the hands of the king with letter of attorney to make livery, and afterwards the feoffor jues outter maine, and the attorney makes livery; it is good. 25. Eliz. Feoffment on condition which is broken; feoffor makes charter of feoffment and letter of attorney to deliver seisin; the attorney enters and makes livery; it is good. Dick's case. Hal. MSS.—(7) P. 40. Eliz. B. R. A tenant for yeares; the reversion is granted to B for life, remainder to C in tail, remainder to D in fee; D by deed infeoffs A and one E, and makes livery: it was ruled to be void, because there was not any surrender, and A was in possession and could not take by livery. Edes and Knotsford. A tenant for yeares, remainder to the king for yeares, remainder to B in fee; B enters and ousts A and makes livery; it is good, notwithstanding the mesne remainder for yeares to the king; but it would have been otherwise, if the king's remainder had been for life. Hal. MSS.—(8) But nota, if lessee consents, livery is good, though he be upon the land. Tr. 40. Eliz. Shephard and Gray. A makes lease for yeares, and afterwards makes charter of feoffment with letter of attorney to enter and take possession and seisin for him and such seisin and possession to deliver; the attorney makes livery with the consent of the lessee, he being on the land; and it was ruled good. P. 1651. Wegg and Villers.—Lessee for yeares consents, that feoffor shall make livery, and afterwards goes out of the country, leaving servants on the land; the feoffor enters and makes livery; it was ruled good. But it was ruled, that if lessee be absent, livery by lessor by consent of servants is void, they being upon the land. 1. 7. Jac. C. B. n. 45. D. D. Blackleach and Small. But if A be lessee of white acre by one demise and of black acre by another demise of the same lessor; or if there be lessee of white acre and black acre by one demise, and he makes lease for yeares of black acre, and lessor enters on black acre and makes livery, though A be on white acre it is good. 2. Rep. Bettisworth's case. Hal. MSS.

being on the cart should not privilege the whole team.—(13) If ferrets and nets in a warren be taken damage tenant, it is good. But if they are in the hands of a man, they cannot be distrained any more than a horse on which a man is; nor can they be distrained, if they are out of the warren. 2. E. 2. Avovery 182. 7. E. 3. ibid. 199. Hal. MSS. See Vin. Abr. Distrains A.—(14) If A brings yarn to his neighbour's house to twigh, it cannot be distrained by the lord. Noy n. 298. Burley and Read. Vid. 15. E. Avovery 216. Hal. MSS. See Noy 68. and f. c. in Cro. Eliz. 549. and 596. For other cases in which things the property of strangers are privileged from

Note a great diversity, when a man hath two waies to passe lands, and both of the waies be by the common law, and he entendeth to passe them by one of the wayes, yet *ut res magis valeat* it shall passe by the other. But where a man may passe lands either by the common law, or by raising of an use, and settling it by the statute, there in many cases it is otherwise (1). For example, if a man be seised of two acres in fee, and letteth one of them for yeares, and intending to passe them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession, in name of both, onely the acre in possession passeth by the livery. Yet if the lessee attorne, the reversion of that acre shall passe by the deed and attornment, for he is in by the common law, and in the *per* in both, and so in the like. But otherwise it is, if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in by the statute in another degree, *viz.* in the *post*, and the intention of the parties worke much both in the raising and direction of uses. So if *Cestuy que use* and his feoffees had joyned in a feoffment after the statute of 1. R. 3. &c. it had bene the feoffment of the feoffees, and the confirmation of *Cestuy que use*, for the state at the common law shall be preferred. So to conclude this point, of freehold and inheritances, some be corporeall, as houses, &c. lands, &c. these are to passe by livery of seisin, by deed or without deed; some be incorporeall, as advowsons, rents, commons, estovers, &c. these cannot passe without deed, but without any livery (2). And the law hath provided the deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth passe, which is in lieu of the livery. See Bract. lib. 2. cap. 18. *Et est traditio de re corporali de persona in personam de manu, &c. gratuita translatio, et nihil aliud est traditio in uno sensu, nisi in possessionem inductio, de re corporali; et ideo dicitur, quod res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inbæret, et quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur.*

This ancient manner of conveyance by feoffment and livery of seisin, doth for many respects exceed all other conveyances. For (as hath bene said) (3) if the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce cleerely the estate of the feoffee, and make a perfect tenant of the freehold, but onely livery of the seisin upon the land: the other conveyances being made off from the ground, doe sometimes more hurt then good, when the feoffor is out of possession (4). And yet in some cases a freehold shall passe by the common law without livery of seisin: as if a house or land belong to an office by the grant of the office by deed, the house or land passeth as belongeth thereunto. So if a house or chamber belong to a corodie, by the grant of a corodie, the house or chamber passeth. A freehold may by custome be surrendered without livery, as hereafter shall be said (6): and so of assignement of dower *ad officium ecclesie*, or otherwise, and by exchange a freehold may passe without livery, as hereafter shall be said in this chapter.

Sect. 60.

MES si home les-
sa terres ou
tenements, per fait ou
sans fait, a (7) terme
des ans, le remain-
der ouster a un au-
ter per terme de vie,
ou en taile, ou en fee;
donque en tiel case il
covient, que le lessor
fait un liverie de seisin
a le lessee per terme
de ans, ou auterment
riens passa a eux en
le remainder, coment
que le lessee enter en
fee enter into the

BUT if a man letteth
lands or tenements
by deed or without
deed for terme of
yeares, the remain-
der over to another
for life, or in taile, or
in fee; in this case it
behooveth, that the
lessor maketh livery of
seisin to the lessee for
yeares, otherwise no-
thing passeth to them
in the remainder, al-
though that the les-
see enter into the

PER fait, ou sauns
fait. For seeing that

the remainders take effect by
livery, there needes no deed (8).

Le remainder is a re-
sidue of an estate in land de-
pending upon a particular e-
state, and created together
with the same, and in law La-
tine it is called *remanere* (9).

Fait un livery de

seisin al lessee. This live-
ry is not necessary in this
case for the lessee himsele,
because he hath but a terme
for yeares, but it is for the
benefit of them in the rem',
so as the livery to the lessee
shall enure for the benefit of
them in the rem': for the li-
verie

(1) Where land shall pass by one way or the other at common law.—*Termor for years makes charter of feoffment by the word dedi, with letter of attorney in the same deed to deliver seisin, and afterwards livery is made, yet it is a forfeiture, and the term shall not be said to pass first by the delivery of the deed, as it seems. Dy. 362.—Grant to a tenant at will shall enure as a confirmation. Dy. 269.—*29. Eliz. B. R. *Leonard's case.* If A makes lease for years to B, and afterwards makes charter of feoffment to B being in possession with the words *dedi et concessi*, with letter of attorney to deliver seisin; before livery, he may use the deed as a confirmation in fee, and after livery as a feoffment. And there it was also agreed, that if by indenture in consideration of money A bargains and sells to B with letter of attorney, and the deed is inrolled, it is a good bargain and sale.—17. Eliz. Lessee for life and he in remainder in fee make charter of feoffment, and letter of attorney to make livery, which is made accordingly, it is good and the remainder shall not be said to pass by delivery of the deed.—Where one shall have election to take by statute or common law. Vid. Dy. 302. Grant of reversion to a brother averred to be pro fraterno amore.—2. Rep. Sir R. Heyward's case. Demise or concessi taken either as lease or bargain and sale. 7. Rep. *Bedell's case.* Grant to a son. T. 15. Car. B. R. entered H. 11. Car. Rot. 459. Father gives and grants to his son and his heirs, habendum after the death of the father; and no consideration of blood or marriage is mentioned in the deed: an estate shall not arise by way of use. Nota videtur, that there was a letter of attorney in the deed. P. 1657. *Jackson's case.* A by indenture for love and affection grants to B a rent in esse, habendum to B for life, remainder to the use of C in tail, remainder to the use of A's right heirs, and attornment was made but not till after the death of A; and it being found that B was cousin it was ruled, that an estate should arise by way of use without attornment.—Where one may elect one way or the other by statute.—Vid. 7. Rep. *Bedell's case.* If father in consideration of money bargains and sells to his son, there ought to be an enrollment. But if A for natural love to his son and also for money grants to the son, the land shall pass without inrollment, because the consideration of love is expressed. M. 1649. *Watts and Dicks B. R.*—Hal. MSS. See further as to electing in what way an estate shall pass, Yelv. 124. the case of *Crofting and Scudamore*. 1. Ventr. 137. and 1. Mod. 175. and *Barker and Keat* in 2. Mod. 249. See also Vin. Abr. *Uses B. a.* and the observation in *Hawk. Abr. of Co. Litt. 83.*—(2) See ante 9. a. 47. a. 48. a. and Post 121. b. and 169. a.—(3) Ante 9. a.—(4) For this see 2. Rep. 56. *Buckler's case.* Fine by disseisee extinguishes his right, and shall enure to the disseisor. But see this denied M. 13. Car. B. R. *Crook n. 7. Fitzherbert's case.* Hal. MSS.—See Cro. Cha. 483. and S. C. W. Jo. 397. In this last book it is said, that the judges did not deliver any opinion on the point. See further W. Jo. 317. Cro. Cha. 305. and *Gouldsb. 162.*—(5) Rot. 74. Hal. MSS.—(6) Vid. 5. Rep. *Peryman's case.* Hal. MSS.—See 5. Co. 84. In *Peryman's case* the jury found, that in the manor of *Porchester* there was a custom, according to which all alienations of lands within that manor by writing feoffment or last will were void, unless presented at the next court of the manor, or at some court within a year after, or at the next court after the year; and this was adjudged to be a good custom. In the same case mention is made, that by the custom of *Lidford Castle* in *Devonshire* a freeholder of inheritance cannot pass his freehold except by surrender into the lord's hands. As to this latter kind of custom, in consequence of which the estates subject to it have been called *customary freeholds*, see Post 59. b. and *Blackit. Law Tracts*, 8vo ed. vol. 1. p. 144.—(7) *Un pur.* L. and M.—(8) 12. H. 4. 20. Hal. MSS.—(9) *Sett.* 215. Hal. MSS.

from distress for the sake of trade and commerce, see *Francis and Wyatt*. 4. Bur. v. 3. p. 1498. In that case the question was whe-

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verie of the possession could not be made to the next in remainder, because the possession belonged to the lessee for yeares, and for that the particular terme, and all the remainders, made in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee. But if a lease for yeares without deed be made to A and B, the remainder to C in fee, and livery is made to A in the absence of B, in the name of both; it seemeth the livery is good to vest the remainder, and there is a diversity, between two joynt attornies to receive livery for another, and livery and seisin is made to one of them, in the name of both, this is cleerly void, because they had but a meer and bare authority (1), and they both doe in law make but one attorney, unlesse the warrant be joyntly and severally (2), but the lessee for yeares hath an interest in the land. Againe, if A is to make a feoffment to B and C, and their heires without deed, and A makes livery to B in the absence of C in the name of both, and to their heires; this livery is void to C, because a man being absent cannot take a freehold by a livery, but by his attorney being lawfully authorised to receive livery by deed, unlesse the feoffment be made by deed, and then the livery to one in the name of both is good (4).

Note there is a diversity between livery of seisin of land, and the delivery of a deed, for if a man deliver a deed without saying of any thing, it is a good delivery, but to a livery of seisin of land words are necessary; as taking in his hand the deed, and the ring of the doore (if it be an house) or a tursle or twigge (if it be of land) and the feoffee laying his hand on it, the feoffor say to the feoffee, Here I deliver to you seisin of this house, or of this land, in the name of all the land, contained in this deed, according to the forme and effect of the deed, (as hath been said) and if it be without deed, then the words may be, Here I deliver you seisin of this house or land, &c. to have and to hold to you for life, or to you and the heires of your body, or to you and your heires for ever as the case shall require.

When the kinsman of Elimelech gave unto Boas the parcell of land that was Elimelech's, he tooke off his shoe, and gave it unto Boas in the name of seisin of the land (after the manner in Israel) in the presence, and with the testimony of many witnesses. And when Ephron infeoffed Abraham of the field of Machepela, he said to him, *agrum trado tibi*, &c. I deliver this field to thee.

A man makes a lease for yeares to A, the remainder to B in fee, and makes livery to A within the view: this livery is void, for no man can take by force or a livery within the view, but he that taketh the freehold himselfe.

Et si le termor en tiel case enter devant ascun livery fait, &c. By the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est, amplius meum esse non potest*. But if the lessor and lessee come upon the ground, of purpose for the lessor to make, and the lessee to take livery, there his entry vests no actuall possession in him untill livery be made; for [a] *affectio tua nomen imponit operi tuo* (5). And therefore if it be agreed betweene the disseisor and disseisee, that the disseisee shall release all his right to the disseisor upon the land, and accordingly the disseisee entreth into the land, and delivereth the release to the disseisor upon the land, this is a good release, and the entry of the disseisee, being for this purpose, did not avoid the disseisin, for his intent in this case did guide his entry to a speciall purpose. And so was it resolved [b] by Sir James Dyer, and the whole court of Common Pleas, Pasch. 18. Eliz. upon evidence which I myselfe heard and observed. But if the disseisor enfeoffe the disseisee and others, there albeit the disseisee came to take livery, yet when livery is made, the disseisee is remitted to the whole in judgment of law, as shall be said more at large in the chapter of remitter in his proper place.

Sect.

(Post 143 a.)

(5. Co. 94 b.)

10. E. 4. 1. 12. E. 4. 16. 15. E. 4. 18. 22. E. 4. 35. 40. E. 3. 10. 41. (3)
Temps H. 8. Feoffments 72.
6. H. 4. 2. b. Litt. 153.
3. H. 7. 13. (Post 359 a.)
(Ante 36. a. 9. Co. 137.)

Ruth cap. 4. verse 7. 8. Deut. 25. 9. 10.
Gen. 23. verse 11.

(Mo. 14)

[a] Bracton lib. 1.

[b] P. 19. Eliz. in Communi Banc. Pl. Com. in Aff. de fresh-force. 92. 29. Aff. 26. 43. Aff. p. 3. 3. H. 6. 19. in formdon. (6)

(1) See further as to the difference between a naked authority and an authority coupled with an interest, Post 52. b. 113. 2. and 181. b.

(2) See Post note 1. in 52. b.

(3) 18. E. 4. 12.—Hal. MSS.

(4) Dy. 14. 35. 18. H. 6. 9. 22. H. 6. 1.—Hal. MSS.

(5) Nota, if the lease for years with the remainder over be by deed, the deed ought not to be delivered till livery made; for otherwise the livery is bad. H. 2. Eliz. Helyar's case. Vide Bendl. n. 130. Hal. MSS.—See N. Ben. 85. and S. C. Mo. 14. 1. And. 8.

(6) 9. H. 7. 1. 41. E. 3. 17. Hal. MSS.

whether a person's chariot, which stood at a common livery stable, could be distrained for rent due from the keeper of the livery stable; and the court after two arguments appearing to be strongly inclined in favour of the distress, the owner of the chariot afterwards declined bringing the question to a third argument, which had been ordered by the court.—(15) 20. H. 7. 9. 13. 21. E. 4. 47. Hal. MSS.—(16) But now by the 2. W. and M. c. 5. sheaves, or cocks of corn, or corn loose or in the straw, or hay in any hovel, stack or rick, or otherwise on the land, may be distrained for rent due on demise lease or contract.—(17) Sheep are equally privileged with *averia caruæ*, and cannot be taken, if any other distress can be found. See further 2. Inst. 133. 134. and the case cited in n. 18.—(18) But it has been adjudged, that beasts of the plow may be taken for the poor's rate under the 43. Eliz. because the remedy given by that and other statutes for compelling the payment of particular rates or sums of money, though called a distress, is in effect an execution. 4. Burr. v. 1. p. 579. See acc. Saund. on 22. Ch. 2. against convenicles 39. which is referred to in Com. Dig. *Distrs* C. but not cited in the case in 4. Burr.

Sect. 61.

ET si home voile faire feoffment, per fait ou sans fait, de terres ou tenements que il ad en plusors villes en un countie, le liverie de seisin fait en un parcel de les tenements en un vile, en le nosme de tous, suffist pur tous les autres terres et tenements comprehendes deins mesme le feoffment, en toutz les autres villes deins mesme le countie. Mes si home fait un fait de feoffment des terres ou tenement en divers counties, la il covient en chescun countie aver un liverie de seisin.

AND if a man wil make a feoffment, by deed or without deed, of lands or tenements which he hath in divers townes in one countie, the livery of seisin made in one parcell of the tenements in one towne, in the name of all the rest, is sufficient for all other the lands and tenements comprehended within the same feoffment in al other the townes in the same countie (1). But if a man maketh a deed of feoffment of lands or tenements in divers counties, there it behoveth in every county to have a livery of seisin (2).

EN un countie. (Post = 53. 2.) A countie is fetched from the French, and shire from the Saxon. For *Syran* in the Saxon tongue signifieth *partiri*, because everie countie or shire is divided and parted by certaine metes and bounds from another, and in Latine is called *Comitatus à comitando*, for accompanying together. And for as much as the men of one county doe not accompany together with men of another county at countie courts, turnes, leets, and other courts, therefore in judgement of law they shall take no notice of a liverie in another

countie to passe any lands in their owne countie. But of this more shall be said hereafter.

Sect. 62.

ET en ascun cas home avera per le grant dun auter fee simple, fee taile, ou frankten. sans liverie de seisin. Si come deux homes sont, et chescun deux est seise dun quantite de terre deins un countie, et lun granta sa terre a l'auter en eschange pur la terre que l'auter ad, et en mesme le manner l'auter granta sa ter-

AND in some case a man shall have by the grant of another a fee simple, fee tail, or freehold without livery of seisin. As if there be two men and each of them is seised of one quantity of land in one countie, and the one granteth his land to the other in exchange for the land which the other hath, and in like maner the other grant-

HERE Littleton putteth a case where freehold, &c. shall passe without liverie of seisin, and thereupon putteth the case of an exchange of lands in one countie that is good by deed or without deed, without any livery, but if it be in severall counties there must be a deed. Also of things that lye in grant, as advowsons, rents, commons, &c. an exchange of them albeit they be in one counties, is not good, unlesse it be by deed; and therefore Littleton putteth his case warily of land. And in case of a fine which is a feoffment of record, of a devise by a last will, of a surrender, of a release or confirmation to a lessee

(1) Vid. 11. Eliz. Dy. 233. Cestui que use of three acres by three several feoffments in one county makes charter of feoffment of all and livery in one of the acres, it is pursuant to the statute and passes all. Hal. MSS.—The statute meant is the 1. R. 3. c. 1. which empowers cestui que use to make effectual feoffments and conveyances against his feoffees in trust; and the case cited was of a feoffment before the 27. H. 8. for transferring uses into possession. It is stated, that the livery was made by attorney, and that was the cause of the doubt, it being said, by some, that the statute of R. 3. ought to be construed strictly and to be confined to conveyances made by the cestui que use in his own person. See Bro. Feoffment to Uses 28.

(2) Vid. Dy. 246. 22. H. 6. 10. If a manor extends into two counties, livery in that part of the manor, which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin. Hal. MSS.—But Mr. Perkins holds, that livery of parcel of such a manor in one county will pass the parcel in the other county. Perk. Sect. 227. However he admits, that if one be disseised of two acres in different counties, entry into the acre in one of the counties, though made in the name of both acres, will not extend to the acre in the other county. Perk. Sect. 229.

Lib. 1.

Vide Sect. 1.

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lessee for yeares, or at wil. In all these and some other cases a freehold, &c. (as hath beene said) may passe without livery. But this word (exchange) which our author here useth, is so appropriated by law, to this case, as it cannot be expressed by any periphrasis or circumlocution (3).

En ceo case chescun poet enter, &c. For by

the exchange the parties, albeit the lands be all in one county, have no freehold in deed or law in them before they execute the same by entry; and therefore if one of them dyeth, before the exchange be executed by entrie, the exchange is void; for the heire cannot enter and take it as a purchasor, because he was named onely to take by way of limitation of estate in course of descent.

re a le primer grantor en eschange pur la terre que le primer grantor ad; enceo case chescun poet entrer en lauter terre issint mise en eschange sans ascun liverie de seisin, et tiel eschange fait per parolx de tenements deins mesme le countie sans escript est assets bone.

eth his land to the first grantor in exchange for the land which the first grantor hath; in this case each may enter into the other's land, so put in exchange without any livery of seisin(1). And such exchange made by paroll of tenements within the same county without writing is good enough (2).

9. E. 4. 38. 39. 45. E. 3. 20. 21. 45. E. 3. Exchange 10.

Sect. 63.

THIS is evident enough. But of what things an exchange may be made (which was a convenience frequent in former times) is to be seene, and herein many things are to be observed.

First, that the things exchanged [a] need not to be in esse at the time of the exchange made. As if I grant a rent newly created out of my lands in exchange for the manor of Dale, this is a good exchange (4).

[b] Secondly, there needeth no transmutation of possession, and therefore a release of a rent, or estovers, or right to land, in exchange for land, is good (5).

The things [c] exchanged need not be of one nature, so they concerne lands or tenements, whereof Littleton here speaketh. As land for rent or common, or any other inheritance which concerne lands or tenements, or spirituall things, as tythes, &c. for temporall, and tenure by a divine service for a temporall seigniorie, &c. But annuities or such like which charge the person onely, and doe not concerne lands or tenements, cannot be exchanged for lands or tenements.

ET si les terres ou tenements soient en divers counties, cest ascavoir ceo que lun ad est un countie et ceo que lauter ad est en auter countie, la il covient de aver un fait indent destre fait enter eux de tiel eschange.

AND if the lands or tenements be in divers counties, viz. that which the one hath in one county, and that which the other hath in another county, there it behoveth to have a deed indented made betweene them of this exchange.

(Hob. 41.)

[a] 30. E. 1. Esch. 15. 3. E. 4. 10. 9. E. 4. 21. 14. H. 8. 20.

(Post 366. a.)

(1. Ro. Ab. 812.)

[b] 6. E. 56. 30. E. 1. Es. 16. 16. E. 3. Esch. 2. 7. H. 4. 34. 3. E. 4. 11.

[c] 9. E. 4. 21. 9. E. 3. 56. 21. E. 3. 6.

Sect. 64, 65.

EN eschange, il covient que les estates soient egales, &c. Equality in lands is threefold, viz. First equality in value:

ET nota que en eschange il covient, que les estates soient egales, que

AND note that in exchanges it behoveth, that the estates, which both parties

(1) It is observable, that Littleton expresses himself concerning an exchange as of a transaction between two; and in a late case the court held, that an exchange in the strict legal sense of the word cannot be between three, the principles of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, 1. The consideration of an exchange and of the implied warranty incident to it is the receiving something with warranty from the same person, to whom something with warranty is given; but if there could be three distinct parties, each would give to one and receive from another. 2. The implied condition of re-entry is, that re-entry may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as of his own. See the case of Eton College in Wilton, v. 2. part 3. page 483. and Post n. 1. in 51. a. and n. 2. in 51. b.

(2) But now by force of the statute of 29. C. 2. c. 3. a writing is necessary, if the exchange is of freeholds or of terms for years being for more than three years.

(3) See acc. Post 51. b. and Will. vol. 2. part 3. page 491. 496.

(4) But in one of the books cited by lord Coke, the opinion is, that both of the things exchanged ought to be in esse at the time of the exchange. See 9. E. 4. 21.

(5) See as to this Fulb. Paral. 33. a. in the dialogue on exchanges.

Estates.
Vide Sect. 650.

ambideux tielx parties averont en les terres issint eschanges, car si lun voloit et grant que l'auter a-veroit la terre en fee taile, pur le terre que il a-veroit del grant de le auter en fee simple, coment que l'auter soit agree a cel, cest eschange est voide, pur ceo que les estates ne sont my egales.

EN mesme le man-
ner est, lou il est
grant et agree enter
eux, que lun avera en
lun terre fee taile, et
l'auter en l'autre terre
forsque a terme de
vie, ou si lun avera
en lun terre fee taile
generall, et l'auter en
l'autre terre fee taile
especial, &c. Issint
touts foits il covi-
ent que en eschange
les estates dambideux
parties soient egales,
cest ascavoir, si lun
ad fee simple en lun
terre, que l'auter ave-
ra tiel estate en lau-
ter terre, et si lun ad
fee taile en lun terre
il covient que l'auter
avera semblable estate
en l'autre terre, &c. et
sic de aliis statibus.
Mes nest my riens a
charger del egal va-
lue des terres, car

ties have in the lands
so exchanged, be e-
quall, for if the one
willeth and grant that
the other shall have his
land in fee taile for the
land which he hath of
the grant of the other
in fee simple, although
that the other agree
to this, yet this ex-
change is voyde, be-
cause the estates be not
equall.

IN the same manner
it is, where it is
granted and agreed be-
twene them, that the
one shall have in the
one land fee taile, and
the other in the other
land but for terme of
life, or if the one shall
have in the one land
fee taile generall, and
the other in the other
land fee taile especial,
&c. So alwaies it beho-
veth that in exchange
the estates of both par-
ties be equall, viz. if
the one hath a fee sim-
ple in the one land that
the other shall have
like estate in the other
land, and if the one
hath fee taile in the
one land the other
ought to have the like
estate in the other land,
&c. and so of other e-
states. But it is nothing
to charge of the equal

Secondly, equality in quan-
tity of estate given and taken.
Thirdly, equality in quality
or manner of the estate given
and taken. But as Littleton
after saith, equality in value
of lands in an exchange is not
requisite; neither equality in
the quality or manner of the
estate. And therefore if two
jointenants give lands joint-
ly to two men and their heires,
and the other in exchange of
other lands to them and their
heires in common, this is a
good exchange⁽¹⁾, and yet the
manner of their estates is not
equall, for the estate of one
party is joynt, and the other
in common. And so it is if
two men give lands in ex-
change to A and his heires
for lands from A to them two
and their heires, though the
one party have a joynt estate,
and the other a sole estate, yet
the exchange is good. The
like is if the one land be of a
defeasible title, and the other
of an undefeasible title, yet
the exchange is good till it be
avoided.

[a] An exchange with the
king is good, and yet the
king is seised in his politike
capacity, and the subject in his
naturall capacity⁽²⁾. But e-
quality of the quantity of the
estate is requisite, as it appear-
eth clearly in the cases put
by Littleton. [b] But therein
it is to be observed, that it is not
necessary that the parties to
the exchange be seised of an
equall estate at the time of the
exchange made: for if tenant
in taile, or a husband seised in
the right of his wife, exchange
lands, and both by the ex-
change give a fee simple, this
is good until it be avoided by
the issue in tail, or by the wife
after the death of the husband;
[d] so as Littleton saith, that
in exchanges it behoveth that
the estates which both parties
have in the land so exchang-
ed be equal, is as much as to
say that the state reciprocally
given in exchange ought to be
equall. [e] But in a parti-
tion the estates allotted to ei-
ther party need not to be e-
quall,

[a] Bracton lib. 5. fo. 389. 17.
E. 3. 12. b. 4. H. 4. 2.

[b] 14. H. 6. 6. E. 2. Exch. 12.
8. E. 2. Cui in vita 28. 10. E. 2.
Exch. 13. 16. E. 3. Exch. 2. 3.
E. 3. 19. 12. H. 4. 12. 21. H.
6. 25. 13. E. 4. 3. (3)

(1. Ro. Ab. 311. 4. Co. 121.)

[d] 44. E. 3. 20. 38. E. 3. 15.
39. E. 3. 1. 9. E. 4. 21. 7. H.
4. 17. 30. E. 1. tit. Bre. 884. 30.
E. 1. tit. Exchange, 15.

[e] F. N. B. 62. m
(Post. 172. b.)

(1) Here four persons are named as parties to an exchange. But this is not irreconcilable with the opinion mentioned in note 7. of fol. 30. b. that an exchange cannot be between more than two distinct parties; because though four persons are named, yet they constitute only two distinct parties; for in point of interest the two joint-tenants are the conveying parties on the one side, and the two tenants in common are the conveying parties on the other, and consequently there is the same reciprocity as if the transaction was between two persons only. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only two distinct relative parts.

(2) See 2. Inst. 269.—But if the king makes exchange, it seems that it should be by writing recorded; because he can neither give nor take land without matter of record. See Lane 31. 60. Vin. Abr. Z. c. A. d. B. d.

(3) 45. E. 3. 20. Hal. MSS.

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equall, as shall be observed in his proper place.

To shut up this point, there be five things necessary to the perfection of an exchange.

1. That the estates given be equall (1): 2. That this word (*excambium* exchange) be used, [f] which is so individually requisite, as it cannot be supplied by any other word or described by any circumlocution (2): and herewith agreeth Littleton afterwards in this Section. In the booke of Domesday I finde, *hanc terram cambiavit Hugo Briccni- no quod modo tenet comes Meriton, et ipsum scambium valet duplum.*

Hugo de Belcamp pro escambio de warres.

3. That there be an execution by entry or claime in the life of the parties, as hath bin said. [g] 4. That if it be of things that lye in grant, it must be by deed. [h] 5. If the lands be in severall counties there ought to be a deed indented, or if the thing lye in grant albeit they be in one county.

[i] If an infant exchange lands, and after his full age occupy the lands taken in exchange, the exchange is become perfect, for the exchange at the first was not void (because it amounted to a livery, and also in respect of the recompence) but voidable (3).

Coment que l'auter agree a cel cest eschange est voide. The agreement of the parties cannot make that good which the law maketh void.

*coment que la terre
lun vault mult plus
que la terre de l'auter
ceo nest reins a pur-
pose; issint que les
estates per leschange
fait soient egales.
Et issint en leschange
sont deux grants; car
chescun partie grant
son terre a l'auter en
eschange, &c. et en
chescun de leur grants
mention serra fayt de
leschange.*

value of the lands, for albeit that the land of the one be of a farre greater value then the land of the other, this is nothing to the purpose, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each party granteth his land to the other in exchange, &c. and in each of their grants mention shall be made of the exchange.

[f] 9. E. 4. 21. 25. H. 6. 56.
19. H. 6. 27. 44. E. 3. 24. 50.
Ass. Dorset. Wadon. Bedf. Sande-
deia.
9. E. 4. 39. 15. E. 4. 3.
45. E. 3. 30.
(4. Co. 121.)

45. E. 3. Eschange 1.
[g] 28 H. 6. 2.
[h] 45. E. 3. 20. 7. H. 4. 11.

[i] 4. E. 2. tit. Exch. 10. 12. H.
4. 12.

Sect. 66.

*SI home lessa terre
a un auter pur
terme dans, coment que
le lessor morust devant,
&c.* The reason is because the interest of the tearme (as hath beene said) doth passe and vest in the lessee before entry, and therefore the death of the lessor cannot devise that which was vested before.

Attorney. Is an ancient English word, and signifieth one that is set in the turne, stead, or place of another, and of these some be private (whereof our author here speaketh) and some be publike, as attorneys at law, whose warrant from his master is *ponit loco suo talem attorneyatum suum*, which setteth in his turne or place such a man to be his attorney.

*ITEM si home
lessa terre a un
auter pur term dans,
coment que le lessor
morust devant que le
lessee enter en les te-
nements, uncore il
poit enter en mesmes
les tenements apres
le mort le lessor, pur
ceo que le lessee per
force de le lease ad
droit maintenant da-
ver les tenements so-
lonque le forme de le
lease. Mes si home
fait un fait de feoffe-
ment a un auter, et un
letter dattorney a un*

ALSO if a man let-
teth land to ano-
ther for term of years,
albeit the lessor dieth
before the lessee en-
treth into the tene-
ments, yet he may en-
ter into the same tene-
ments after the death
of the lessor, because
the lessee by force of
the lease hath right
presently to have the
tenements according
to the forme of the
lease. But if a man ma-
keth a deed of feoff-
ment to another, and a
letter of attorney to
home

(Post 270. a.)

(9. Co. 75. F. N. E. 156.)

(1) Vid. 22. E. 3. 3. Contra 38. E. 3. 15. Hal. MSS..

(2) See ante 50. b. n. 1. and 3. and the case of Eton College there cited. In that case one reason given, why an act of parliament was not suffered to operate as an exchange, was the want of that word in the act.

(3) Contra in *surrender or partition*. 11. H. 4. 61. Hal. MSS.—But see the case of Zouch against Parsons 4. Burr. v. 3. page 1806. where lord Mansfield in delivering the opinion of the court seems to incline strongly in favour of construing an infant's surrender, if made by deed, as voidable only. In Zouch and Parsons it became necessary to consider what was the true ground for holding the acts of infants as voidable only, whether the *solemnity of the instrument*, or the *semblance of benefit* to the infant on the face of the deed. As to the former ground, the court thought fit to approve of Mr. Perkins's distinction, according to which all such grants gifts or deeds of an infant as do not take effect by delivery of his hand are void, and those which do are voidable. See Perk. sect. 12. But the court decided the case principally on the latter ground, and held a lease and release by an infant to be voidable, because the consideration of the conveyance and other circumstances shewed, that the act was right and proper and apparently not in the least to his prejudice. See further as to the deeds of infants ante 45. b. note 1. and Post 171. b.

home a deliverer a luy seisin per force de mesme le fait, uncore si liverie de seisin ne soit fait en la vie celui, que fesoit le fait, ceo ne vault riens, pur ceo que l'auter nad pas ascun droit d'aver la tenements solongue le purport de le dit fait, devant le liverie de seisin; et si nul liverie de seisin soit fait, donque apres le mort celui, que fist le fait, le droit de tiels tenements est maintenant en son heire, ou en ascun autre.

one to deliver to him seisin by force of the same deed, yet if livery of seisin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the tenements according to the purport of the said deed before livery of seisin made; and if there be no livery of seisin, then after the decease of him who made the deed, the right of these tenements is forthwith in his heire, or in some other.

Et un letter dat-torney a un home a deliver a luy seisin per force de mesme le fait.

Here first it appeareth that the authority to deliver seisin (as hath bin said) must be by deed (1): for letter d'attorney is as much as a warrant of attorney by deed, for *litteræ* doe signifie sometime a deed, as *litteræ acquietancie* doe signifie a deed of acquittance, and herewith [a] agreeth Britton.

2. Littleton here speakes generally a *un home*, and few persons are [b] disabled to be private attornies to deliver seisin; for mounks, infants, feme covert (2), persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attornies. A feme may be an attorney to deliver seisin to her husband, and the husband to the wife, and he in the remainder to the lessee for life.

3. It appeareth here that

the attorney must [c] pursue his warrant, otherwise he doth not deliver seisin by force of the deed, as Littleton speaketh. Now his authority is twofold, expressed in his warrant, and implied in law, both which he must pursue, and first of his expresse authority. A man seised of blacke acre and white acre makes a deed of feoffment of both, and a letter of attorney to enter into both acres, and to deliver seisin of both of them according to the forme and effect of the deed, and he entreth into blacke acre and delivers seisin *secundum formam cartæ*, this livery and seisin is good, albeit he did not enter into both, nor into one in the name of both; for when he delivereth seisin of one *secundum formam cartæ*, this is tantamount and implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of seisin to both, and the attorney make livery of seisin to one of the feoffees *secundum formam et effectum cartæ*, this is good to both, and yet in that case he that is absent may waive the livery (3). If lessee for life make a deed of feoffment and a letter of attorney to the lessor to make livery, and the lessor maketh livery accordingly, notwithstanding he shall enter for the forfeiture. But if lessee for yeares make a feoffment in fee and a letter of attorney to the lessor to make livery, and he make livery accordingly, this livery shall binde the lessor, and shall not be avoyded by him: for the lessor cannot make livery as attorney to the lessee, because he had no freehold, whereof to make livery, but the freehold was in the lessor (4). If the lessor make a deed of feoffment, and a letter of attorney to the lessee for yeares to make livery, and he doth it accordingly, this shall not drowne or extinguish his tearme, because he did it as a minister to another (6) and in another's right, and is accounted in judgement of law the act of the other and the feoffee claimeth nothing by him (7).

If one as procurator or attorney to another present to his owne benefice, he puts himselfe out of possession, because he commeth in by the induction and institution of the ordinary. If the tenant devise that the lord shall sell the land, and dieth, and the lord selleth it, the feignory remains. But if the lord or a grantee of a rent charge had been also *Ce que use* of the land, and after the statute of R. 3. and before the statute of 27. H. 8. *Ce que use* had made a feoffment in fee of the land, albeit the land passeth from the feoffees, and his feoffment is warranted by the power given to him by the statute, yet the feignory or rent charge is extinct by his feoffment, for that he hath not a bare authority as the attorney hath (8).

If a man be disseised of blacke acre, and white acre, and a warrant of attorney is made to enter into both and to make livery, there if the attorney enter into blacke acre onely and makes livery *secundum formam cartæ*, there the livery of seisin is void, because he doth lesse then his warrant (9).

(1) Vid. 1. Aff. 16. 26. Aff. 29. 35. Aff. 1. 12. H. 7. 27. 13. H. 7. 14. 4. H. 7. 13. 13. E. 4. 8. Hal' MSS.—(2) In another place lord Coke cites a passage from the Miroir, which excludes both infants and femes covert from being attornies. Post 128. a. But that is quite reconcileable with the doctrine here; for there publick attornies for prosecuting suits at law are meant, whose office cannot be properly executed without considerable knowledge and discretion; but here lord Coke in the first part of the sentence confines himself to private attornies to deliver seisin, which is an act so merely ministerial that it may be done by the most ignorant. See the case of Hearle and Greenough in 3. Atk. 695. and 1. Ves. 298. One question in that case was, whether a power of disposing of real estate could be well executed by an infant feme-covert of the age of 19; and lord ch. Hardwicke determined against the execution of the power, 1. because he thought in general, that such a power could not be well given to an infant, the disability of infancy being stronger than that of coverture; 2. because in the particular case it did not appear, that the power was intended to be given during infancy, the power being given notwithstanding coverture without the least notice of infancy; and 3. because it was a power coupled with an interest, the infant having a trust in equity for life, together with the trust of the inheritance subject to the power.—(3) Adjudged accordingly of livery to one feoffee. T. 1651. B. R. Troutman's case. Vide M. 31. 32. Eliz. C. B. Trevillian's case. A seised of two acres makes lease of one acre to B for years, and afterwards makes charter of feoffment of both acres and letter of attorney to B and C conjunctim et divisim to make livery; B makes livery in one acre and C in another, and adjudged good. Entered M. 30. 31. Eliz. Rot. 2908. Vide Bandl. n. 15. M. 32. 33. Eliz. 1868. Hal. MSS.—(4) Yet vide if lessee for years makes feoffment and livery, though lessor be on the land, it seems to be a forfeiture. Dy. 362. 363. 14. H. 7. Hal. MSS.—(5) Smyth's case. Hal. MSS.—(6) If A brings præcipe of C's land against B, and recovers, and C is made sheriff, and habere facias seisinam comes to him, he may return the special matter on account of the mischief. 13. H. 4. 15. 7. H. 6. 33. Hal. MSS.—(7) So it is of livery by the lord. H. 4. E. 6. Mo. n. 41. Trevillian's case supra. Hal. MSS. See notelq.—By the case of livery by the lord, it is meant, that if tenant makes feoffment of his tenancy and the lord as attorney makes livery, it shall not extinguish his feignory. Mo. 11.—(8) See supra note 7.—(9) Vid. 11. H. 4. 3. If there be feoffment on condition and letter of attorney to make livery accordingly, and livery is made absolutely, it is void and a disseisin. So e converso 12. Aff. 24. 26. Aff. 39.—H. 38. Eliz. B. R. Poph. n. 2.

Vid. Sect. 196.

[a] 24. E. 3. 27. 11. H. 7. 13. Britt. 101. b.

[b] 21. E. 4. 18. Br. feoffments, 50. 21. H. 6. 30. 13. E. 3. Attorney 73.

[c] 12. Aff. pl. 24. 26. Aff. 39. 11. H. 4. 3. 10. H. 7. 11. H. 7. 13. 40. Aff. 38. (9. Co. 76. b.)

27. Aff. 61. 41. Aff. 10. 41. E. 3. 17. (2. Leon. 73.)

(Post 310. 2. 359. a.)

Tr. 7. Eliz. in com. banco. (5) (Mo. 11. Cro. Ja. 177.)

17. E. 3. 61. (F. N. B. 35. O.)

(1. Co. 111. Post 265. b.)

(Post 252. b.)

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 67.

(1. Ro. Ab. 511.)

[1] Hil. 36. El. Rot. 492. Inter Stanton & Barnes, in ejectione firma, in the King's Bench. (Post 265. b. 1. Sid. 6.)

2. & 3. Ph. & M. Dyer 131. 17. El. Dyer. 40. (Mo. 91. 2. Sid. 65. 2. Leon. 19. Ante 48. b.)

[1] Pasc. 31. El. Rot. 514. in Com. Banc. inter Carter pl. & Claypole & al. def. In ejectione firma, & in brieve de error. Hil. 32. El. Rot. 791.

• Communis error fecit jus (ut dicitur) in contrarium. (2. Inst. 673. 2. Ro. Ab. 8. Cro. Eliz. 905.)

Pasc. 3. El. in Com. Banc. in Yarham's case.

22. H. 6. 6.

Bracton. li. 2. fo. 16. 40. Aff. pl. 38. 29. H. 6. 7. a. 14. E. 4. 2. 18. E. 3. 16. b. 11. H. 7. 13. &c.

18. H. 8. 3. 11. H. 7. 19. (1. Sid. 162.)

(4. Co. 119. b. Cro. Ja. 103. 6. Co. 38) Mich. 3. Ja. in Com. Banc. F. N. B. 223. 2. E. 3. offi. de Court. 29. Stamf. Prior. 30. (1. Ro. Ab. 331. 332.)

warrant for the estate of the disseisor in white acre cannot be divested without an entry. But there is a diversity between an authority coupled with an interest, and a bare authority (1). For example, a custome within a manor time out of mind of man used, was to grant certaine lands parcell of the said manor in fee simple, and never any grant was made to any, and the heires of his body, for life or for yeares; and the lord of the said manor did grant to one by copie for life, the remainder over to another, and the heires of his body: and it was [k] adjudged, that the grant and remainder over was good; for the lord having authoritie by custome, and an interest withall, might grant any lesser estate: for in this case, the custome that enableth him to the greater, enableth him to the lesser, *Omne majus in se continet minus*. But he that hath but a bare authority, as he that hath a warrant of attorney, must pursue his authority (as hath bene said) and if he doe lesse, it is voyd (2).

A man make a lease for life, and after make a charter of feoffment, with a letter of attorney to deliver seisin, the attorney enters upon the lessee, this is sufficient to convey away the reversion, for (3) (that it may be said once for all) livery of seisin being to perfect the common assurance of lands, is alwayes expounded favorably, *ut res magis valeat quam pereat*. And all this was adjudged and [7] resolved by the court of Common Pleas, and after affirmed by all the judges of the King's Bench, in a writ of error.

And it is to be knowne, that a deed of feoffment beginning *Omnibus Christi fidelibus, &c.* or *Sciatis presentes et futuri, &c.* or the like, a letter of attorney may be contained in such a deed; for one continent may containe divers deeds to severall perions; but if it be by indenture between the feoffor on the one part, and the feoffee on the other part, * there a letter of attorney in such a deed is not good, unlesse the attorney be made a partie in the deed indented (4).

Now the authoritie of an attorney implied in the law, is, though the warrant be generall, to deliver seisin: yet the attorney cannot deliver seisin within the view, for his warrant is intendable in law of an actuall and expresse livery and not of a livery in law, and so hath it bene resolved (5). See more hereof here next following.

Uncore si livery et seisin ne soit fait en la vie celui que fesoit le fait.

Here albeit the warrant of attorney be indefinite, without limitation of any time, yet the law prescribeth a time, as Littleton here saith, in the life of him that made the deed: but the death not only of the feoffor, of whom Littleton speaketh, but of the feoffee also, is a countermand in law of the letter of attorney, and the deed it selfe is become of none effect, because in this case nothing doth passe before livery of seisin. For if the feoffor dieth, the land descends to his heire, and if the feoffee dieth, livery cannot be made to his heire, because then he should take by purchase, where heires were named by way of limitation (6). And here-with agreeth Bracton, *Item oportet quod donationem sequatur rei traditio, etiam in vita donatoris et donatorij*. Therefore a letter of attorney to deliver livery of seisin after the decease of the feoffor is voyd (7).

Fourthly, in all cases the attorney must pursue the warrant in substance and effect that he hath to deliver seisin.

Fifthly, all this is to be understood of sole persons, or of a corporation or body consisting of one sole person, or a bishop person, &c. But it holdeth not in a corporation aggregate of many persons capable (8). And therefore if a maior and commonalty make a charter of feoffment, and a letter of attorney to deliver seisin, the livery of seisin is good after the decease of the maior, because the corporation never dieth (9). The like of a deane and chapter, *Et sic de similibus*.

Lastly, if the lessor by his deed licence the lessee for life or yeares, (which is restrained by condition not to alien without licence) to alien, and the lessor dyeth before the lessee doth alien, yet is his death no countermand of the licence, but that he may alien, for the licence exempteth the lessee out of the penaltie of the condition, and it was executed on the part of the lessor as much as might be. And so was it resolved, *Michael. 3. Jacob. in communibus Banco*. As if the king doth licence to alien in mortmaine, and dyeth, the licence may be executed after (10).

Sect. 67.

(F. N. B. Waste 55. Post 355.)

SI le le lessee fait waft. Waste, *Vastum dicitur à vastando*, of wasting and depopulating: and for that waft is often alledg- **ITEM** si tenements soient lesses a un home per term de demy an, ou pur le **ALSO** if tenements be let to a man for terme of halfe a yeare, or for a quarter of a quarter

n. 2. Slaving's case. A seised of the manors of B and C, and also of a mill in possession of I. S. by force of a lease for years makes charter of feoffment, with letter of attorney to enter into the said manors and all other the said lands and tenements and seisin thereof to take and after such possession and seisin taken such seisin and possession to deliver, &c. according to the form and effect of the deed. The attorney makes livery in the manors of C and B, but not of the mill, nor doth I. S. attorn. Ruled, that the mill doth not pass, but that the livery of the manors was well executed. Hal. MSS.

(1) See ante 49. b. and Post. 115. a. and 181. b.—(2) Vide these diversities. A makes letter of attorney to B C and D conjunctim et divisim to make livery. If two make livery, it is void, because it is neither conjunctim nor divisim. 27. H. 8. 6. But if one makes livery in one parcel, and another in another parcel, it is good. M. 31. 32. Eliz. Trevillian's case. But if two make livery in presence of the third, he not saying anything, it seems good. Dy. 63. But if authority be to six or any two of them to do an act, there if it be done by three it is good. 5. Rep. 91. Hoe's case. So where one devised, that his executors or any one of them might sell his land, and made three executors, and one died, and the other two sold, it was ruled good; for it is not so strict as conjunctim et divisim. M. 37. 38. Eliz. C. B. the case of Townsend and Whales. But if warrant be by sheriff to three bailiffs conjunctim et divisim, execution by two is good, because it is the execution of justice. M. 44. 45. Eliz. King and Hobbs. Hal. MSS. See ante 52. note 3. to which part this note more properly belongs. See also infra note 6.—(3) So such attorney may deliver seisin with assent of lessee for years, he being on the land. Adjudged P. 1651. B. R. Wegg and Villers. Hal. MSS.—See ante 48. b.—(4) Adjudged contra between Dicker and Noland. Hal. MSS. See also another case contra in Cro. Eliz. 905. The case cited by lord Hale is in 2. Ro. Abr. 8. pl. 12.—(5) Dy. 233. Sir Walter Denny's case. Hal. MSS.—(6) If A and B join-tenants in fee make charter of feoffment to C and D with letter of attorney to deliver seisin, and B or C dies, it is good as to the survivor. M. 32. 33. Eliz. W. 68.—(7) Vid. letter of attorney to deliver seisin after the feoffor's death in 40. Aff. 38. Nota by devise or by special custom authority may be created executory after the party's death. Lease to A for life, remainder to B for life, A dies, videtur, that livery cannot be made to B. P. 31. Eliz. B. R. W. n. 4. Peirce and Leverage. Hal. MSS.—(8) 11. H. 7. 27. 12. H. 8. 12. 5. H. 7. 25. 21. H. 7. 1. Hal. MSS.—(9) But it seems, that livery cannot be made till the new mayor is made. Hal. MSS.—(10) Vid. Plowd. Com. 457. contra in licence to the tenant to alien, ut videtur. Hal. MSS.

quarter de un an, &c. en tiel case, si le lessée fait wast, le lessor averra envers luy briefe de wast, et le briefe dirra, Quod tenet ad terminum annorum, mes il avera un speciall declaration sur le veritie de son matter, et le count nabatera le briefe, pur ceo que il puit aver nul autre briefe sur le matter.

yeares, &c. in this case if the lessee commit wast, the lessor shall have a writ of waste against him; and the writ shall say, *Quod tenet ad terminum annorum*, but he shall have an especiall declaration upon the truth of his matter, and the count shall not abate the writ, because he cannot have any other writ upon the matter.

ged to be in timber, which we call in Latine *maremium*, or *marefnum*, or *marefmium*, it is good to fetch both of them from the original. First, *timber* is a Saxon word. Secondly, *maremium* is derived of the French word *marreim*, or *marrein*, which properly signifieth timber.

An action of wast doth lie against tenant by the curtesie, tenant in dower, tenant life, foryeares, or halfe a yeare; or gardian in chivalry (1), by him that hath the immediate estate of inheritance, for wast or destruction in houses, gardens, woods, trees, or in lands (2); meadows, &c. or in exile of men to the disherison of him in the reversion or remainder.

V. Marlb. ca. 23. 2. part of the Instit. (F. N. B. 55.)

There be two kinds of wasts, viz. voluntary or actual, and permissive. [a] Wast may be done in houses, by pulling or prostrating them down, or by suffering the same to be uncovered, whereby the spars or rafters, plaunchers, or other timber of the house are rotten (3).

[b] But if the house be uncovered when the tenant cometh in, it is no wast in the tenant, to suffer the same to fall downe. But though the house be ruinous at the tenant's coming in, yet if he pull it downe, it is wast unless he reedifie it againe (4). [c] Also if glasse windowes (tho' glased by the tenant himselfe) be broken downe, or carried away, it is wast, for the glasse is part of his house. And so it is of wainscot (5), benches, doores, windowes, furnaces, and the like, annexed or fixed to the house, either by him in the reversion, or the tenant.

[d] Though there be no timber growing upon the ground, yet the tenant at his perill must keepe the houses from wasting. If the tenant doe or suffer waste to be done in houses, yet if he repaire them before any action brought, there lieth no action of wast against him, but he cannot plead, *Quod non fecit vastum*, but the speciall matter.

A wall uncovered when the tenant cometh in, is no wast if it be suffered to decay. [e] If the tenant cut downe or destroy any fruit trees growing in the garden or orchard, it is waste; but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste (6).

[f] If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste. [g] If the house fall downe by tempest, or be burnt by lightning, or prostrated by enemies, or the like, without a default of the tenant, or was ruinous at his coming in, and fall downe, the tenant may build the same againe with such materials as remaines, and with other timber which he may take growing on the ground for his habitation, but he must not make the house larger then it was. If the house be discovered by tempest, the tenant must in convenient time repaire it (7).

[h] If the tenant of a dove house, warren, parke, vivary, estanges, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is wast, and to suffer the pale to decay, whereby the deere is dispersed, is waste (8).

And it is to be observed, that there is wast, destruction, and exile. Wast properly is in houses, gardens, (as is aforesaid) in timber trees, (viz. oke, ash, and elme, and these be timber trees in all places) either by cutting of them downe, or topping of them, or doing any act whereby the timber may decay. Also in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber. [i] If the tenant cut down timber trees, or such as are accounted timber (10), as is aforesaid, this is wast, and if he suffer the young germins to be destroyed this is destruction [k] So it is, if the tenant cut down underwood, (as he may by law) yet if he suffer the young germins to be destroyed, or if he stub up the same, this is destruction.

[l] Cutting downe of willowes, beech, birch, aspe, maple, or the like, standing in the defence and safeguard of the house, is destruction. [m] If there be a quickset fence of white thorne, if the tenant stub it up, or suffer it to be destroyed, this is destruction (11), and for all these and the like destructions an action of wast lyeth. [n] The cutting of dead wood, that is, *Ubi arbores sunt aride, mortuae, cavae, non existentes macremium, nec portantes fructus, nec folia in aestate*, is

[a] 34. E. 3. Wast. 143. (4. Co. 62. Mo. 54. 2. Ro. Ab. 819.)

[b] 40. Aff. p. 22. 2. Mar. Dyer 117. 23. H. 6. 24. 10. H. 7. 2. 44. E. 3. 44. 29. E. 3. 33. 4. Co. 63. Herlakenden's case.

[c] 22. H. 6. 18. 12. H. 8. 1. 13. H. 7. 21. 22. E. 4. 18. 21. E. 4. 39. 10. H. 7. 2. Reg. Judic. 26.

[d] 44. E. 3. 21. 38. Aff. 1. 4. E. 3. Wast. 22. 10. El. Dyer 276. 5. Co. 119. in Whelpdale's case. 19. E. 3. Wast. 30. 44. E. 3. 44.

[e] 7. H. 6. 38. 44. E. 3. 44.

[f] 42. E. 3. 21. 49. E. 3. 2. 9. H. 6. 52. 17. E. 2. Wast. 118. (Hob. 234. 2. Ro. Ab. 814. 815. 820. 1. Ro. Ab. 507. cont. Mo. 7.)

[g] 4. Co. 63. Herlakenden's case. 43. E. 3. 6. 26. E. 3. 76. 11. H. 4. 32. 12. H. 4. 5. 22. H. 6. 18. 19. E. 3. Wast. 30.

[h] Temps E. 1. wast. 128. Brit. fo. 34. 5. R. 2. wast 97. 12. H. 8. 2. Pl. Com. 322. 7. H. 3. Wast. 141. (2. Ro. Ab. 814.)

[i] 22. H. 6. 12. 2. 9. H. 6. 1. 66. 11. H. 6. 1. F. N. B. 59. m. [j] 20. E. 3. Wast. 32. 10. H. 7. 2. 42. E. 3. 6. b. 5. E. 4. 100.

41. E. 3. wast. 82. 20. E. 3. wast. 32. 12. E. 4. 1. (9) [k] 40. E. 3. 15. b. & 35. 12. E. 4. 1. 12. H. 8. 1. b. 10. H. 7. 2. 8. E. 2. wast. 111. 4. E. 6. wast.

Br. 136. (Cro. Ja. 126. 4. Co. 63. 64. 1. Ro. Ab. 569.) [m] 46. E. 3. 17. 9. H. 6. 10. 12. H. 8. 1.

[n] 16. El. Dy. 332. 20. E. 3. Wast. 32. F. N. B. 59. m. no

- (1) Some of these were not punishable at common law. See Post 53. b. and 54. 2.
- (2) On writ of waste in lands, one cannot assign waste for cutting of trees, because for that the writ should be in boscis. Tr. 6. Eliz. More n. 200. Hal. MSS.
- (3) But the bare suffering them to be uncovered, without rotting the timber, is not waste. P. 9. Jac. C. B. Knoll's case. Converting two chambers into one, or converting a hand-mill into an horse-mill, is waste. H. 4. Jac. C. B. Grave's case. Hal. MSS.
- (4) But if an house built de novo was never covered in, it is not waste to abate it. 40. Aff. 12. Vid. 21. H. 6. 46. 26. E. 3. 26. Dy. 36. Hal. MSS.
- (5) It is said, that a tenant for years during his term may take away chimney pieces and even wainscott. See 1. Atk. 477. and 3. Atk. 13. and note there the distinction taken as to fixtures between the several cases of heir and executor, of tenant for life and him in remainder, and of landlord and tenant.
- (6) 14. H. 4. 12. Hal. MSS.
- (7) 12. H. 4. 5. Hal. MSS. — The 6. An. ch. 31. which was at first temporary, but is now made perpetual, enacts, that no action shall be prosecuted against any person, in whose house any fire shall accidentally begin, with a proviso that the act shall not defeat any agreement between landlord and tenant. See Post 53. b. and n. 5. there.
- (8) If B lessee of warren by charter or prescription ploughs the land, it is waste. Contra if it be only land stored with conies and not a legal warren. P. 40. Eliz. C. B. Moyle's case. C. C. n. 21. and T. 40. Eliz. n. 21. Vid. Noy n. 312. Moyle's case. Stopping and digging coney-boroughs not waste in a warren. Hal. MSS. See Noy 70.
- (9) 7. H. 6. 38. Dy. 35. Hal. MSS.
- (10) Beech and White-thorn may be timber by the custom of the country, and it is waste to cut them. M. 9. Jac. Palmer's case. Hal. MSS.
- (11) But cutting up of quick-sets is not waste, if it preserves the spring. M. 9. Jac. C. B. Palmer's case. Cutting of ash under the growth of 20 years not waste. M. 41. 42. Eliz. C. B. Hal. MSS.

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 67.

[o] 44 E. 3. 44. 20. E. 3. Waff. 32. F. N. B. 59. b. 19. E. 3. Waff. 20.

[p] 22. H. 6. 18. b. 9. E. 4. 35. 41. E. 3. Waff. 82. 17. E. 3. 7. 9. H. 6. 66. 2. H. 7. 24. F. N. B. 59. n. & 149. c. 20. E. 3. Waff. 32. (2. Ro. Ab. 815. 116.)

[q] Anno 6. El. Of the report of Justice Dailion in Griffin's case. 17. E. 3. 65. Brit. fol. 168. b. (Mo. 62. 69.)

[r] 20. H. 6. 1. F. N. B. 59. n. 6. El. ubi supra.

[s] 23. H. 8. Dyer 37. 22. H. 6. 24. 10. H. 7. 5. 2. 44. E. 3. 44. (2. Ro. Ab. 814. Cro. Ja. 182.)

[t] 16. El. Dy. 332. 21. H. 6. 47. 5. E. 4. 100. 12. E. 3. Waff. 28. 48. E. 3. 25. Temps. F. 1. 123. 20. E. 3. Waff. 32.

39. E. 3. Waff. 30. (Cro. Ja. 292)

[u] 3. E. 3. Waff. 5. Bracton lib. 4. fol. 315.

[v] Bracton fol. 168. Fleta lib. 1. cap. 11. 16. H. 3. Waff. 135. 3. E. 2. tit. Waff. 2. 17. E. 2. Waff. 118. 10. H. 7. 2. H. 6. 11. c. H. 6. 52. 11. E. 2. Waff. 113. F. N. B. 56. H. & 55. c. Regill. judic. 25.

[w] Glouc. cap. 5. W. 1. cap. 21. Magna Charta cap. 4. Merlebr. cap. 23.

[x] Bract. lib. 4. fol. 316. & 317.

[y] Fleta lib. 1. cap. 11.

[z] 7. E. 3. 54. b. 2. H. 5. 7. 22. H. 6. 24. 13. H. 7. 27. H. 8. 13. F. N. B. 59. f. 8. R. 2. Waff. 147 (6). (5. Co. 11.)

[a] 2. H. 4. 22.

[b] 2. H. 4. 2 (8).

[c] 10. E. 4. 1. 49. E. 3. 25. 23. H. 8. tit. Waff. Br. 38. E. 3. 17. 44. E. 3. 8. 45. E. 3. 3. 46. E. 3. 11. 11. E. 2. Waff. 115. 2. Mar. Waff. 117. 8. E. 2. Waff. 110 (9). (Ant. 42. a.)

[d] 24. E. 3. 27. 50. E. 3. 3. 8. H. 6. 13. (Post. 247. b. 5. Co. 75. 2. Ro. Ab. 834. Post. 218. b.)

[e] Bract. lib. 4. f. 315. 316. 317. Fleta lib. 1. cap. 11. Brit. fol. 168. Doct. & Stud. lib. 2. ca. 1. 12. H. 4. 3. 10. H. 3. Waff. 142. 20. H. 6. 1. 4. H. 3. Waff. 140. 9. H. 3. ibid. 136. (10. Co. 116. b.)

no wast; but turning of trees to coles for fewell, when there is sufficient dead wood, is wast.

[o] If the tenant suffer the houses to be wasted, and then fell down timber to repaire the same, this is a double wast. [p] Digging for gravel, lime, clay, brick, earth, stone, or the like, or for mines of mettall, coale, or the like, hidden in the earth, and were not open when the tenant came in, is wast; but the tenant may dig for gravell or chay for the reparation of the house, as well as he may take convenient timber trees (1).

[q] It is wast to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable: but if it be surrounded suddenly by the rage and violence of the sea, occasioned by winde, tempest, or the like, without any default in the tenant, [r] this is no wast punishable (2). So it is, if the tenant repaire not the bankes or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable (3).

[s] If the tenant convert arable land into wood, or *à converso*, or meadow into arable, it is waste, for it changeth not onely the course of his husbandry, but the proove of his evidencce.

[t] The tenant may take sufficient wood to repaire the walls, pales, fences, hedges and ditches, as he found them, but he can make no new (4): and he may take also sufficient plowbote, firebote, and other housebote.

The tenant cutteth downe trees for reparations and selleth them, and after buyeth them againe, and employs them about necessary reparations, yet it is wast by the vendition: he cannot sell trees, and with the money cover the house: burning of the house by negligence or mischance is waste (5).

[u] If a man make a lease for life and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding an action of wast shall lye, for the place wasted cannot be recovered without a plea.

[v] Bracton, Fleta, and Britton doe use the same division as is aforesaid, *viz. Vastum, destructio, et exilium*, in their proper signification.

Now somewhat is to be spoken of exile or destruction of men; exile or destruction of villaines, or tenants at will, or making them poore, where they were rich when the tenant came in, whereby they depart from their tenures, is wast. [a] And yet the statute of Glouc' speaketh not of exile, but it is comprehended under the general word of wast. The statute of W. 1. hath *destructio*, the statute of Magna Charta hath *vastum et destructio*, the statute of Merlebridge hath *vastum, venditionem et exilium in domibus, boscis, vel hominibus, &c.*

But wast and destruction in their larger sence are words convertible. [b] *Item de hoc quod dicit vastum et exilium, sciendum est quod non sunt referenda ad eundem intellectum, sed vastum et destructio fere idem sunt, vastum idem est quod destructio, et à converso, et se habent ad omnem destructionem generaliter.*

[c] *Vastum autem et destructio fere æquipollent et convertibiliter se habent in domibus, boscis, et gardinis; sed exilium dici poterit, cum servi manumittantur et à tenementis suis injuriose ejiciantur. Fortuna autem et ignis vel hujusmodi eventus inopinati omnes teneantes excusant.*

[d] No person shall have an action of wast, unlesse he hath the immediate state of inheritance, but sometime another shall joyne with him for conformity. As if a reversion be granted to two, and to the heires of one; they two shall joyne in an action of wast: and in like sort the surviving coparcener, and the tenant by the curtesie shall joyne in an action of waste: and if two joyntenants be, and to the heires of one of them, and they make a lease for life, they shall joyne in an action of waste (7). [e] If the estate tail determine, hanging the action of waste, and the plt. becomes tenant in taile after possibility, the action of waste is gone. [f] If the tenant doth wast, and he in the reversion dyeth, the heyre shall not have an action of waste for the waste done in the life of the ancestor; nor a bishop, master of an hospitall, parson, or the like in the time of the predecessor. [g] And so if lessee for yeares doth wast, and dyeth, an action of wast lyeth not against the executor or administrator, for waste done before their time. But if two coparceners be of a reversion, and waste is committed, and the one of them die, the aunt and the neece shall joyne in an action of waste (10).

[h] If lands be given to two and the heires of one of them, he that hath the fee shall not have an action of waste upon the statute of Glouc. for that they are joyntenants, but his heire shall have an action of waste against tenant for life.

Note after wast done there is a speciall regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done, for if after the waste he granteth it over, though he taketh backe the whole estate again, yet is the wast dispunishable. So if he grant the reversion to the use of himselfe and his wife, and of his heires, yet the wast is dispunishable, and so of the like, because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before (which consists in privy) is gone.

[i] A prohibition of waste did lye against tenant by the curtesie (11), tenant in dower, and a gardian in chivalry by the common law, but not against tenant for life, or yeares, because they

(1) Nota, though mines be open at the time, one cannot take timber to use in them. T. 16. Jac. Darcy's Case, Hutt. 19. Hob. n. 298. Hal. MSS.

(2) See Call. on Sew. 2d. ed. 146.

(3) Because he is bound to repair, though he doth hold the bank. 46. E. 3. Waste 91. Vid. T. 6. Eliz. Mo. n. 173. Hal. MSS.

(4) Tenant cannot make rails, where none were before. Dy. 332. Hal. MSS.

(5) But now by the 6. An. c. 31. no action will lie against the tenant for such an accident. See the statute more fully stated in note 7. ante 53. a. Note also the passage from Fleta cited *infra* by lord Coke.

(6) 17. E. 3. 50. Hal. MSS.

(7) Fine to the use of A for life, remainder to B in fee, with power for A to make leases for three lives; A makes lease accordingly, and the lessee commits waste: A and B shall join in waste. T. 4. Car. C. B. Sacheverell's case. Hal. MSS.

(8) 21. H. 6. 46. 39. E. 3. 15. 42. E. 3. 22. Hal. MSS.

(9) 18. E. 4. 16. 10. H. 7. 5. 2. E. 3. 2. Hal. MSS.

(10) Waste amongst tenants in common.—A makes lease to B for years of two parts of a messuage; B commits waste. It was ruled that waste lies, and shall be assigned in the intirety, but that the recovery should be of only two parts of the damages and of two parts of the place wasted. P. 35. Eliz. Poph. n. 2. Warnford's case. Hal. MSS.

(11) Some have thought, that at common law waste did not lie against tenant by the curtesy. See 2. Inst. 301.

they came in by their own act, and he might have provided that no waste should be done.

[i] A tenant by the curtesie or in dower can hold of none but of the heire, and his heires by descent, and therefore if they grant over their whole estate, and the grantee doth waste, yet the heire shall have an action of waste against them, and recover the land against the assignee: but if the heire either before the assignment had granted, or after the assignment doth grant the reversion over, the stranger shall have an action of waste against the assignee, because in both cases the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste (for it is in nature of a trespassse) unless it be in the case of a ward [k] for there if the gardian doth waste and assigne over, the action lieth against the assignee [l]. A gardian shall not be punished for waste done by a stranger, it is so penall unto him, for he shall lose the wardship both of the body and of the land (5), though the waste be but to the value of twenty shillings, and if that sufficeth not to satisfie for the waste, then he shall recover damages of the waste, over and above the losse of the ward. But tenant by the curtesie, tenant in dower, tenant for life, yeares, &c. shall answer for the waste done by a stranger, and shall take their remedy over. [m] But if there be two joyntenants of a ward, and one of them doe waste both shall answer for it.

[n] If the gardian doth waste and the heire within age bring an action of waste, the gardian shall lose the wardship as is aforesaid, but if the heire bring an action of waste at his full age, then he shall recover treble damages, for then he cannot lose the wardship.

[o] An infant and baron and fem shall be punished for waste done by a stranger, and so shall the wife that hath the state by survivour for waste done by the husband in his life time, if she agree to the estate, though there hath been variety of opinions in our bookes.

[p] But if fem tenant for life take husband, and the husband doth waste, and the wife dieth, no action of waste lieth against the husband in the *tenuit*, for he was seised but *in jure uxoris*, and his wife was tenant of the freehold; but if a fem be possessed of a terme for yeares, and take husband, and the husband doth waste, and the wife dieth, the husband shall be charged in an action of waste, for the law giveth the terme to him.

[q] If tenant for life grant over his estate upon condition, and the grantee doth waste, and the grantor re-enteth for the condition broken, the action of waste shall be brought against the grantee, and the place wasted recovered.

[r] If a lease for life be made to a villeine, and waste is done, the lord enteth, he shall not be punished for the waste done before, but for waste done after, he shall.

[s] An occupant shall be punished for waste, and so if an estate be made to A. and his heires during the life of B. A dieth, the heire of A shall be punished in an action of waste.

[t] If a lease be made to A for life, the remainder to B for life, the remainder to C in fee, in this case where it is said in the Register, and in F. N. B. that an action of waste doth lie, it is to be understood after the death or surrender of B in the meane remainder, for during his life, no action of waste doth lie (5).

But if a lease for life be made, the remainder for yeares, the remainder in fee, an action doth lie presently during the terme in remainder, for the meane terme for yeares is no impediment.

But if a man make a lease for life or yeares, and after granteth the reversion for yeares, the lessor shall have no action of waste during the yeares, for he himself hath granted away the reversion, in respect whereof he is to maintaine his action. (*) Otherwise it is, if he had made a lease in reversion which had been but a future interest, for there an action of waste lieth during the terme, and so is the booke to be understood, and the terme shall be saved in that case.

[u] No action of waste lieth against a gardian in socage, but an account or trespassse, nor against tenant by statute staple, &c. or *elegit* (6).

[w] If tenant for life or yeares or their assignee make a grant over, and notwithstanding take the profits, an action of waste lieth against him, by him in the reversion or remainder by the statute, *Nota* (7).

[x] If waste be done *sparfim* here and there in woods, the whole woods shall be recovered, or so much wherein the waste *sparfim* is done. And so in houses so many rooms shall be recovered wherein there is waste done, but if waste be done *sparfim* throughout, all shall be recovered. It hath beene said that if the hall be wasted, the whole house shall be recovered, because the whole house is denominated of the hall: but later authority is to the contrary.

[y] There is waste of a small value, as Bracton saith, *Nisi vastum ita modicum sit propter quod non fit inquisitio facienda*. Yet trees to the value of three shillings and foure pence hath beene adjudged waste, and many things together may make waste to a value (9). But let us now returne to our author (10).

Briefe de waste. See in the Register five severall writs of waste; two at the common law for waste done by tenant in dower, or the gardian; and three by speciall or statute law, for waste done by tenant for life, for yeares and tenant by the curtesie.

Briefe

(1) 7. E. 3. 34. Hal. MSS.

(2) 26. E. 3. Waste 10. is contra. Hal. MSS.

(3) Value of wardship not lost. Vid. Dy. 35. 28. H. 8. Bendl. n. 33. Hal. MSS.

(4) 3. E. 3. 18. Hal. MSS.

(5) But though action of waste doth not lie in this case on account of the intermediate remainder for life, yet a court of equity will interpose by injunction to prevent waste. See 3. Atk. 95. and 210.

(6) Vid. F. N. B. 58. Grantee of reversion shall have waste. Hal. MSS.

(7) F. N. B. 59. C. Hal. MSS.

(8) 3. E. 3. 24. Hal. MSS.

(9) Vid. Hil. 40. Eliz. C. B. n. 9. Thorne's case. C. C. Waste to the value of 4 d. Hal. MSS.

(10) It ought to be to the value of 40 d. at least. Noy n. 18. Thore and Thomas. Hal. MSS.—See Noy 4.—As lord Hale makes so frequent a reference to Noy's Reports, it may not be amiss to apprise the student, that though the book is known by the name of that very learned lawyer, yet there is not the least reason to suppose, that such a loose collection of notes was intended by him for the public eye. In an edition of Noy's Reports *penes editorem*, there is the following observation upon them in manuscript. *A simple collection of scraps of cases made by Serjeant Sizer from Noy's loose papers, and imposed upon the world for the reports of that vile prerogative fellow Noy.* This account of Noy's Reports, which was probably written soon after the first publication in 1656, though expressed in terms inexcusably gross, contains an anecdote not altogether useless.

(11) 9. H. 6. 66. Hal. MSS.

(2. Inst. 145. Pest 273. 299. b. 5. Co. 77. Stat. Glouc. c. 5.)

[i] F. N. B. 56. c. et f. Temps E. 1. Waste 122. 18. E. 3. 30. E. 3. 16. 38. E. 3. 23. 11. H. 4. 18. 4. E. 3. 25. Regist. 72. 3. Co. 23. Walker's case. 9. Co. 142. Beaumont's case (1). (2. Inst. 303. Dr. & Stud. lib. 2. c. 1.)

[k] 27. E. 3. 81. 26. E. 3. Waste 10 (2).

[l] 12. H. 4. 3. Bract. lib. 4. 316. 317. Fleta lib. 1. c. 11. Brit. 168. 34. E. 3. Waste 146. 44. E. 3. 27. F. N. B. 59. a. & 60. g. & T.

[m] 33. E. 3. Waste 6 (4).

[n] 44. E. 3. 27. 48. E. 3. 10. F. N. B. 60. r. 12. H. 4. 3. 19. E. 2. Waste 117. 41. E. 2. Waste 81. 3. E. 2. Waste 3. 7. E. 3. 12.

[o] 15. H. 3. Waste 16. temps E. 1. Waste 128. 2. H. 4. 3. E. 3. 13. 76. 11. Aff. 1. 217.

H. 6. 24. b. 33. H. 6. 31. 4. 42. E. 3. 22. 19. E. 3. Waste 246. 46. E. 3. 25. 7. H. 6. 2. b. 3. E. 3. 46. 10. E. 3. 17. 18. 9.

E. 3. 42. 9. E. 3. Waste 246. 17. E. 4. 7. 9. H. 6. 52. F. N. B. 36. b. Doct. & Stud. lib. 2. c. 1. 23.

H. 8. Waste 138. 8. Co. 442. Willingham's case.

[p] 5. Co. 75. Clifton's case. 49. E. 3. 25. 46. E. 3. Waste. Stat. tham. 10. H. 6. 11. 12. (2. Inst. 301.)

[q] 30. E. 3. 16.

[r] 48. E. 3. 19.

[s] 6. Co. 37. le Deane and Chapt. of Worcester's case 10. Co. 9. b. (2. Ro. Ab. 826.)

[t] 4. E. 3. 18. Cote's case. 3. F. 3. 18. F. N. B. 58. c. & 59. h. 50.

E. 3. 33. E. 3. Waste 144. 11. E. 3. Waste 118. 10. E. 4. 9. Regist. 74. 2. Co. 92. inter Pa-

get & Carie in Bingham's case. 5. Co. 76. Paget's case. 10. Co. 44. Jenning's case. F. N. B. 59. h. 4. E. 3. 18.

* 4. E. 3. 18. F. tit. Waste 18.

[u] Merlebridge cap. 17. 21. E. 3. 30. 16. E. 3. tit. Waste 100.

14. E. 3. Waste 107. 2. E. 2. Waste 1. 28. H. 6. Waste 9. 32.

H. 6. 7. F. N. B. 59. E.

[w] 11. H. 6. cap. 5. 5. Co. 77. Boothe's case.

[x] 8. E. 3. Waste 112. 4. E. 6. Waste 136. 4. E. 3. 32. 15. H. 7. 11. 15. E. 3. Waste 134.

temps E. 1. Waste 134. 18. H. 8. 1 (8).

[y] Bract. lib. 4. fo. 316. 38. E. 3. 7. b. 34. E. 3. Waste 146. 14. H. 4. 11. b. F. N. B. 60. c. temps E. 1. Waste 124. 19. H. 6. 8 (11).

Lib. 1. Cap. 7. Of Tenant for yeares. Sect. 67.

[z] Vid. Bract. lib. 5. f. 413. b. Fleta lib. 2. cap. 12. See the second part of the Institutes. W. 2. cap. 24.

De vasto. Bract. li. 4. f. 315. 316. 317. Fleta li. 1. c. 11. & li. 5. c. 33. Britton fol. 163. & 168. 46. E. 3. 31. F. N. B. 60. c. 4. E. 4. 13. 37. H. 6. 26. b. 7. H. 7. 2. 14. H. 8. 12. 13. E. 3. 27. (Dr. & Stud. li. 1. ca. 23.)

Vide Marlebridge, ca. 23. 2. part of the Institutes.

[a] 12. H. 8. 1. (11. Co. 47. 79. b. Mo. 23.)

F. N. B. fo. 127.

(Hob. 234.)
[b] 17. E. 3. 7. 9. H. 6. 66. 12. H. 6. 18. 9. E. 4. 35. 12. E. 4. S. F. N. B. 149. c. & 59. n.
[c] 5. Co. 12. Sanders' case. (1. Co. 46.)

[d] 19. E. 2. Covenant 25. 19. E. 3. Covenant 24. 32. E. 3. Quid juris cl. 5. 17. E. 3. 20. 46. E. 3. 31. 40. E. 3. 5. 11. H. 4. 34. 14. Eliz. Dyer 309. M. 40. & 41. Eliz. in Com. Banc. Rot. 2215. in tresp. inter Sparke & Sparke. Hill. 42. Eliz. Sir John Savage's case in Curia Wardorum. (2. Ro. Abr. 47. 418. Mo. 100. 339. 666. 2. Leon. 6. Yelv. 85.)

Briefe dirra. The writs original of the register [z] (as Bracton saith) were formed, and of course had their first authority by act of parliament, and therefore without an act of parliament they cannot be altered, or changed, which is proved by the statute of W. 2. cap. 24. whereby remedy is provided in many cases. But heare what Bracton saith. *Sunt quedam brevia formata in suis casibus, et quedam de cursu, quæ concilio totius regni sunt approbata, quæ quidem mutari non possunt, absque eorundem contraria voluntate. Magistralia autem sæpe variantur secundum varietatem casuum, &c.* And this is the reason that in this case of halfe a yeare the words of the writ shall be without change, *Quod tenet ad terminum annorum*, and the pl' must make a speciall declaration according to his case, for otherwise he should be without remedy. In this particular case the statute of Glouc. cap. 5. which giveth the action of waste against the lessee for life or yeares (which lay not against them at the common law) speaketh of one that holdeth for tearme of yeares in the plurall number, and yet here it appeareth by the authority of Littleton, that although it be a penall law, whereby treble damages and the place wasted shall be recovered, yet a tenant for half a yeare being within the same mischiete, shall be within the same remedie, though it be out of the letter of the law, for *Qui hæret in littera, hæret in cortice*, which is an excellent example, whereupon in many like cases a man may settle a certaine judgment. You may observe in the said ancient authors, what remedie was given for wast at the common law, and against whom, and what was adjudged waste, destruction, and exile.

In many cases a tenant for life or yeares may fell down timber to make reparations, albeit he be not compellable thereunto, and shall not be punished for the same in any action of waste. As [a] if a house be ruinous at the time of the lease made, if the lessee suffer the house to fall down he is not punishable, for he is not bound by law to repaire the house in that case. And yet if he cut down timber upon the ground so letten, and repaire it, he may well justifie it, and the reason is, for that the law doth favour the supportation and maintenance of houses of habitation for mankind. And therefore if two or more joyntenants or tenants in common be of a house of habitation, and the one will not repaire the house, the other shall have by the law a writ *de reparatione facienda*, and the writ saith, *Ad sustentationem ejusdem domus teneantur*. So it is if the lessor by his covenant undertaketh to repaire the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repaire it though he be not compellable thereunto (1). In the same manner, if a man make a lease of a house and land without impeachment of waste for the house, yet may the lessee with the timber upon the ground repaire the house, though he may utterly waste it if he will, and so in many other cases. A man hath land in which there is a mine of coales, or of the like, and maketh [b] a lease of the land (without mentioning any mines) for life or for yeares, the lessee for such mines as were open at the time of the lease made, may digge and take the profit thereof. [c] But he cannot digge for any new mine, that was not open at the time of the lease made, for that should be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines onely, and not to any hidden mine (2), but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may digge for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious, concerning this learning of waste, for that it is most necessary to be knowne of all men (3).

Now hath Littleton spoken of an estate for life, and an estate for yeares in severall persons. Now let us see how they stand *simul* and *seml* in one person.

If a man letteth lands to another for life, the remainder to him for 21 yeares, he hath both estates in him so distinctly, as he may grant away either of them; for a greater estate may uphold a lesser, but not *à converso*, and therefore if a man make a lease to one for 21 yeares, the remainder to him for terme of his life, the lease for yeares is drowned.

[a] If a man make a lease for life to one, the remainder to his executors for 21 yeares, the terme for yeares shall vest in him (4), for even as ancestor and heire are *correlativa*, as to inheritance: (as if an estate for life be made to A the remainder to B in taile, the remainder to the right heires of A the fee vested in A as it had been limited to him and his heires) even so are the testators and the executors *correlativa* as to any chattell. And therefore if a lease for life be made to the testator, the remainder to his executors for yeares, the chattle shall vest in the lessee himselfe, as well as if it had been limited to him and his executors.

CHAP.

(1) But if lessee covenants to repaire and doth not repaire, waste will not lie. 29. E. 3. 43. 21. H. 6. 6. Dy. 198. Hal. MSS.

(2) See ante 53. b. and n. 1. there.

(3) See further as to waste in the severall Abridgments, title Waste, and Fulb. 2. part Paral. Dial. 5. fol. 49. b.

(4) 50. Aff. 1. And per curiam in Sparke's case adjudged, that it shall go to the administrator. Vide tamen M. 44. 45. Eliz. Moore's Reports, n. 911. contra. Vid. 4. & 5. P. & M. Bendl. n. 115. Gravenor's case. Hal. MSS.

CHAP. 8. Sect. 68.

Of Tenant at will.

TENANT à vol-
lunt est, ou terres
ou tenements sont
lesses per un home
a un auter, a aver
et tener a luy a la
volunt le lessor, per
force de quel lease
le lessée est en pos-
session. En tiel cas le
lessée est appel tenant
a volunt, pur ceo que
il nad ascun certaine
ne sure estate, car le
lessor luy poit ouster
a quel temps que il
luy plerroit. Uncore si
le lessée emblea la terre,
et le lessor, apres lem-
bleer et devant que les
bles sont matures,
luy ousta, uncore le
lessée avera les bles, et
avera frank entre e-
gres et regres a scier
et de carier les bles,
pur ceo que il ne scarvoit
a quel temps le lessor
voloit entre sur luy.
Auterment est si te-
nant pur terme dans
que conust le fine de son
terme emblea sa terre,
et le terme est finy de-
vant que les bles sont
matures. En ceocas le
lessor, ou celuy en la

TENANT at will
is, where lands
or tenements are let
by one man to an-
other, to have and to
hold to him at the will
of the lessor, by force
of which lease, the les-
see is in possession. In
this case the lessee is
called tenant at will,
because he hath no
certain nor sure estate,
for the lessor may put
him out at what time
it pleaseth him. Yet if
the lessee soweth the
land, and the lessor, af-
ter it is sown and be-
fore the corne is ripe,
put him out, yet the
lessee shall have the
corne, and shall have
free entry egress and
regress to cut and ca-
rie away the corne,
because he knew not
at what time the les-
sor would enter upon
him. Otherwise it is
if tenant for yeares,
which knoweth the
end of his terme, doth
sow the land, and his
terme endeth before
the corn is ripe. In this
case the lessor, or he in

TENANT à vo-
lunt est, ou terres
ou tenements sont
lesses per un home a un
auter, a aver et tener
a luy a la volunt le les-
sor, &c.

(1) It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be onely at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the bookes, that seeme *prima facie* to differ, cleerly reconciled (3).

Pur ceo que il nad
ascun certaine ou sure
estate, &c.

Alia possessio est præcaria, et alia pro prece concessa, ut si quis sine scripto concesserit alicui habitationem vel usumfructum in re sua tenenda ad voluntatem suam, hæc quidem possessio præcaria est et nuda, eo quod tempestive et in-tempestive pro voluntate domini poterit revocari.

Uncore si le lessée em-
blea la terre, et le lessor
apres le embleer, &c.

(4) The reason of this is, for that the estate of the lessee is uncertain, and therefore least the ground (5) should be unmanured, which should be hurtfull to the common-wealth, he shall

Fleta lib. 3. cap. 13.

(1. Ro. Abr. 853.)

18. H. 6. 1. 38. H. 6. 21. 9. E. 4.

1. b. 10. E. 4. 18. b. 21. H. 7.

38. 13. H. 8. 16. 14. H. 8. 11.

14. (2)

Fleta lib. 3. cap. 15.

(5. Co. 85. a. 1. Sid. 339.)

(1) 21. H. 6. 37. Lease for years with proviso that lessor may enter at his will is a lease at will. Per Past.—21. H. 6. 37. A grants to B that he may sow A's land, which is done accordingly; yet A shall have the emblements, because B hath not an interest. Per Past. Hal. MSS.—See acc. as to the former case 14. H. 8. 12. and by Yelverton justice in Litt. Rep. 235. and Hetl. 128.

(2) 49. H. 6. 18. 20. E. 4. 9. Hal. MSS.

(3) See further as to the manner in which an estate at will may be created by act of the parties, or arise by act of law. Vin. Abr. Estate S. b. and T. b. Com. Dig. Estates H. 1. 2. In 4. Burr. v. 3. page 1609. it is said, that in the country leases at will in the strict legal notion being found extremely inconvenient exist only notionally. But this observation I presume means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words, and that the judges incline strongly against implying them. See 2. Blackst. Comment. 147.

(4) 9. E. 3. 24. is according to Littleton's diversity, and so is the 11. H. 4. 90. But lessee at will in such case of entry of the lessor before sowing shall not have the costs of plowing and manuring. Hal. MSS.—See f. c. acc. in Bro. Abr. Emblements pl. 7. and tenant by copie pl. 3.

(5) But if lessor covenants, that lessee for years shall have the emblements which are growing at the end of the term, there the property of the corn is well transferred to the lessee, though it be not severed during the term. Hob. case 175. Grantham and Hawley.—Hal. MSS. See Hob. 132.

shall reape the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes, or sow hempe or flax, or any other annual profit, if (1) after the same be planted, the lessor oust the lessee, or if the lessee dieth,

reversion avera les the reversion shall have *blees, pur ceo que le* the corne, because the *termor conust le cer-* lessee knew the cer- *taintie de sa terme* tainty of his terme and *quant sa terme ser-* when it would end. *roit finy.*

18. E. 4. 13. (Cro. Cha. 515.)

Temps E. 1. br. 25. 10 Aff. pl. 6. 10: E. 3. 29. 45. E. 3. 1. 7. H. 4. 17. 7. Aff. 19. 5 Co. 116. Oland's case. (2. Lill. 81. Hob. 132. 5. Co. 85. 1. Ro. Abr. 727.)

[a] 8. Aff. 21. S. E. 3. 54. Dyer 316. (6) (Cro. Cha. 515.)

[b] 16. H. 6. 6.

[c] 5. Co. 116. Oland's case. (9)

(1. Ro. Abr. 726)

[d] Oland's case ubi supra. (Dy. 31. 11. Co. 51. b.)

[e] 33. E. 3. tresp. F. 254. 42. E. 3. 25. Oland's case ubi supra.

[f] 27. H. 6. 1. 37. H. 6. 6. 22. E. 4. 45. 14. E. 4. 6. 15. E. 4. 31. 2. H. 7. 1. 5. H. 7. 17. 12. H. 7. 25. 10 H. 4. 1. 28. H. 8. 32. Dyer.

[g] 44. E. 3. 15. Fleta lib. 3. cap. 15.

[h] 35. H. 6. 24. 21. H. 6. 9. 1. E. 4. 3. 21. E. 4. 5. Pl. Com. parlon de Honyland's case.

(1. Ro. Abr. 860. Post 245. b. 8. Co. 89. 5. Co. 90.)

14. E. 4. 6. 8. E. 4. 11. &c.

[a] 5. Co. 10. Henstead's case. 10. Eliz. Dier 269. b.

yet he or his executors shall have that yeare's crop. But if he plant yong fruit trees, or yong okes, ashes, elmes, &c. or sow the ground with acornes, &c. there the lessor may put him out notwithstanding, because they will yeeld no present annuall profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corne sowne, &c. but to every particular tenant that hath an estate incertaine, for that is the reason which Littleton expresseth in these words (*Pur ceo que il nad aucun certaine ou sure estate*) (2). And therefore if tenant for life soweth the ground, and dieth, his executors shall have the corne, for that his estate was uncertaine, and determined by the act of God (3). And the same law is of the lessee for yeares of tenant for life (4). So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corne, and if his wife die before him he shall have the corne (5). But if husband and wife be jointenants of the land, and the husband soweth the ground and the land surviveth to the wife, it is said [a] that she shall have the corne (7). If tenant *pur terme d'auver* soweth the ground, and *Cesly que vie* dieth, the lessee shall have the corne. If a man seised of lands in fee hath issue a daughter and dieth, his wife beeing *enfeint* with a son, the daughter soweth the ground, the sonne is borne, yet the daughter shall [b] have the corne, because her estate was lawful and defeated by the act of God, and it is good for the common-wealth that the ground be sowne (8). [c] But if the lessee at will sow the ground with corne, &c. and after he himselfe determine his will and refuseth to occupy the ground, in that case the lessor shall have the corne because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband [d] the lessor shall have the emblements, because that the determination of her owne estate grew by her owne act. But where the estate of the lessee being incertaine is defeasible by a right paramount, or if the lease determine by the act of the lessee as by forfeiture, condition, &c. [e] there he that hath the right paramount, or that entreteth for any forfeiture, &c. shall have the corne (10).

If a disseisor sow the ground and sever the corne, and the disseisee re-enter, [f] he shall have the corne, because he entreteth by a former title, and severance or remooving of the corne altereth not the case, for the regresse is a recontinuacion of the freehold in him in judgment of law from the beginning (11).

[g] If tenant by statute merchant soweth the ground, and then a sudden and casuall profit falleth by which he is satisfied, he shall have the emblements (12).

Le lessor luy puit ouster. There is an expresse *ouster*, and implied *ouster*, an expresse, as when the lessor commeth upon the land, and expressely forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut downe a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawfull albeit the will doth continue. If a man leaseth a manor at will whereunto a common is appendant, if the lessor put in his beasts to use the common, this is a determination of the will (13). The lessor may by actual entry into the ground determine his will in the absence of the lessee (14), but by words spoken from the ground the will is not determined untill the lessee hath notice (15). No more then the discharge of a factor, attorney, or such like in their absence is sufficient in law untill they have notice thereof.

[a] If a woman make a lease at will reserving a rent and she taketh husband, this is no countermand of the lease at will, but the husband and wife shall have an action of debt for the rent; and so it is if a lease be made to a woman at will reserving a rent, and the lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt or distreine them for the rent. So if the husband and wife make a lease at will of the wife's land reserving a rent and the husband die, yet the lease continueth. In like manner if a lease be made by two to two others at will, and the one of the lessors or of the lessees die, the lease at will is not determined in neither of those cases; which are necessary points to be knowne (16).

Après lembler et devant que les blees sont matures. Then put the case that the corne is ripe and ready to cut downe, and the lessor, before the lessee reapeth it, enter and put out the lessee, whether shall the lessee have the corne? and it is without all question that the lessee shall have it, for by the same reason that he shall have it when he is put out before it

(1) If lessee for life of a hop-ground dies in August before severance of the hops, the executor shall have them, though growing on ancient roots. Adjudged M. 13. Car. B. R. Crook n. 13. Latham and Atwood.—Hal. MSS. See Cro. Cha. 515.

(2) A seised in fee sows the land, and devises to B for life, remainder to C in fee, and dies before severance. Ruled 1. The executor of A shall not have the emblements. 2. If B dies before severance, his executor shall not have them, but they shall go to him in remainder. But, 3. if the devise had been only to B, and B had died, there the executor of B should have had the corn, though B did not sow. M. 20. Jac. C. B. n. 22. Spencer's case. Winch. 51. M. 5. Jac. C. B. Skele and Arnold. Vid. Hob. 132. Hal. MSS.—See acc. as to the first point Cro. Eliz. 61. Yet it seems agreed, that executors shall have the corn growing as against an heir. See Hob. 132. 3. Salk. 160. 1. Ventr. 187. 3. Atk. 16. the opinion of Saund. ch. j. in Lill. Pract. Reg. tit. Emblements, and the year-books cited in Com. Dig. Biens G. 2. It is not easy to account for this distinction, which gives corn growing to the devisee, but denies it to the heir; though it has been attempted. See Gilb. Law of Evid. 250.

(3) Whether executor of tenant in dower shall pay rent on the statute of Merton, vid. Keilw. 125.—Hal. MSS: This annotation by lord Hale requires explanation. By the statute of Merton 20. H. 3. c. 2. the widow may devise the corn on the land she holds in dower, which, as some of our most ancient writers have thought, she could not do before; but the statute saves customs and services due in respect of the land which the widow held in dower. Now in the case in Keilway it is asserted, that under this statute the wife's executors may retain the land till they can reasonably carry the corn out of the land; and this I apprehend gave occasion to the query, whether the executors shall not pay rent. See 2. Infl. 80. 81.

(4) See Gouldsb. 144.

(5) But it is said, that if the land was sown before the marriage, the wife shall have the corn. 1. Ro. Abr. 727. pl. 17.

(6) 7. Aff. 13. 10. Aff. 6. 7. E. 3. 57. Hal. MSS.

(7) In Skele and Arnold M. 5. Jac. C. B. n. 5. D. D. the court was divided on the point, whether the wife should have the emblements; but it was adjudged, that she should not. But in P. 26. El. C. B. n. 4. E. E. in Brewster's case, it was adjudged, that the wife shall have them. Hal. MSS.—See Skele and Arnold in 1. Ro. Abr. 727. pl. 16. Noy 149. and Dy. 316. a. in marg. and further on the subject in the books cited Vin. Abr. Emblements pl. 16. and Com. Dig. Biens G. 2.

(8) See

it be ripe, he shall have it when he is put out when it is ripe, *Et ubi eadem est ratio, ibi idem jus.*

Et auxi franke entrie, egres et regres. [b] For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary, for the taking and enjoying of the same, *quando lex aliquid alicui concedit, concedere videtur et id, sine quo res ipsa esse non potest* (1), and the law in this case driveth him not to an action for the corne, but giveth him a speedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to cary it before it be ready to be caried; and therefore the law giveth all that which is convenient, *viz.* free entry, egress and regress as much as is necessary.

If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon his case, and recover his damages, and this action the law doth give unto him, for whensoever the law giveth any thing, it giveth also a remedy for the same. But here is to be observed a diversity betweene a private way, whereof Littleton here speaketh, and a common way. For if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shal he not have an action upon his case; and this the law provided for avoyding of multiplicity of suites, for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an apt remedy, and that is by presentment in the leete or in the torne, unless any man hath a particular damage, as if he and his horse fall into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action upon his case (2); and all this [c] was resolved by the court in the King's Bench. And in that case it was said, that it had bene adjudged in that court betweene Westbury and Powell, that where the inhabitants of Southwarke had by custome a watering place for their cattell which was stopped up by Powel, that in that case any inhabitant of Southwarke might have an action; for otherwise they should be without remedy because such a nuisance is not presentable in the leete or torne. Note the diversity.

There be three kinde of wayes, whereof you shall [d] reade in our ancient bookes. First a foot way, which is called *Iter, quod est jus eundi vel ambulandi hominis*, and this was the first way.

The second is a foot way and horse way, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or *prime way*, and a *packe* or *drift way* also.

The third is *via* or *aditus*, which containes the other two, and also a cart way, &c. for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*; and this is twofold; *viz.* *regia via*, the king's high way for all men, *et communis strata*, belonging to a city or towne, or betweene neighbours and neighbours. This is called in our bookes *chimin*, being a French word for a way, whereof commeth *chiminage chiminagium*, or *chimmagium*, which signifieth a toll due by custome for having a way through a forest; and in ancient records it is sometime also called *pedagium* (3).

If the lessee at will by good husbandry and industry, either by overflowing or trenching, or compassing of the meadows, or digging up of bushes or such like, make the grasse to grow in more abundance, yet if the lessor put him out, the lessee shall not have the grasse, because that the grasse is the naturall profit of the earth. And the same law is if he doth sow hay-feed, and thereby encreaseth the grasse.

Auterment est si tenant pur terme dans que conust le fine de son terme, &c. Well said Littleton (which knoweth the end of his terme) that is, where the end of the terme is certaine; but where the lease for yeares depends upon an uncertainty, as upon the death of tenant for life being made by him, or of a husband seised in the right of his wife, or the like, there it is otherwise.

Sect. 69.

ITEM si un mese soit lessé a un home a tener a volunt, per force de quel le lessé enter en le mese, deins quel mese brings his household- **SI** un mese soit lessé a un home a tener a volunt, &c. The reason of this is evident upon that which hath bene said before.

Mese, or Maison, called

(1) See further on this maxim Finch. Disc. on Law 63. and Finch. Descript. of Law 16. b.

(2) On special damage action on the case lies for not repairing, as well as for a nuisance in the highway. P. 1657. C. B. Adjudged. 18. E. 4. Hal. MSS.

(3) See further as to ways, tit. *Chimin* in Com. Dig. and Vin. Abr. and tit. *Highway* in New Abr. and Burn. Just.

(8) See ante 11. b. and n. 4. there in respect to intermediate profits, where an estate vested is divested by the birth of a posthumous child. To the observation in that note it may be useful to add, that there is an important distinction as to mesne profits between real estate and personalty. The law will not permit the freehold of land, except in certain special cases, to be in abeyance; and therefore where an estate is to arise on a contingency, the freehold must vest in some person in the *mean time*, either in the heir or some other person who takes subject to the contingency, and that person, whoever he is, has the right to the *mesne* profits for his own benefit, unless they are otherwise disposed of by *express* provision of the parties, as in the case of trustees to preserve contingent remainders who are generally directed how to apply the profits they receive, or by act of parliament, as by the 10. & 11. W. 3. c. 16. which preserves contingent remainders for posthumous children, where there are no trustees for that purpose, and gives such children the estate *in the same manner as if they were born in the life-time of the father*, and is therefore construed to carry the profits from the father's death. But the case of personalty is different, for the right to that may be in suspense and contingency, and generally during the time it continues so the profits accumulate till the vesting of the capital happens, and then are added to that and belong to the same person. See 3. P. Wms. 305. 2. Atk. 473. and Fearn. on Conting. Rem. 2d. ed. 173. — (10) Vid. 20. E. 3. *Trespass* 194. 46. *Ass.* 2. Hal. MSS. — (11) According to some of the *antient* authorities, the disseisor shall have the emblements, if the disseisee's entry is *after* severance. See many books cited on this subject in Vin. Abr. *Emblements* 54. The more modern cases are with lord Coke. See Dy. 31. b. Dal. 30. Mo. 24. and 11. Co. 51. b. — (12) See further on this subject infra and also Perk. sect. 512. to 524. Vin. Abr. *Emblements* per tot. and *Executors* U. Com. Dig. *Biens* B. C. and G. New Abr. *Executors* and *Administrators* H. 3. and Gilb. Law of Evid. 242. to 252. — (13) Vid. 11. H. 6. 28. by *Cottes*. lessor's granting a rent-charge doth not determine his will, nor are the lessee's cattle distrainable. Whether the will be determined, if lessor or lessee be outlawed, see 9. H. 6. 20. 5. Rep. 116. Hal. MSS. — Rolle makes a *quare* on the case of the rent-charge. The doubt seems reasonable, for the lease at will and the rent-charge clash with each other. If the grantee has the remedy by distress, that makes the tenant's chattels liable to seizure for money not due by his contract. On the other hand,

[b] Temps E. 1. tit. Grant 4. 9. E. 4. 35. 5. E. 3. *tresp.* 13. 21. H. 7. 14. b. 8. H. 6. 18. b. 2. R. 2. barre 237. 14. H. 8. 2. 27. H. 8. 18. b. (11. Co. 52.)

(5. Co. 100. 104. b. 1. Ro. Ab. 88. Cro. Jam. 446. 491. F. N. B. 176. b. Cro. Jam. 158.)

[c] 27. H. 8. 27. 2. E. 4. 9. 5. E. 4. 2. Tr. 41. Eliz. betweene Finienn and Hovenden. Vid. 5. Co. 72. Williams's case.

[d] Fleta lib. 4. cap. 27. Bracton lib. 4. fol. 132. (1. Ro. Ab. 390)

32. E. 3. barre 261. 27. E. 3. 78. 6. E. 3. 23.

Carta de foresta cap. 14.

(F. N. B. 149. Ante 32. 2. Post 171. 2. 179. 2.)

(1. Co. 32. a.)

[a] 31. El. ca. 1. in Doomsday.

[b] Rev. 153. F. N. B. 127. 4. E. 2. Vouch. 244. Six acres of land may be parcel of a house. (Post 200. b.)

[c] 22. E. 4. 27. 34. H. 6. 40. (Cro. Jam. 335. 204. Hob. 69. 135. 2. Instit. 476. 2. Ro. Rep. 143. 152. 1. Ro. Abr. 523. 2. Ro. Abr. 578. 5. Co. 100. a.)

[d] Braet. li. 2. ca. 52. b. (Post. 59. b. 62. a.)

[e] 2. H. 6. 15. 21. H. 6. 30.

called in legall Latine *messuagium*, containeth (as hath beene said) the buildings, curtelage, orchard, and garden (1).

Cottage, *cotagium* is a little house without land to it. [a] See 31. Eliz. cap. 1. and cottagers in Domesday booke are called *cotterelli*: and in ancient records *baga* signifieth a house. If a man hath a house neer to my house, and he suffereth his house to be so ruinous as it is like to fall upon my house, [b] I may have a writ *de domo reparanda*, and compell him to repair his house (2). But a *praecipe* lieth not *de domo*, but *de messuagio*.

Per reasonable temps.

[c] This reasonable time shall be adjudged by the discretion of the justices, before whom the cause dependeth; and so it is of reasonable fines, customes, and services, upon the true state of the case depending before them: for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. [d] *Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum.* And this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing, that is contrary to reason, is consonant to law.

[e] *Sicome home seisi dun mese en fee simple, ou fee taile, &c.* This is so evident, as it needeth no explanation.

il porta ses utensils de meason, et puis le lessor luy ousta, uncore il avera franke entre egressse et regresse en mesme le mese per reasonable temps, de carrier ses biens et utensils. Sicome home seisse dun mese en fee simple, fee taile, ou pur terme de vie, le quel ad certaine biens deins meme le mese, et fait ses executors, et devy; quecunque apres sa mort ad le mese, uncore les executors averont frank entry egressse et regres de carier hors de mesme le mese les biens lour testator per reasonable temps.

stuff into the same, and after the lessor puts him out, yet he shall have free entrie, egressse and regresse into the said house, by reasonable time to take away his goods and utensils. As if a man seised of a mese in fee simple, fee taile, or for life, hath certaine goods within the sayd house, and makes his executors, and dieth; whosoever after his decease hath the house, his executors shall have free entrie egressse and regresse to carrie out of the same house the goods of their testator by reasonable time.

Sect. 70.

(1. Ro. Abr. 859. 2. Co. 55. b.)

HERE it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreteth by the consent of the feoffor.

Et deliver a luy le fait. Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its naturall effect to make it a deed. [f] *Donationum alia perfecta, alia incepta et non perfecta: ut*

(6. Co. 26. Ante 48. a.) [f] Flet. li. 3. ca. 3. & ca. 15. 43. E. 3. tit. Feof. & Faits 51. 35. H. 8. Feof. Br. 27. Aff. 61. 38. Aff. 2. 39. Aff. 12. 41. E. 3. 17. 6. Co. 26. Sharp's case.

ITEM si un home fait un fait de scoffement a un autre de certaine terre, et deliver a luy le fait, mes nemy livery de seisin; en ceo case celui, a que le fait est fait, poit enter en le terre, et tener et occuper a la volunt celui, que fist

ALSO if a man make a deed of feoffement to another of certaine lands, and delivereth to him the deed, but not livery of seisin; in this case he, to whom the deed is made, may enter into the land, and hold and occupie it at the will of him, which

(1) See ante 5. b. note 1. where some authorities are cited to shew, how much will pass by the word *messuage*.

(2) Also an action on the case will lye for damages arising from the neglect to repair. See Fitzh. N. Br. ed. 1730. p. 296. note 2.

hand, if the grantee of the rent charge cannot distrain, he is left without that remedy, which by the grant is expressly given to him. See 1. Ro. Abr. 860. As to the case of outlawry, see Vin. Abr. *Estate* 2. b. pl. 1. In 2. Ventr. 248. one of the books cited, lord Hale says, that outlawry is not a determination till seizure.—(14) Nota, if lessee at will is ousted by a stranger, he may re-enter and continue tenant at will; but if he accepts of a new lease from a stranger after such ouster, it has been holden, that his re-entry will not re-vest the estate in the ancient lessor. Hal. MSS. See Vin. Abr. *Estate* A. c.—(15) So if lessee says, that he will not hold any longer, it is not a determination of the will, unless he waives the possession. 20. H. 7. Keilw. 65. Hal. MSS.—(16) If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent. But it has been holden, that if lessee at any day before the rent-day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will. Per Fenner and Williams; Yelverton contra. M. 3. Jac. Carpenter and Collins. Yelv. 77. 20. H. 7. Keilw. 65. is accord. if lessor doth not enter before the rent-day. Hal. MSS.—See Ali. 4. in which book there is an opinion by Rolle conformable to that of Fenner and Williams. Also in 1. Sid. 339. it is said to have been agreed by the court, that if land be leased at will and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the rent-day, because that would be a fraudulent determination.

le fait, pur ceo que il est prove per les parols del fait, que il est la volunt que le auter avera la terre; mes celui que fist le fait luy poer ouste quaut luy pleist.

made the deed, because it is proved by the words of the deed, that it is his will that the other should have the land; but he which made the deed may put him out when it pleaseth him.

fi donatio lecta fuerit et concessa, ac traditio nondum fuerit subsecuta. But if the deed be delivered in name of seisin of the land, or if the feoffor saith to the feoffee, Take and enjoy this land according to the deed, or Enter into this land and God give you joy: these words do amount to a livery of seisin. (Ante 42. a.)

Sect. 71.

ITEM si un mese soit lessé a tener a volunt, le lessé neft pas tenu a susteiner ou repaier le meason, sicome tenant a terme d'ans est tenu. Mes si le lessé a volunt fait voluntarie wast, sicome en abatement des measons, ou en couper des arbres, il est dit que le lessor avera de ceo envers luy action de trespassse. Sicome jeo baile a un home mes barbits a compester sa terre, ou mes boefes a arer la terre, et il occist mes avers, jeo puissoy bien aver un action de trespassse envers luy nient obstant le bailement.

ALSO if a house be leased to hold at will, the lessee is not bound to sustain or repaire the house, as tenant for term of years is tyed. But if tenant at will commit voluntary wast, as in pulling downe of houses, or in felling of trees, it is said that the lessor shall have an action of trespassse for this, against the lessee. As if I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespassse against him, notwithstanding the lending.

SI un mese soit lessé a tener a volunt le les neft pas tenu, &c. For the statute of Gloucester above mentioned extends not to a tenant at will, and therefore for permissive wast, the lessor hath no remedy at all (1).

Mes si lessé a volunt fait voluntary wast, &c. [g] And true

it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and prostrate houses, the lessor shall have an action of trespassse against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; [b] and so hath it bene adjudged (2).

[i] If tenant at will granteth over his estate to another, and the grantee entreteth, he is a disseisor (3), and the lessor may have an action of trespassse against the grantee; for albeit the grant was

(5. Co. 13. b.)

[g] 21. H. 6. 38. 28. E. 3. 25. 11. H. 4. 3. 22. E. 4. 50.

(1. Ro. Abr. 860. 2. Ro. Abr. 555.)

[b] Mich. 28. & 29. Eliz. Rot. 318. in Com. Panc. inter Walgrave & Somerset. V. le Counte de Shrewsburie's case, 5. Co. 13. b.

[i] 27. H. 6. 3. 22. E. 4. 5. (2. Instit. 154. 1. Ro. Abr. 661. 663. 659. Post 57. b. Cro. Ch. 303. Cro. Jam. 660. 4. Leon. 35.)

void, yet it amounteth to a determination of his will.

Sicome jeo baile a un home mes barbits a compester son terre, &c.

And the reason is, [k] that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespassse *sur le case* for this conversion, at his election (4).

Trespassse. *Transgressio derivatur à transgrediendo*, because it passeth that which is right: *Transgressio autem est, cum modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere, et mensuram*: Nota, in the lowest and the highest offences there are no accessories, but all are principalls; as in ryots, routs, forcible entries, and other transgressions

[k] V. 11. H. 4. 24. 1. E. 4. 9. b. 12. E. 4. 8. 21. E. 4. 19. & 76. 22. E. 4. 5. 3. H. 7. 4. 21. H. 7. 14.

Flet. li. 2. ca. 1.

(2. Ro. Abr. 555. Cro. Ch. 35.)

(2. Instit. 183. 3. Instit. 20. 21.)

(1) Action on the case doth not lie for permissive waste. 5. Rep. 13. b. Hal. MSS.—The case cited by lord Hale is that of the countess of Salop, who brought action on the case against her tenant at will for so negligently keeping his fire, that the house was burnt; and the whole court held, that neither action on the case nor any other action lay; because at common law and before the statute of Gloucester action did not lie for waste against tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the statute. But the doctrine that no action lies should be understood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence or for other permissive waste, without doubt an action will lie on such express agreement. The same observation holds with respect to tenants for life or years before the statute of Gloucester; for though the law did not make them liable to any action for waste, yet it did not restrain them from making themselves liable by agreement. It may be of use here to add something on the progress of the law as to the accidental burning of houses, so far as regards landlord and tenant. At the common law lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in *Flota*, that *fortuna ignis vel huiusmodi eventus inopinati omnes tenentes excusant*, and lady Shrewsbury's case is a direct authority to prove, that tenants are equally excusable for fires by negligence. See *Flota lib. 1. cap. 12*. Then came the statute of Gloucester, which, by making tenants for life and years liable to waste without any exception, consequentially rendered them answerable for destruction by fire. Thus stood the law in lord Coke's time; but now by the 6. An. ch. 31. the ancient law is restored, and the distinction introduced by the statute of Gloucester between tenants at will and other lessees is taken away; for the statute of Ann exempts all persons from actions for accidental fire in any house, except in the case of special agreements between landlord and tenant. See ante 53. a. and note 7. there, and 53. b. and note c. there. So much relates to tenants coming in by act or agreement of parties. As to tenants of particular estates coming in by act of law, as tenant by the curtesy, tenant in dower, and also before the statute for taking away military tenures guardian in chivalry, these, or at least the two latter, being at common law punishable for waste, were therefore responsible for losses by fire; unless indeed they were answerable for waste voluntary only, and not for waste permissive, which is a distinction I have not yet met with in any book. If then tenant by the curtesy and tenant in dower were by the common law responsible for accidental fire, it may some time or other become necessary to determine, whether they are within the statute of queen Ann. The statute in expression is very general, the words being, that no action shall be prosecuted against any person in whose house any fire shall accidentally begin; and it seems calculated to take away all actions in cases

(1. Co. 32. a.)

[a] 31. El. ca. 1. in Doomsday.

[b] Rep. 153. F. N. B. 127. 4. E. 2. Vouch. 244. Six acres of land may be parcel of a house. (Post 200 b.)

[c] 22. E. 4. 27. 34. H. 6. 40. (Cro. Jam. 335. 204. Hob. 69. 135. 2. Instit. 476. 2. Ro. Rep. 143. 152. 1. Ro. Abr. 523. 2. Ro. Abr. 578. 5. Co. 100. a.)

[d] Bract. li. 2. ca. 52. b. (Post. 59 b. 62. a.)

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Per reasonable temps.

[c] This reasonable time shall be adjudged by the discretion of the justices, before whom the cause dependeth; and so it is of reasonable fines, customes, and services, upon the true state of the case depending before them: for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices. [d] *Quam longum esse debet non definitur in jure, sed pendet ex discretione justiciariorum.* And this being said of time, the like may be said of things incertaine, which ought to be reasonable; for nothing, that is contrary to reason, is consonant to law.

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il porta ses utensils de meason, et puis le lessor luy ousta, uncore il avera franke entre egressé et regresse en mesme le mese per reasonable temps, de carrier ses biens et utensils. Sicome home seisse dun mese en fee simple, fee taile, ou pur terme de vie, le quel ad certaine biens deins meme le mese, et fait ses executors, et devy; quecunque apres sa mort ad le mese, uncore les executors averont frank entry egressé et regres de carrier hors de mesme le mese les biens leur testator per reasonable temps.

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Sect. 70.

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HERE it appeareth, that if the feoffee doth enter, he is tenant at will, because he entreath by the consent of the feoffor.

Et deliver a luy le fait. Albeit the deed be delivered upon the ground, yet doth it not amount to a livery of seisin of the land; for it hath its naturall effect to make it a deed. [f] *Donationum alia perfecta, alia incepta et non perfecta: ut*

(6. Co. 26. Ante 48. a.) [f] Flet. li. 3. ca. 3. & ca. 15. 43. E. 3. tit. Feof. & Fais 51. 35. H. 8. Feof. Br. 27. Aff. 61. 38. Aff. 2. 39. Aff. 12. 41. E. 3. 17. 6. Co. 26. Sharp's case.

ITEM si un home fait un fait de feoffement a un autre de certaine terre, et deliver a luy le fait, mes nemy livery de seisin; en ceo case celuy, a que le fait est fait, poit enter en le terre, et tener et occuper a la volunt celuy, que fist

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(1) See ante 5. b. note 1. where some authorities are cited to shew, how much will pass by the word *messuage*.

(2) Also an action on the case will lye for damages arising from the neglect to repair. See Fitzh. N. Br. ed. 1730. p. 296. note a.

hand, if the grantee of the rent charge cannot distrain, he is left without that remedy, which by the grant is expressly given to him. See 1. Ro. Abr. 860. As to the case of outlawry, see Vin. Abr. Estate Z. b. pl. 1. In 2. Ventr. 248. one of the books cited, lord Hale says, that outlawry is not a determination till seisure.—(14) Nota, if lessee at will is ousted by a stranger, he may re-enter and continue tenant at will; but if he accepts of a new lease from a stranger after such ouster, it has been holden, that his re-entry will not re-vest the estate in the ancient lessor. Hal. MSS. See Vin. Abr. Estate A. c.—(15) So if lessee says, that he will not hold any longer, it is not a determination of the will, unless he waives the possession. 20. H. 7. Keilw. 65. Hal. MSS.—(16) If there is tenant at will rendering rent at Michaelmas, and lessor determines the will before Michaelmas, he shall not have any rent. But it has been holden, that if lessee at any day before the rent-day determines his will, yet lessor shall have the rent incurring the next day after such determination of the will. Per Fenner and Williams; Telverton contra. M. 3. Jac. Carpenter and Collins. Telw. 73. 20. H. 7. Keilw. 65. is accord. if lessor doth not enter before the rent-day. Hal. MSS.—See All. 4. in which book there is an opinion by Rolie conformable to that of Fenner and Williams. Also in 1. Sid. 339. it is said to have been agreed by the court, that if land be leased at will and the rent is reserved half-yearly or quarterly, the lessee cannot determine his will two or three days before the rent-day, because that would be a fraudulent determination.

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Sect. 71.

ITEM *si un mese soit leſſe a tener a volunt, le leſſee neſt pas tenuſ a ſuſteiner ou repaier le meſſon, ſicome tenant a terme d'ans eſt tenuſ. Mes ſi le leſſee a volunt fait voluntarie waſt, ſicome en abatement des meſſons, ou en couper des arbres, il eſt dit que le leſſor avera de ceo envers luy action de treſpaſſe. Sicome jeo bayle a un home mes barbits a compeſter ſa terre, ou mes boeſes a arer la terre, et il occiſt mes avers, jeo puiſſoy bien aver un action de treſpaſſs envers luy nient obſtant le bailement.*

ALSO if a house be leased to hold at will, the lessee is not bound to sustain or repair the house, as tenant for term of years is tyed. But if tenant at will commit voluntary waſt, as in pulling downe of houses, or in felling of trees, it is said that the lessor shall have an action of trespass for this, against the lessee. As if I lend to one my sheepe to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending.

SI *un mese soit leſſe a tener a volunt le les neſt pas tenuſ, &c.* For the statute of Gloucester above mentioned extends not to a tenant at will, and therefore for permissive waſt, the lessor hath no remedy at all⁽¹⁾.

Mes si leſſee a volunt fait voluntary waſt, &c. [g] And true

it is, that if tenant at will cutteth downe timber trees, or voluntarily pull downe and prostrate houses, the lessor shall have an action of trespass against him, *quare vi et armis*; for the taking upon him power to cut timber, or prostrate houses, concerneth so much the freehold and inheritance, as it doth amount in law to a determination of his will; [b] and so hath it bene adjudged⁽²⁾.

[i] If tenant at will granteth over his estate to another, and the grantee entreth, he is a disseisor⁽³⁾, and the lessor may have an action of trespass against the grantee; for albeit the grant was

[g] 21. H. 6. 38. 28. E. 3. 25. 11. H. 4. 3. 22. E. 4. 50.

(1. Ro. Abr. 860. 2. Ro. Abr. 555.)

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[i] 27. H. 6. 3. 22. E. 4. 5. (2. Instit. 154. 1. Ro. Abr. 667. 663. 659. Post 57. b. Cro. Ch. 303. Cro. Jam. 660. 4. Leon. 35.)

void, yet it amounteth to a determination of his will.

Sicome jeo baile a un home mes barbits a compeſter ſon terre, &c.

And the reason is, [k] that when the bailee having but a bare use of them, taketh upon him as an owner to kill them, he loseth the benefit of the use of them. Or in these cases he may have an action of trespass *sur le case* for this conversion, at his election⁽⁴⁾.

Treſpaſſe. *Transgreſſio derivatur à transgrediendo*, because it passeth that which is right: *Transgreſſio autem eſt, cum modus non ſervatur, nec meſſura: debet enim quilibet in ſuo facto modum habere, et meſſuram: Nota*, in the lowest and the highest offences there are no accessories, but all are principalls; as in ryots, routs, forcible entries, and other transgressions

[k] V. 11. H. 4. 24. 1. E. 4. 9. b. 12. E. 4. 8. 21. E. 4. 19. & 76. 22. E. 4. 5. 3. H. 7. 4. 21. H. 7. 14.

Flet. li. 2. ca. 1.

(2. Ro. Abr. 555. Cro. Ch. 35.)

(2. Instit. 183. 3. Instit. 20. 21.)

(1) *Action on the case doth not lie for permissive waſt.* 5. Rep. 13. b. Hal. MSS.—The case cited by lord Hale is that of the counts of Salop, who brought action on the case against her tenant at will for so negligently keeping his fire, that the house was burnt; and the whole court held, that neither action on the case nor any other action lay; because at common law and before the statute of Gloucester action did not lie for waſt against tenant for life or years, or any other tenant coming in by agreement of parties, and tenant at will is not within the statute. But the doctrine that no action lies should be understood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence or for other permissive waſt, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life or years before the statute of Gloucester; for though the law did not make them liable to any action for waſt, yet it did not restrain them from making themselves liable by agreement. It may be of use here to add something on the progress of the law as to the accidental burning of houses, so far as regards landlord and tenant. At the common law lessees were not answerable to landlords for accidental or negligent burning; for as to fires by accident, it is expressed in *Fleta*, that *fortuna ignis vel hujusmodi eventus inopinati omnes tenentes excusant*, and lady Shrewsbury's case is a direct authority to prove, that tenants are equally excusable for fires by negligence. See *Fleta* lib. 1. cap. 12. Then came the statute of Gloucester, which, by making tenants for life and years liable to waſt without any exception, consequentially rendered them answerable for destruction by fire. Thus stood the law in lord Coke's time; but now by the 6. An. ch. 31. the ancient law is restored, and the distinction introduced by the statute of Gloucester between tenants at will and other lessees is taken away; for the statute of Ann exempts all persons from actions for accidental fire in any house, except in the case of special agreements between landlord and tenant. See ante 53. a. and note 7. there, and 53. b. and note 4. there. So much relates to tenants coming in by *act or agreement of parties*. As to tenants of particular estates coming in by *act of law*, as tenant by the curtesy, tenant in dower, and also before the statute for taking away military tenures guardian in chivalry, these, or at least the two latter, being at common law punishable for waſt, were therefore responsible for losses by fire; unless indeed they were answerable for waſt *voluntary* only, and not for waſt *permissive*, which is a distinction I have not yet met with in any book. If then tenant by the curtesy and tenant in dower were by the common law responsible for accidental fire, it may some time or other become necessary to determine, whether they are within the statute of queen Ann. The statute in expression is very general, the words being, that no action shall be prosecuted against any person in whose house any fire shall accidentally begin; and it seems calculated to take away all actions in cases

fions *vi et armis*, which are the lowest offences; and so in the highest offence, which is *crimen lese majestatis*, there be no accessaries: but in felonies there be accessaries both before and after.

Sect. 72.

21. H. 7. 39. b. 2. E. 4. 6. b. 7. E. 4. 27. a. 6. R. 2. Avourie 86.

IL poet distreyner pur le rent arere ou aver de ceo un action de debt, &c. But if he impound the distresse upon the ground letten at will, the will is determined. Note, he may distreine for the rent, and yet it is no rent service, for no fealty belonging thereunto, but a rent distreinable of common right.

NOTA, si le lessor sur sur tiel lease a volunt reserve a luy un annuall rent, il poet distrainer pur le rent arere, ou aver de ceo un action de debt a son election.

NOTE, if the lessor upon a lease at will reserve to him a yearly rent, he may distreine for the rent behinde, or have for this an action of debt at his owne election⁽¹⁾.

(Post 142. a.)

[1] Bracton lib. 4. fol. 318. 4. E. 3. 39. 7. E. 3. 13. 24. E. 3. 24. 38. E. 3. 28. 7. R. 2. Saver de def. 30. 8. E. 4. 25. 4. H. 6. 30. 22. E. 4. 38. 18. E. 4. 25. F. N. B. 201. D. 203. 8. E. 2. entre 87. Temps H. 8. Br. 15. tit. Tenant a volunt. Pl. com. 138. 4. H. 7. 3.

(3) (Post 270. b. Cro. Cha. 187. Cro. Jam. 169. Ante 57. a.)

[m] 13. H. 7. 10. a. 21. H. 6. 54. 5. E. 4. 3. 22. R. 2. tit. Discont. 48. E. 3. 23. Pl. Com. 435. 19. E. 3. bre. 468. 15. E. 4. Discont. 30. 6. E. 3. 56. 57. 21. E. 4. 5. 21. H. 7. 38. 10. E. 4. 18. Per Choke. & Litt.

[n] Statute de Merlbridge cap. 26. Abb. Aff. 120. b. F. N. B. 196. 11. E. 4. 10. & 11. Bract. lib. 4. fo. 251. 253.

(Post 271. 1. Ro. Abr. 663.)

There is a great diversity between a tenant at will, and a tenant at sufferance; for tenant at will is alwaies by right, and tenant at sufferance entreth by a lawfull lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawfull demise, and after his estate ended continueth the possession and wrongfully holdeth over⁽²⁾. [1] As tenant *par terme dauter vie*, continueth in possession after the decease of *Ce' que vie*, or tenant for yeares holdeth over his terme; the lessor cannot have an action of trespass before entry. Now that a writ of entry *ad terminum qui præterit* lyeth against such a tenant, as holdeth over, is rather by admission of the demandant, then for any estate of freehold that is in him, for in judgement of law he hath but a bare possession. But against the king there is no tenant at sufferance, but he that holdeth over in the cases abovesaid is an intruder upon the king, because there is no laches imputed to the king for not entering⁽⁴⁾. [m] If tenant in taile of a rent grant the same in fee and dieth, yet the issue in taile may bring a *formedon*, and admit himselfe out of possession. The like law is it, if a man maketh a lease at will and dieth, now is the will determined, and if the lessee continueth in possession he is tenant at sufferance, and yet the heyre by admission may have an issue of Mordancesthor against him⁽⁵⁾. [n] But there is a diversity between particular estates made by the *terretenaunt*, as above is said, and particular estates created by act in law: as if a gardian after the full age of the heire continueth in possession, he is no tenant at sufferance, but an abator, against whom an assize of Mordancesthor doth lye⁽⁶⁾. *Et sic de similibus*⁽⁷⁾.

CHAP. 9. Sect. 73.

Tenant by Copie.

TENANT per Copie, &c. *Tenens*

per copiam rot. Cur'. Copie we call in Latine *copiam*, though *copia* in his proper signification signifieth plenty, but we have made a Latine word of the French word *copie*, and this is ancient, for in the Register fol. 51. there is a writ *de copia libelli deliberanda*, which is grounded upon the statute of 2. H. 4. ca. There is no tenant in the law, that holdeth

TENANT per copie de court rol

est⁽⁸⁾, *deins quel manor il y ad un custome que ad est use de temps dont memorie ne court, que certaine tenants deins mesme le manor ont use daver terres et tenements, a tener a*

TENANT by copy

of court roll is, as if a man be seised of a mannor, within which mannor there is a custome, which hath beene used time out of minde of man, that certaine tenants within the same mannor have used to have lands and te-

(1) But in his count in debt against lessee at will, he ought to shew that he entred; but otherwise it is as to lessee for years. 18. H. 3. 1. Dy. 14.—Debt lies against copyholder for his rent. Adjudged M. 10. Car. B. R. Hitcham's case. Hal. MSS.—Hitcham's case is in 1. Ro. Abr. 374. P. pl. 1. and 374. Q. pl. 3. But from Rolle's report of the case, and from some subsequent authorities it seems doubtful, whether debt will lie for rent against a copyholder, particularly unless the lord has conveyed away the manor and so lost the remedy by distress. See Carth. 92. and Gilb. Ten. 3d. Lond. ed. 308.—(2) As to holding over, see 4. G. 2. c. 28. by which every tenant for life or years or other person claiming under or by collusion with such tenant, who shall wilfully hold over after determination of the term and demand made in writing of delivery of the possession by the landlord or him in reversion or remainder, is made liable to the payment of double the yearly value of the lands detained. This statute only took in cases in which the landlord gave notice to quit, and therefore the deficiency was supplied by the 11. G. 2. c. 19. which extends the provision for double rent to the holding over after the tenant's giving notice to quit. See a case on this latter statute in 4. Burr. v. 3. page 1603. See also 6. An. c. 18. f. 1. against holding over by guardians or trustees of infants and by husbands seised in right of their wives and by all others having particular estates determinable on any life or lives.—(3) Vid. 21. H. 6. 38. Hal. MSS.—(4) 4. H. 6. 12. Hal. MSS.—(5) If the heir accepts rents from him, he is tenant at will to the heir. 10. E. 4. 18. Tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election. Dy. 62. Hal. MSS.—(6) And if guardian in such case dies seised, the entry of the heir tolls. 7. H. 4. 42. per Cul. Hal. MSS.—(7) See further as to tenant by sufferance in title Estate Vin. Abr. and Com. Dig.—(8) Si come un home soit seise d'un maner. L. and M.—Roh.—P. and Red.

cases of accidental fire as well from other persons as from landlords. Note, that it has been doubted on the statute of Ann, whether a covenant to repair generally extends to the case of fire, and so becomes an agreement within the statute; and therefore where it is intended, that the tenant shall not be liable, it is most usual in the covenant for repairing expressly to except accidents by fire.—Note also, that the distinction which is taken as to waste at common law between tenants coming in by act of law and tenants whose estates accrue by act of parties, will not universally hold; for tenants by statute-merchant and statute-staple, though they come in by process of law, are not punishable for waste. 6. Co. 37. Perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates or to determine them by paying the debts, for which creditors have such estates, and also that the tenants of such estates are accountable for all profits they make beyond the amount of the debts due to them.—(2) Yet if a stranger cuts trees, the tenant at will shall have action, as shall also the lessor, regard being had to their several losses. 2. H. 4. 12. 19. H. 6. 45. Hal. MSS.—(3) Lessee at will makes lease for years, and the lessee enters. Ruled on solemn argument.

eux et a lour heires en fee simple, ou en fee taile, ou a terme de vie, &c. a volunt le seigni- or solonque le custome de mesme le manor.

nements to hold to them and their heires in fee simple, or fee taile, or for terme of life, &c. at the will of the lord⁽¹⁾ according to the custome of the same manor.

by copie but onely this kinde of customary tenant, for no man holdeth by copie of a charter, or by copy of a fine, or such like, but this tenant holdeth by copy of court roll.

[a] Bracton calleth copiholders *willanos sockmannos*, not because they were bond, but because they held by base tenure by doing of villein services.

[a] Bracton lib. 2. cap. 8. fol. 26. & lib. 4. fo. 209. Britton 165. Fleta lib. 1. ca. 8. & lib. 2. cap. 6. Item de custumariis. Ockam Cap. quid murdrum. F. N. B. f. 12. c.

And Britton saith that some that be free of blood doe hold land in villenage, and Littleton himselfe in the next chapter calleth them tenants by base tenure: and in F.N.B. fol. 12. C. *Et cest terme, que est ore a cest jour appel copitenaunts, ou copiholders, ou tenaunts per copie, est forse que un novel nosme trove, car dancient temps ils fuer' appellees tenants in villenage, ou de base tenure, &c.* [b] And yet in 1. H. 5. 11. they be called copiholders, in 14. H. 4. 34. *tenant per le verge*, in 42. E. 3. 25. *tenant per roll solonque le volunt le seignior*; and in the statute of 4. E. 1. called *extenta manerii*, they are called *custumarii tenentes*, and so doth Fleta call them; and before him Ockam⁽²⁾ (who wrote in the raigne of H. 2.) spake of them, and how, and upon what occasion they had their beginning.

[b] 1. H. 5. 11. 14. H. 4. 34. 42. E. 3. 25. Vid. 4. Co. 2. Browne's case.

[c] *Terra ex scripto Saxonice Bockland. Fundum veteres aut ex scripto qui Bockland, i. bookland, aut sine scripto qui Folkland dicebatur, possidebant. Quæ fuit ex scripto possessio commodior erat conditione, hæreditaria, libera, atque immunis. Fundus sine scripto censum pensabat annuum, atque officiorum servitute quadam est obligatus. Priorem viri plerunque nobiles atque ingenui, posteriorem rustici fere et pagani possidebant* (3).

[c] Lamb. verb. Terra ex scripto.

Court. *Curia*, court is a place where justice is judicially ministred, and is derived *a cura, quia in curiis publicis curas gerebant.* [d] The court baron must be holden on some part of that which is within the manor, for if it be holden out of the manor it is voyd, unless a lord being seised of two or three manors hath usually time out of mind kept at one of his manors courts for all the said manors, then by custome such courts are sufficient in law, albeit they be not holden within the severall manors⁽⁴⁾. And it is to be understood that this court is of two natures, the first is by the common law, and is called a court baron, as some have said for that it is the freeholders or freemen court, (for barons in one sense signifie freemen) and of that court the freeholders being suitors be judges, and this may be kept from three weekes to three weekes. The second is a customary court, and that doth concerne copiholders, and therein the lord or his steward is the judge. Now as there can be no court baron without freeholders, so there cannot be this kind of customary court without copiholders or customary holders. And as there may be a court baron of freeholders only without copiholders, and then is the steward the register, so there may be a customary court of copiholders onely without freeholders, and then is the lord or his steward the judge⁽⁵⁾. And when the court baron is of this double nature, the court roll containeth as well matters appertaining to the customary court, as to the court baron.

(4. Instit. 268.)

[d] Vid. 4. Co. 24. inter Murrell & Smith. Eodem lib. fol. 27. inter Clifton & Molineux.

(1. Ro. Abr. 527.)

4. Co. 26. Melwitche's case, Britton fol. 274.

(4. Co. 26. b.)

And for as much as the title, or estate of the copiholder is entred into the roll whereof the steward delivereth him a copie, thereof he is called copiholder. [e] It is called a court baron, because amongst the lawes of King Edw. the Confessor it is said: *Barones vero qui suam habent curiam de suis hominibus, &c.* taking his name of the baron who was lord of the manor, or for that properly in the eye of law it hath relation to the freeholders, [f] who are judges of the court. And in ancient charters and records the barons of London, and barons of the cinque ports, do signify the freemen of London and of the cinque ports.

[e] Lamb. fol. 128. & 136. Cambden Brit. 10. 121. b. Britton fol. 274.

[f] Mirror cap. 1. sect. 3.

Seisie dun mannor. *Manerium dicitur a manendo secundum excellentiam sedes magna fixa et stabilis. Lageman, i. habens socam et facam super homines suos, &c.* [g] *Et sciendum est, quod manerium poterit esse per se ex pluribus edificiis coadjutivum sive villis et hamletis adjacentibus. Poterit etiam esse manerium et per se et cum pluribus villis, et cum pluribus hamletis adjacentibus, quorum nullum dici poterit manerium per se sed villa sua hamletta. Poterit etiam esse per se manerium capitale, et plura continere sub se maneria non capitalia, et plures villas et plures hamlettas quasi sub uno capite aut domino uno.* And afterwards, *Manerium autem fieri poterit ex pluribus villis vel una, plures enim villæ poterunt esse in corpore manerii sicut et una* (6). And in these [b] ancient authors you shall see the difference, *inter mansionem, villam, et manerium.* Concerning the institution of this court by the lawes and ordinances of ancient kings and especially of King Alfred, it appeareth that

Domesday.

[g] Bracton lib. 4. fo. 112. Fleta lib. 4. c. 15. & lib. 6. cap. 49. Britton fol. 124.

[b] Bract. lib. 5. fo. 434. Fleta ubi supra. Mirror. cap. 1. sect. 3.

(1) Nota, these words ad voluntatem domini are material to express copyhold; for if these words be omitted in pleading, it shall be intended, that the estate is a customary freehold. M. 7. Car. B. R. Crook n. 7. Hughes's case. Hal. MSS. See Cro. Cha. 129. See further as to customary freehold Post 59. b. and note 1. there.—(2) This author, whom lord Coke cites on several occasions, according to Sir William Dugdale wrote a book on *tenures of the king*, but did not perfect it. Dugd. Orig. Jurid. 1st ed. 56. I imagine, that this book is the work referred to by lord Coke; but whether it is in print, or lord Coke cites it from a manuscript, I have not yet been able to learn.—(3) See ante 5. b. and note 1. there, and 6. a. and note 6. there.—(4) See acc. Cro. Cha. 367. But the lord may take a surrender out of the manor, because that may be done out of court; and so may the steward if there is a special custom, or according to latter authorities without. See 1. Salk. 184. and Post 59. a.—(5) A steward de facto is sufficient.—The king constitutes A and B stewards of a manor by patent sub sigillo scaccarii; A holds courts; and though the appointment ought to have been sub magno sigillo, and both ought to have holden the courts, yet it was ruled, that grant by one was good. So it is as to the lord's clerk or an under steward. P. 22. Eliz. Scacc. Hal. MSS.—The doctrine in this case seems confirmed by the cases and authorities cited in Vin. Abr. Steward F. G. J. K. and Com. Dig. Copyhold C. 5. Note also particularly what is expressed in Co. Copyhold. sect. 45. in respect to the law's not being nice in examining the imperfections of the steward's authority, where his acts are ordinary and necessary, and not of a judicial kind.—(6) For other explanations of the word manor, see in Cow. Interp. voc. Manor, and the books there cited, particularly Fulb. Paral. part 1. fol. 18. a.

argument, 1. That it is only a disseisin at election, and not prima facie. 2. That admitting it to be a disseisin the lessee at will is the disseisor, and has gained the freehold, and not the lessee for years. Pasch. 9. Car. B. R. Blunden and Baugh. Hal. MSS.—See S. C. in W. Jo. 315. Cro. Cha. 302. Litt. 297. 372. and 1. Ro. Abr. 661. See also Mr. Atkins's case in 4. Burr. vol. 1. page 60. in which the curious doctrine of disseisin by election is most elaborately explained.—(4) A lessee for 20 years makes lease to B for ten; B continues in possession after expiration of the lease for ten years, and commits waste. A may have either trespass or action on the case, because he is chargeable over in waste. P. 6. Car. B. R. Crook n. 7. West and Trude. Hal. MSS. See Cro. Cha. 187. and S. C. W. Jo. 224.

that the first kings of this realme had all the lands of England in demeane(1), and *les grand manors et royautes* they reserved to themselves, and of the remnant they, for the defence of the realme, enfeoffed the barons of the realme with such jurisdiction as the court baron now hath, and instituted the freeholders to be judges of the court baron. And herewith agreed the aforefaid law of Saint Edward. And it is to be observed, that in those ancient lawes under the name of barons were comprised all the nobility.

(1. Co. 140. b. Cro. Jam. 260. Mo. 95. 8. Co. 63. b. 1. Ro. Abr. 499. 4. Co. 26. b. 23. b. Cro. Jam. 98.)

[i] 4. Co. 24. p. 29. Eliz. inter Rous & Artois.

[k] Dier. Mich. 7. & 8. Eliz. Manuscript.

[l] Vid. 4. Co. 24. inter Murrell & Smith.

(1. Ro. Abr. 498.)
31. Co. 17. Sir H. Nevill's case.
4. Co. 30. 31. inter Hoc & Taylor.

Regill. F. N. B. 270. d. V. mag.
Carta in cap. Itin. fol. 151. Braet.
ib. 3. 117. Fleta lib. 1. cap. 20.

There may be a customary manor granted by copy of court roll (2). So although the word be (*seise*) which properly betokeneth a freehold, yet tenant for yeares, tenant by statute merchant, staple, elegit, and tenant at will, gardian in chivalry (3), &c. who are not properly seised but possessed, are *domini pro tempore*, not only to make admittance, but to grant voluntary copies of ancient copihold lands which come into their hands (4). And therefore there is a diversity between disseisors, abators, intruders, and others that have defeasible titles; for their voluntary grants of ancient copihold lands shall not bind the disseisees or others that right have (5). And voluntary grants by copie, made by such particular tenants as is aforefaid, shall binde him that hath the freehold and inheritance, because all these be lawfull lords for the time being; but so is not a tenant at sufferance, because he is in by wrong as hath been said, and so [i] was it adjudged P. 29. Elij. inter Rowse & Artois 4. Co. 24. But admittances made by disseisors, abators, intruders, tenant at sufferance or others that have defeasible titles, stand good against them that right have, because it was a lawfull act, and they were compellable to doe them.

[k] And yet in some speciall case an estate may be granted by copie, by one that is not *dominus pro tempore*, nor that hath any thing in the manor. As if the lord of a manor by his will in writing deviseth, that his executor shall grant the customary tenements of the manor according to the custome of the manor for the payment of his debts, and dieth, the executor, having nothing in the manor, may make grants according to the custome of the manor (6).

Deins quel mannor il y ad un custome, que ad este use de temps dont memory ne court, &c.

Of this custome here spoken of there be three supporters. The first is time, and that must be out of memory of man, which is included within this word (custome) so as copihold cannot begin at this day. [l] The second supporter is that the tenements be parcell of the manor or within the manor, which appeare by these words of Littleton, *que certaine tenants deins mesme le mannor, &c.* The third supporter is that it hath beene demised and demisable by copie of court roll; for it need not to be demised time out of mind by copie of court, but if it be demisable it is sufficient. For example: if a copihold tenement echeat to the lord, and the lord keepeth it in his hands by many yeares, during this time it is not demised but demisable, for the lord hath power to demise it againe (7).

A volunt le seignior selonque le custome. So as he is not a bare tenant at will, but a tenant at will according to the custome of the mannor, as shall be spoken more hereafter in this chapter.

Certaine tenements. What things may be granted by copy, is necessary to be knowne. First, a manor may be granted by copy (8). Secondly, underwoods without the soile may be granted by copy to one and to his heires, and so may the herbage or veiture of land. Thirdly, generally all lands and tenements within the manor and whatsoever concerneth lands or tenements may be granted by copie: as a faire appendant to a mannor may be granted by copy, &c (9).

Consuetudines. This word *consuetudo* being derived à *consuetudo*, properly signifieth a custome, as here Littleton taketh it: but in legall understanding it signifieth also tolles, murage, pontage, paviage, and such like newly granted by the king; and therefore when the king grants such things, the words be, *concessimus, &c. in auxilium ville predictæ paviandæ &c. consuetudines subscriptas, viz. de quolibet funnagio, &c.*

And it was an article of the justices in Eire to inquire, *de novis consuetudinibus levatis in regno, sive in terra, sive in aqua, et quis eas levavit et ubi*; where *consuetudo* is taken for tolles and such like taxes or charges upon the subject.

Sect. 74.

(1. Ro. Abr. 509.)

E T tiel tenant ne puit aliener sa terre, &c. *E T tiel tenant ne puit alien sa terre per fait, car* AND such a tenant may not alien his land by deed, for then

(1) See as to this ante 1. b. and the authorities in note 1. there.—(2) This is denied in Cro. Jam. 260. and is a point, which has been much controverted. See Vin. Abr. Copyhold E. and Com. Dig. Copyhold C. 1.—(3) Guardian in socage may grant copies in his own name, nor can the heir hold courts during the interest of the guardian. T. 1. Jac. Rot. 883. C. B. Shopland and Ridler. Noy n. 372. Clare's case. Hal. MSS.—See the former case acc. in Cro. Jam. 55. 98. 1. Ro. Abr. 499. pl. 4. Ow. 115. Godb. 143. 4. Leon. 238. See also acc. 2. P. Wms. 122.—(4) Custom to grant copies in reversion after estates for life. Ruled, that dominus pro tempore may make such grants; and they will bind, though the particular estate doth not determine during his interest. P. 41. Eliz. B. R. n. 27. C. C. Guy and Rey. Hil. 26. Eliz. Sir Peter Carew's case. More 147. Vide tamen H. 14. Eliz. ibid. 95. the case of Com. Oxon. contra. Hal. MSS. Accord. that the lord *pro tempore* may grant in reversion, where reversions are grantable by copy; see Cro. Eliz. 66. 2. P. Wms. 122. and the case of Lade and Barker in 2. New Abr. 684. See also the subject enlarged upon in Gilb. Ten. 3d. Lond. edit. 204.—(5) If copyholder surrenders to disseisor for the use of 1. S. disseisor may admit him, if the surrenderor be a copyholder in fee; but otherwise it is, if he be only copyholder for life, as it seems, for it is a new grant. P. 41. Eliz. B. R. Martyn and Rew. Hal. MSS. See Gilb. Ten. 3d. Lond. edit. 201.—(6) If heir before assignment of dower grants copies, it will not bind the wife. P. 28. Eliz. B. R. Rous and Artois. Hal. MSS.—See further as to the persons by whom copyhold estates may be granted, in Vin. Abr. Copyhold G. and Com. Dig. Copyhold C. 3.—(7) What thing destroys the custom of granting a copyhold. One is *lessee for life or tenant in tail of a manor*; a copyhold escheats; and *lessee or tenant in tail makes lease for years of the copyhold*. Though quoad himself the custom is gone, yet quoad the issue or reversioner the custom is not gone. So it is in case of a husband seised in right of his wife. P. 38. Eliz. B. R. Conesby and Ruskey. And accordingly agreed per curiam P. 1650. in Cremer and Burnet. But vid. contra M. 14. Car. B. R. Crook n. 22. in Lee's case. Copyholder surrenders to the use of the lord, who makes lease of the manor and of this tenement by name. Ruled, that the tenement is still grantable by copy; for it passes with the manor, and so continues demisable. Tr. 10. Car. Crook n. 4. Lee and Boothby.—The king is seised of a copyhold manor, the copyhold escheats, and the king makes lease for years. Ruled, that though the lease is good, yet after the term the copyhold is grantable by copy, because the grant doth not inure to a double intent in the case of

donques le seignior poit entre come en chose forfeit a luy. Mes fil voit alien sa terre a un auter, il covient solonque ascun custome de surrender les tenements en ascun court, &c. en le maine le seignior, al use celuy que avera le state, en tiel forme, ou a tiel effect.

Ad hanc curiam venit A de B et sursum reddidit in eadem curia, unum mesuagium, &c. in manus domini, ad usum C de D et hæredum suorum, vel hæredum de corpore suo exeuntium vel pro termino vitæ suæ, &c. Et super hoc venit prædictus C de D et cœpit de domino in eadem curia, mesuagium prædictum, &c. Habendum et tenendum sibi et hæredibus suis, vel sibi et hæredibus de corpore suo exeuntibus, vel sibi ad terminum vitæ, &c. ad voluntatem domini, secundum consuetudinem manerii, faciendo et reddendo inde redditus, servitia, et consuetudines inde prius debita et consueta, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, &c.

the lord may enter as into a thing forfeited unto him. But if he will alien his land to another, it behoveth him after the custome to surrender the tenements in court, &c. into the hands of the lord to the use of him that shall have the estate, in this forme or to this effect.

A of B commeth unto this court, and surrendreth in the same court a mease, &c. into the hands of the lord, to the use of C of D and his heires, or the heires issuing of his body, or for terme of life, &c. And upon that commeth the aforesaid C of D, and taketh of the lord in the same court, the foresaid mease, &c. To have and to hold to him and to his heires, or to him and to his heires issuing of his body, or to him for terme of life, at the lord's will, after the custome of the manor, to do and yeeld therefore the rents, services, and customes thereof before due and accustomed, &c. and giveth the lord for a fine, &c. and maketh unto the lord his fealty, &c.

true in case of alienation (1), but when a man hath but a right to a copyhold, he may release it by deed or by copie, to one that is admitted tenant *de facto* (2).

Alien per fait.

Here it appeareth by Littleton that there must be an alienation: for the making of the deed alone, unless somewhat passe thereby, is no forfeiture. As if he make a charter of feoffment, or a deed of demise for life, and make no livery, this is no forfeiture, because nothing passeth, and therefore no alienation (3); but otherwise it is of a lease for years (4).

Forfeit a luy.

This adjective in Latine is *forisfactus*, the verbe is *forisfacere*, and the nowne *forisfactura*. They are all derived of *foris*, (that is) *extra*, and *facere*, *quasi diceret, extra legem seu consuetudinem facere*, to do a thing against or without law or custome; and that legally is called a forfeiture. Littleton useth this word but once in all his booke. What shall be said [4] forfeitures of copyholds you may read at large in my Reports (5).

En ascun court.

[1] This is the generall custome of the realme, that every copyholder may surrender in court and need not to allege any custome therefore. So if out of court he surrender to the lord himselfe, he need not alledge in pleading any custome. But if he surrender out of court into the hands of the lord by the hands of two or three, &c. copyholders, or by the hands of the baylis or reeve, &c. or out of court by the hand of any other, these customes are particular, and therefore he must plead them (6).

[m] Bracton lib. 4. fol. 209. speaking of these kind of customary tenants, saith, *Dare autem non possunt tenementa sua, nec ex causa donationis ad alios transferre non magis quam villani puri; et unde si transferre debeant, restituant ea*

Lib. intrat. 137. 4. Co. 25. b. inter Kite and Queinton.

[4] 4. Co. Inter les copyhold cases 21. 23. 25. 27. 28. 8. Co. 92. 99. 100. 9. Co. 75. 107. 10. Co. 131.

[7] Bract. lib. 2. cap. 8. & lib. 4. 49. 15. H. 4. 34. 1. H. 5. 11.

(1. Ro. Abr. 500. 9. Co. 76.)

(1) *Parceners of copyhold cannot make partition without the lord's licence.* P. 41. Eliz. B. R. Fuller and Terry. Hal. MSS. The same case is in 1. Ro. Abr. 509. pl. 1. 2. but the points there are different.—(2) *If copyhold is granted to A and B, who are admitted, A may release to B without fine or surrender.* Adjudged P. 19 Jac. entered H. 16. Rot. 735. C. B. Wase and Pretty. So he may release condition. T. 2. Jac. —But if he release to disseisor, it is holden void; but he may release all his right to him who is admitted. M. 5. Car. C. B. per curiam. Hal. MSS.—See acc. Wase and Pretty in Winch. 3. and f. p. acc. by the court in Hetl. 150. See further as to the effect of a release on a copyhold. Vin. Abr. Copyhold Z. a. and Com. Dig. Copyhold I. i.—(3) But according to Rolle, though livery is not made, the feoffment is a forfeiture, if there be a letter of attorney to deliver seisin, because then the feoffee may at any time perfect the conveyance; and he thinks, that lord Coke ought to be understood with this distinction. 1. Ro. Abr. 508. pl. 12. 13. However the distinction in Rolle may be doubted, for the criterion of forfeiture of a copyhold by alienation seems to be the actual passing of an unlawful estate to the lord's prejudice, and in the case of the feoffment no interest can pass till livery; nor is it strictly true, that the feoffee may at any time perfect the conveyance, for it is possible, that before livery the feoffor may revoke the power of attorney, or the attorney may die or refuse to execute his authority. See further on this subject 3. Leon. 109. and Godb. 269.—(4) The plural number is here significant; for a lease for one year is not a forfeiture, such lease by copyholder being, as lord Coke in another place writes, warranted by the general custom of the realm. 4. Co. 26. See also acc. 9. Co. 75. b. W. Jo. 249 and Litt. Rep. 233. See also 1. And. 192. and Mo. 272. and 679. by which it appears that it was once doubted, whether to warrant a lease for one year without the lord's licence a particular custom was not necessary.—The following annotation is by lord Hale. Vid. as to forfeiture by lease or alienation. *A is lessee of a manor for free years; copyholder grants bargains and sells his copyhold to A and his heirs. Ruled, that this amounts to a full surrender; and if after the term he who hath the fee of the manor admits A or his heir, it amounts to a new grant.* T. 21. Jac. C. B. Hassel and Hamerton.—*Copyholder in fee makes lease for a year and so de anno in annum during the life of the copyholder except one day at the end of every year; and this was adjudged to be a forfeiture; and so if it was by covenant, for it amounts to a lease for two years, and the exception*

of the king. P. 1650. Cramer and Burnet. Hal. MSS. See Conesby and Ruskey in Cro. Eliz. 459. Cramer and Burnet in Sty. 266. and 2. Ro. Abr. 196. pl. 34. and Lee's case in Cro. Cha. 521. W. Jo. 449. and 1. Ro. Abr. 498. pl. 1. See also the observations on the two latter cases in Vin. Abr. Prerogative G. c. pl. 3. 4. See further on the destruction of copyhold estates in Com. Dig. Copyhold B. 3. and L. and Vin. Abr. Copyhold R.—(8) See note 2. supra.—(9) *Tithes are grantable by copy.* P. 45. Eliz. B. R. Sands and Drury per curiam. Hal. MSS. See as to the case here cited by lord Hale Vin. Abr. Copyhold E. pl. 1: See also as to things grantable by copy, Vin. Abr. ubi supra and Com. Dig. C. 1.

[b] Coram rege Mich. 31. E. 3. Ranulph Huntingfield's case. 3. E. 3. Corona 310. 11. H. 4. 83. per Thorning.

[c] Vide 4. Co. inter les cafes de copiholds.

[d] Mich. 2. & 3. Ph. & M. in Com. Banco, by the whole court in Constable's case of Pickenham in Norfolk.

[e] Fleta lib. 2. c. 65. & 71.

[f] See more of this 4. Co. the cafes of copiholds. Trin. 1. Ja. Rot. 854. inter Shapland & Ridler in repl. in Com. Banco. the case of the gardian in socage adjudged. (Cro. Jam. 98. 6. Co. 60. b.)

[g] T. 39. Eliz. betweene the copiholders of the mannor of Guiltins, in the county of Northumberland and Armstrong, lord of the manor, in chancery. (11. Co. 44. a. Cro. Cha. 196. 2. Ro. Abr. 578.)

eo domino vel baliivo, et ipsi ea tradant aliis in villenagium tenenda. But although it be incident to the estate of a copihold to passe, as our author saith, by surrenders, [b] yet so forcible is custome, that by it a freehold and inheritance may also passe by surrender (1) (without the leave of the lord) in his court, and be delivered over by the bailly to the tefsee, according to the forme of the deed, to be inrolled in the court or the like.

Ad hanc curiam venit Ade B et sursum reddidit, &c. Here Littleton putteth an example of a surrender in court, and in this example three [c] things are to be observed.

First, that the surrender to the lord be generall without expressing of any estate (2), for that he is but an instrument to admit *Cessy a que use*, for no more passeth to the lord, but to serve the limitation of the use (3); and *Ce' que use*, when he is admitted, shall be in by him that made the surrender, and not by the lord (4).

Secondly, if the limitation of the use be generall, then *Ce' que use* taketh but an estate for life, and therefore here Littleton expresseth upon the declaration of the use, the limitation of the estate, viz. in fee simple, fee taile, &c.

Thirdly, the lord cannot grant a larger [d] estate then is expressed in the limitation of the use. Littleton here putteth his case of one. If two joyntenants be of copihold lands in fee, and the one out of court according to the custome surrender his part to the lord's hands, to the use of his last will, and by his will deviseth his part to a stranger in fee, and dyeth, and at the next court the surrender is presented, by the surrender and presentment the joynture was severed, and the devisee ought to be admitted to the moitie of the lands, for now by relation the state of the land was bound by the surrender (5).

In manus domini. Dominus manerii. The lord of a mannor is described [e] by Fleta as he ought to be, in these words. *In omnibus autem et supra omnia decet quolibet dominum verbis esse veracem, et in operibus fidelem, Deum et justitiam amantem, fraudem et peccatum odientem, voluntariosque, malevolos, et injuriosos contententem, et apud proximos pietatem vultumque motibilem et plenum, ipsius enim interest potius consilio quam viribus uti, proprio arbitrio. Non cujuslibet voluntarii juvenis menestrali, vel adulatoris, sed jurisperitorum virorum fidelium et honestorum, et in pluribus expertorum, consilio debet favere. Qui bene sibi vult disponere et familie sue, scire veram executionem terrarum suarum necessarium erit, ut perinde sciat quantitatem suarum facultatem et finem annuarum expensarum.* And the residue is fit for every lord of a mannor to know and follow, which were too long here to be recited, only his conclusion having spoken of the lord's revenue and expences I will adde, *Quae omnia distincte scribantur in membranis, ut perinde sagacius vitam suam disponat et facilius convincat mendacia compositorum.*

[f] If the lord of the manor for the time being be lessee for life or for yeares, gardian, or any that hath any particular interest, or tenant at will of a manor, (all of which are accounted in law *domini pro tempore*) and doe take a surrender into his hands, and before admittance the lessee for life dyeth, or the yeare's interest or custody doe end or determine, or the will is determined, though the lord commeth in above the lease for life or for yeares, the custody or other particular interest or tenancy at will, yet shall he be compelled (6) to make admittance according to the surrender; and so was it holden in 17. Eliz. in the earle of Arundel's case, which I my selfe heard.

Et dat domino de fine. For the signification of this word (*finis*) Vide Sect. 174. 182. 194. 441.

Of fines due to the lord by the copiholder, some be by the change or alteration of the lord (7), and some by the change or alteration of the tenant. The change of the lord ought to be by act of God, otherwise no fine can be due; but by the change of the tenant either by the act of God, or by the act of the party, a fine may be due: for if the lord doe alledge a custome within his manor to have a fine of every of his copiholders of the said manor at the alteration or change of the lord of the mannor, be it by alienation, demise, death, or otherwise; this is a custome against the law, as to the alteration or change of the lord by the act of the party, for by that meanes the copiholders may be oppressed by multitude of fines, by the act of the lord. But when the change groweth by the act of God, there the custome is good as by the death of the lord. And this, upon a case in the chancery [g] referred to Sir John Popham chiefe justice, and upon conference with Anderson, Periam, Walmesley, and all the judges of Serjants Inn in Fleetstreet, was resolved, and so certified into the chancery. But upon the change or alteration of the tenant (8), a fine is due unto the lord.

Of fines taken of copiholders some be certaine by custome, and some be uncertaine, but that fine, though it be *incertus*, yet must it be *rationabilis*. And that reasonableness shall be discussed by the justices upon the true circumstances of the case appearing unto them; and if the court where the cause dependeth, adjudgeth the fine exacted unreasonable, then is not the

(1) M. 9. Jac. C. B. n. 5. D. D. Wilde and Francis. *Adjudged accordingly, and the admittance is tenendum but not ad voluntatem domini.* Hal. MSS.—Vid. acc. ante 49. a. and note 6. there, and also the books cited in Blackitt. Law Tr. 8vo. ed. v. 1. p. 144. From these authorities it appears, that estates held by copy of court-roll, but not at the will of the lord, have been deemed freehold estates as well by others, as by lord Coke, and in order to distinguish them from the ordinary kind have been denominated *customary freeholds*. In consequence of the prevalence of this notion, a considerable number of such tenants some few years ago claimed a right of voting as *freeholders* at the election of knights of the shire. This gave occasion to a short but most excellent treatise on the subject, in which the learned author traces the origin of lands held in this peculiar way, and proves by the most clear and forcible arguments, that, though these tenures in some respects resemble freeholds, they are in truth nothing more than a *superior* kind of copyhold. Soon after the publication of this treatise, the doctrine asserted in it received confirmation from an act of parliament, declaring, that no person holding by copy of court-roll should be intitled to vote at the election of knights of the shire. See Blackitt. Law Tr. 8vo. ed. v. 1. page 105. and 31. G. 2. c. 14.—(2) Copyholder for life surrenders to the use of D, the lord accepts the surrender and admits D for his life who dies. *Adjudged, that the surrenderor shall not have the land, but the lord, for he who surrendered had not any reversion.* But if copyholder surrenders to the use of B, there on B's death the surrenderor shall have, for he hath the remainder. M. 6. Car. B. R. Crook n. 10. King and Lord. Hal. MSS. See Cro. Cha. 204. and S. C. 1. Ro. Abr. 504. 2. Ro. Abr. 462. See 9. Co. 107. Vin. Abr. Copyhold P. 6. Mod. 68. 1. Salk. 188. and Gilb. Ten. 3d Lond. ed. 257.—(3) See Post 62. a. and Jefferies's case cited from Wilf. in note 1.—(4) Acc. by Wilmot justice in 4. Burr. vol. 3. page 1543. and see further as to this Yelv. 223. 4. Co. 27. b. Com. Dig. Copyhold F. 14. and Gilb. Ten. 3d Lond. ed. 257.—(5) M. 3. Jac. B. R. Crook n. 30. Porter and Porter. Hal. MSS. See Cro. Jam. 100. by which the case appears to have been adjudged according to lord Coke's doctrine of relation. See further as to the relation of Surrenders in Vin. Abr. Copyhold T. b.—(6) Nota ruled, that action on the case doth not lie against the lord who refuses to admit, but the remedy is to compell him in chancery. P. 13. Jac. B. R. Crook n. 1. Ford and Hopkins. Hal. MSS. See Cro. Jam. 368. and S. C. Mo. 842. 2. Bulltr. 336. But it is said to have been adjudged, that though surrenderer cannot have action on the case against the lord for refusing to admit, yet the surrenderor may. 3. Bulltr. 217.—(7) Vid. for tallages in Wales on change of the lord. 34. H. 8. c. 26. Hal. MSS. See sect. 93.—(8) See Vin. Abr. Copyhold W. b. See also much curious learning on this subject in the case of the earl of Bath and Abney in 4. Burr. vol. 1. page 206. In that case the court held, that the executor of a copyholder, for a long term of years, was compellable to be admitted and to pay a fine. The great point of the case was, whether a fine became due on every change of the tenant, or on change of the estate only.

exception of a day doth not aid the case. Vid. 10. Jac. B. R. Bulltr. n. 201. Hamlen and Hamlen. T. 10. Jac. ibid. n. 232. Luttrell and Wilson.—Copyholder makes lease by indenture for one year, and same day by another makes another lease for one year to commence after the former, and so a third lease by a third indenture for one year after the second, and then surrenders to the steward to the use of

copiholder compellable to pay it (1). And so was it adjudged: [b] for all excessiveness is abhorred in law. See more concerning fines of copiholders in my Reports [i] which are so plainly there set downe, as they need not be rehearsed here.

[b] Pasch. 1. Jac. in com. banco rot. 1845. inter Stallon & Brady.
[i] 4. Co. the cases of copiholds.

Sect. 75.

ET tiels tenants sont appellez tenants per copie de court rolle; pur ceo que ils nont autre evidence concernant leur tenements, fors que les copies des rolles de court.

AND these tenants are called tenants by copie of court rolle; because they have no other evidence concerning their tenements, but onely the copies of court rolles.

ILS nont autre evidence.

This is to be understood of evidences of (4. Co. 25.) alienation; for a release of a right by deed a copiholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the copyhold, which he that maketh the release had (2).

Sect. 76.

ET tiels tenants ne empleront, ne seront empledes de leur tenements per briefe le roy. Mes fils voient empler auters pur leur tenements, ils averont un plaint fait en le court le seignior en tiel forme, ou a tiel effect: A. de B. queritur versus C. de D. de placito terræ, videlicet, de uno mesuagio, quadraginta acris terr', quatuor acris prati, &c. cum pertin'. & facit protestationem sequi querelam istam in natura brevis dominis regis assisæ mortis antecessoris ad communem legem, vel brevis domini regis assisæ novæ disseisinæ ad communem legem, aut in natura brevis de for-

AND such tenants shall neither implead nor be impleaded for their tenements by the king's writ. But if they will impleade others for their tenements, they shall have a plaint entered in the lords court in this forme, or to this effect: A. of B. complains against C. of D. of a plea of land, viz. of one mesuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assise of Mordancester at the common law, or of an assise of novel disseisin, or formedon in the descender at the

TIELS tenants ne empleront, ne seront empledes, &c.

This is evident, and needs no explanation.

Mes fils voient empler auters, ils averont, &c.

Put the case that the demandant in a plaint in nature of a reall action recovereth the land erroneously, what remedy for the party grieved? For he cannot have the king's writ of false judgement in respect of the baseness of the estate and tenure, being in the eye of the law but a tenant at will. And the freehold being in another, he shall have a petition to the lord in the nature of a writ of false judgement, and therein assigne errors, and have remedy according to law.

De forma donationis in descender ad communem legem. By the opinion of Littleton, as there may be an estate taile by custome with the co-operation of the statute of W. 2. cap. 1. so may he have a formedon in descender; but as the statute without a custome extendeth not to copiholds, so a custome

4. H. 4. 34. adjudged in parliament.

14. H. 4. 34. 1. H. 5. 11. Vet. N. B. 18. 13. R. 2. tit. Faule judgment. 7. E. 4. 19. 21. E. 4. 80.
(4. Co. 21. b.)

3. Co. 8. 9. in Heydon's case 4. Co. 22. 23. 15. H. 8. Br. tit. Taile.
(3. Co. 8. b. 1. Ro. Abr. 838.)

(1) 1. What shall be a reasonable fine. Two years and an half of rack'd rent adjudged unreasonable; and year and an half is sufficient. T. 6. Car. B. R. Crook n. 8. Dow and Goding. Two years value of rack'd rent adjudged unreasonable. 2. He, who would take advantage of a forfeiture for non-payment of a fine uncertain, ought to assesse a reasonable fine and prefix a day and place within the manor for payment of it. Otherwise non-payment is not a forfeiture. 3. If it be doubtful, whether the fine be reasonable or not, non-payment is not a forfeiture. M. 6. Jac. C. B. n. 5. D. D. Willowe's case. Vide tamen, for if in truth it be reasonable, non-payment at the day prefixed has been held a forfeiture. M. 1650. Parker's case.—Custom, that copyholder shall pay a fine of two years rent or under, held good. M. 10. Jac. B. R. 2. Bullstr. n. 23. Allen and Abraham. But M. 36. 37. Eliz. A. B. n. 148. in Green and Bury it was ruled void for the uncertainty. Hal. MSS. See the first case in Cro. Cha. 196. the second in 13. Co. 3. the third in 2. Bullstr. 32. and the fourth in 2. Ro. Abr. 165. pl. 1. Note that in the case, in which two years rack rent was deemed an unreasonable fine, the admittance was on an alienation and not on a descent, and that on a descent two years value is generally understood to be reasonable. See Rep. temp. Finch 464. See further on the quantum of fines tit. Copyhold in Vin. Abr. X. b. Com. Dig. H. 4. and New Abr. I. 3. and the case of the earl of Bath and Abney in 4. Burr. vol. 1. page 206.—(2) Vid. hic fol. 59. a. A surrenders to the use of B, clearly the land is bound by the surrender, but B hath nothing in the land till admittance. M. 8. Car. B. R. Burgoin and Spurling. But if the surrenderee dies, his heir shall be admitted. If the lord accepts rent of B, it is a good admittance. M. 24. Car. B. R. Baker and Denham. A surrenders to the use of B, who before admittance surrenders to the use of C and C is admitted. Ruled, that C takes nothing, for B who surrenders hath not any interest to surrender till admittance. 24. Eliz. Alderman Dixe's case. M. 6. Jac. B. R. n. 6. Wilson and Woodhall. But yet it hath been ruled good, for the admittance of C shall be implied to be an admittance of B first, and so there shall be priority. M. 24. Car. B. R. Baker and Denham. P. 41. Eliz. C. B. Colchin and Colchin. Vid. T. 15. Jac. B. R. 2. Popb. 5. Hal. MSS.—See the first case in Cro. Cha. 273. & 283. and 1. Ro. Abr. 473. & 500. the second in Sty. 145. the fourth case in Yelv. 144. the fifth in Cro. Eliz. 662. and 1. Ro. Abr. 499. pl. 1. See further as to the subject of the cases in this annotation, Com. Dig. Copyhold F. 11. and Vin. Abr. Copyhold U. W. Y. and Q. b.—(3) It has been often adjudged accordingly; and in such case surrender is not a discontinuance, but there may be a bar by custom either by surrender or recovery, but not without custom. M. 2. Car. C. B. Crook n. 4. P. 37. Eliz. Clun and Turner. P. 1651. B. R. Franklin and Myn. Hal. MSS.—See the case of M. 2. Cha. in Cro. Cha. 42. See also Post 60. b. and note 1. & 2. there.

the lord. Ruled, 1. Though this be by several indentures, and two days interpose between the end of one lease and the beginning of another, it is a forfeiture. 2. The covin is apparent, though it was not found. 3. Though he surrenders to the lord not having notice, the lord shall be adjudged to be in point of forfeiture, and shall avoid the leases. M. 7. Car. B. R. n. 15. Matherw and Whetton. Hal. MSS.

some without the statute cannot create an estate taylor. Now it is not a sufficient proofe, that lands have been granted in taile; for albeit lands have anciently and usually beene granted by copie to many men and to the heires of their bodies, that may be a fee simple conditionall as it was at the common law. But if a remainder have been limited over such estates and enjoyed, or if the issues in taile have avoided the alienation of the ancestor, or if they have recovered the same in writs of *formedon* in the descender, these and such like be proofes of an estate taile. [y] But if by custome copihold may be intailed, the same by like custome by surrender may be cut off (1); and so hath it beene adjudged. [z] Some have holden that there was a *formedon* in the descender at the common law (2).

(1. Ro. Abr. 506. 1. Sid. 267. 314. Cro. Eliz. 717.)
[y] P. 29. Eliz. inter Hill and Upcheic. Custome deins le manor de Overhall in Essex. 21. El. 2. Dier 366. 23. Eliz. Dier 373.
[z] 10. E. 2. Formdon 55. 21. E. 3. 47. Pl. Com. 240. 4. E. 2. Formdon 50.

Sect. 77.

CAR (il est dit) que *ET* coment que *AND* although that *si le Seignior,* *ont inheritance solonque* some such tenants *Et c.* And here *le custome del manor, un-* have an inheritance according to the custome of the manor, yet they have but an estate but at the will of the lord according to the course of the common law. For it is said, that if the lord doe oust them, they have no other remedy but to sue to their lords by petition, for if they should have any other remedy, they should not be said to be tenants at will of the lord according to the custome of the manor. But the lord cannot breake the custome which is reasonable in these cases.

13. E. 3. tit. Prescript. 20. 13. R. 2. faux judgement 7. 33. H. 6. tit. Subpna 2. 7. E. 4. 19.

But he setteth not down his owne opinion, but rather to the contrary, as hereafter in this chapter appeareth. But now *magistra rerum experientia* hath made this cleare and without question, that the lord cannot at his pleasure put out the lawfull copiholder without some cause of forfeiture, and if he do the copiholder, may have an action of trespass against him, for albeit he is *tenens ad voluntatem domini*, yet it is *secundum consuetudinem manerii* (4).

Vide fecit. 81. 82. 84. 132.

[b] Vid. 42. E. 3. 25. Brit. fol. 165.

[b] And Britton speaking of these kinde of tenants faith thus, *et ceux sont privileges en tiel maner, que nul de les doit ouster de*

est dit, si le seignior eux ousta, fils nont auter remedy forsque de fuer a leur seigniors per petition; car fils averont auter remedie, ils ne seront dits tenants a volunt le seignior solonque le custome del manor. Mes le seignior ne voile enfreinder le custom que est reasonable en tiels cases.

Mes Brian chiefe justice dit, que son opinion ad tous foits este, et unquez serra, si tiel tenant per le custome payant ses services soit eject per le seignior, que il avera action de trespass vers luy, H. 21. Ed. 4. Et issint fut l'opinion de Danby chiefe justice, M. 7. Ed. 4.

But *Brian chiefe justice* said, that his opinion hath alwaies been and ever shall be, that if such tenant by custome paying his services be elected by the lord, he shall have an action of trespass against him. *H. 21. Ed. 4.* And so was the opinion of *Danby chiefe justice*.

(1) See 2. Vef. 603 the case of Carr and Singer, in which three judges against Willes chief justice held, that where copyholds are intailable, and the custom has not prescribed any mode of barring, the intail may be barred by surrender. But Willes ch. justice thought, that in such a case recovery was the proper mode. Note the three ways of barring intails of copyholds mentioned in this case; namely recovery, surrender, and forfeiture and regnant.

(2) See further as to intails of copyholds in Vin. Abr. Copyhold F. E. G. c.

(3) What follows in this section is neither in L. & M.—nor P.—The addition first appears in Redm.

(4) But trespass lies not against the lord for cutting trees. Hill. 10. E. 1. Rot. 3. Casus prioris of Anthony. But now the law is changed. Hal. MSS.

See the first case cited by lord Hale in Winch 66. W. Jo. 41. and Hutton 65. though in these books the name is different. See the second case in 1. Bulstr. 189. the third in 1. Bulstr. 215. and the fourth in Cro. Cha. 233. W. Jo. 249. and 1. Ro. Abr. 508. pl. 10.—It is observable, that according to the third case cited by lord Hale a mere covenant that the lessee shall enjoy for a second year is a forfeiture; but the second case and other authorities are to the contrary, because; though in general a covenant amounts to a lease, yet it seems harsh to give such a construction, where a lease amounts to a forfeiture, and the intention of the parties may have effect by way of agreement. See Cro. Jam. 311. and 2. Keb. 267. See further as to leases by copyholders and forfeiture on that account, New Abr. tit. Leases I. 6. Vin. Abr. Copyhold G. c. H. C.—(5) See also tit. Copyhold in Vin. Abr. D. c. to E. d. 2. New Abr. L. and Com. Dig. M.—(6) Nota, by Rolle surrender into the hands of the steward, though out of the court is good without custom. M. 24. Car. B. R. Baker and Denham. Hal. MSS. See acc. 1. Ro. Abr. 500. pl. 3. 4. Leon. 111. 1. Salk. 184. Some make a distinction between stewards by deed and stewards by parol, and think, that only the former can take surrenders out of court. Godb. 142. and 1. L. Raym. 159. But this distinction has been frequently denied, and indeed seems unsupported by any good reason. Cro. Jam. 526. Com. Rep. 85.

Car il dit que le tenant per le custome est bien enheritor de aver son terre selon que le custome, come cestuy que ad frank-tenement al common ley.

tice in 7. Ed. 4. For he saith, that tenant by the custome is as well inheritour to have his land according to the custome, as he which hath a freehold at the common law (1).

tiels tenements, tant come ilz font les services que a leur tenements appendent, ne nul ne poet leur services acressre ne echange a faire autres services ou plus. And herewith agreeth Sir Robert Danby, chiefe justice of the court of Common Pleas, M. 7. E. 4. 19. and Sir Thomas Brian his successor, M. 21. E. 4. 80. viz. that the copyholder doing

his customes and services, if he be put out by his lord, he shall have an action of trespass against him.

have an action of trespass a-

CHAP. 10. Sect. 78.

Tenant per le Verge.

TÉNANTS per le verge sont en tiel nature come tenants per le copy de court roll. Mes la cause, pur que ils sont apelles tenants per la verge, est per ceo que quant ils voient surrender leur tenements en le main leur seignior al use dun autre, ils averont un petite verge (per le custome) en leur main, le quel ils bailera al seneschall ou al bailife solonque le custome et use del manor, et celui, que avera la terre, prendra mesme la terre en le court, et son prisel sera enter en le roll, et le seneschal ou le bailife solonque le custome delivera a ce-

Tenants by the verge are in the same nature as tenants by copy of court roll. But the reason, why they be called tenants by the verge, is for that when they will surrender their tenements into the hands of their lord to the use of another, they shall have a little rod (by the custome) in their hand, the which they shall deliver to the steward or to the bailife according to the custome of the manor, and he which shall have the land shall take up the same land in court, and his taker shall be entered upon the roll, and the steward or bailife according to the custom

TÉNANTS per le verge. This tenant per

le verge is a mere copyholder, and taketh his name of the ceremony of the verge (2). Tenure in villenage, or by base tenure is thus described by Britton, [a] Villenage est tenant de demeines de cheescun seigneur baille, a tener a son volunt per villeines services de enprover al opes le seignior, et liwere per verge et nient per tittle de escript, ne per succession de heritage, dont gards de mariages ne autres services reals, come homage et relieves, ne poient des amones de demeines ne de villenage es demand.

14. H. 4. 33. (Cro. Cha. 597.)

[a] Britton fol. 165. a. F. N. B. fol. 12. Liberatio per Virgam.

A le seneschal.

(Which we call a steward) seneschallus is derived of sein a house or place, and schale an officer or governor. Some say that sen is an ancient word for justice, so as seneschall should signifie officarius justitie; and some say that steward is derived of stewe (that is) a place, and ward, that signifieth a keeper, warden, or governor; and others, that it is derived of stede, that signifieth a place also, and ward as it were the keeper or governor of that place. But it is a word of

(1) This must be understood with exception of such copyholds, as by the custom are grantable for life only.

(2) In Cro. Cha. 597. there is a case, in which it was pleaded, that the custom was to surrender by a knife, and therefore that a surrender by the verge was void. This custom being alledged before the council of the marches of Wales, they proceeded to try it. On moving this matter in the King's Bench, a prohibition was granted, because the custom was only triable at the common law; but it is not mentioned, what the court thought of the operation of the surrender.

Lib. 1. Cap. 10. Of Tenant le Verge. Sect. 79.

Vide sect. 93. & 379. Fleta lib. 2. cap. 66. Vide statut. de extent. maner. 14 E. 1.

of many significations. In this place it signifieth an officer of justice, viz. a keeper of courts, &c. Fleta describeth the office and duty of this officer at large most excellently: *Provideat sibi dominus de seneschallo circumspetto et fidei, viro provido et discreto et gratiofo, humili, pudico, pacifico, et modesto, qui in legibus consuetudinibusque provincie et officio seneschalcie se cognoscat, et iura domini sui in omnibus teneri assuetet, quique subballivos domini in suis erroribus et ambiguis sciat instruere et docere, quique egenis parcere, et qui nec prece vel pretio velit à tramite iusticie deviare, et perverſe judicare; cujus officium est curias tenere maneriorum; et de subtractionibus consuetudinum, serviciorum, reddituum, sectarum ad cur', mercata, molendina domini et ad visus francpledgi aliarumque libertatum domino pertinentium inquirat, &c.* The residue pertaining to his office is worth your reading at large. Every steward of courts is either by deed or without deed (1); for a man may be retained a steward to keepe his court baron and leet also belonging to the manor without deed, and that retyner shall continue untill he be discharged. The lord of a manor may make admittances out of court and out of the manor also (2), as at large appeareth in my Reports.

Vide 4. Co. Cases de Copiholds. fol. 26, 27, 30.

luy que prist la terre mesme le verge, ou un auter verge, en nosme del seisin; et pur cel cause ils sont appellez tenants per le verge, mes ils nont auter evidence, sinon pur copy de court roll.

shall deliver to him that taketh the land the same rod, or another rod, in the name of seisin; and for this cause they are called tenants by the verge, but they have no other evidence but by copy of court roll.

Sect. 79.

A Le bailie. This word *bailie* as some say commeth of the French word *baylife*, in Latin *ballivus*; but in truth bailie is an old Saxon word, and signifieth a safe keeper or protector, and *baile* or *baillium* is safe keeping or protection: and thereupon we say when a man upon surety is delivered out of prison *traditur in ballium*, he is delivered into bayle, that is, into their safe keeping or protection from prison: and the sherife that hath *custodiam comitatus*, is called *ballivus*, and the county *balliva sua*.

Reve, is derived of the Saxon word *gerefa* or *gereve*; and by contraction or rather corruption *greve*, or *reve*, and is in Latine *præfectus* or *præpositus*. It signifies as much as *appruator* a disposer or director, as wood-reeve, sheepe reve, shire reeve, &c. whereof more shall be said hereafter. Vide Fleta lib. 2. cap. 67. where he treateth of the office of the bailie, and cap. 69. *de officio præpositi*, of

Vide Lamb, exposition of Saxon words.

Fleta lib. 2. ca. 67. & 69.

ET auxy en divers seigniories et mannors, il y ad tiel custome, si tiel tenant, que tient per custome, voloit aliener ses terres ou tenements, il poit surrender ses tenements a le baily, ou a le reeve, ou a deux probes homes del seigniory, al use cestuy que avera le terre, daver en fee simple, fee taile, ou pur terme de vie, &c. Et tout ceo ils presenteront al procheine court, et donque celuy, que avera la terre per copy de court roll, avera mesme la terre solonque lentent del surrender.

AND also in divers lordshippes and mannors there is this custome, viz. if such a tenant, which holdeth by custome, will alien his lands or tenements, he may surrender his tenements to the bailie or to the reeve, or to two honest men of the same lordship, to the use of him which shall have the land, to have in fee simple, fee taile, or for terme of life, &c. and they shall present all this at the next court, & then he, which shall have the land by copy of court roll, shall have the same according to the intent of the surrender.

the

(1) But a patent is necessary to the making of stewards of the king's manors. See further title *Stewards of courts* in Vin. Abr. F. and Com. Dig. *Copyhold* R. 5.

(2) See ante 59. a. and note 6. there.

the office of the reeve, and what belongeth of duty and right to either of them, which words are too long here to be inserted. Only this I will take out of him. *Balivus autem cujuscunque manerii esse debet in verbo verax, et in opere diligens et fidelis, ac pro discreto approbatore cognitus plegiatus et electus, qui de communioribus legibus pro tanto officio sufficienter se cognoscit, et quod sit ita justus, quod ob vindictam seu cupiditatem non querat versus tenentes domini nec alios, &c. Prepositus autem tanquam approbator et cultor optimus, &c. domino vel ejus seneschallo palam debet presentari, cui injungatur officium illud indilate. Non ergo sit piger aut somnolentus, sed efficaciter et continue commodum domini adipisci nitatur et exarare, &c.* The residue concerning both the offices being worth your reading.

A le bailie ou a le reeve. Littleton intendeth into the hands of the lord by the hands of the baliffe or the reeve.

Ou al deux probes homes del seignorie. The custome doth guide these surrenders out of court and the custome must be pursued.

Vid. 4. Co. 25. Kite and Quaintin's case.

Et tout ceo ils presenteront al prochein court, &c. By the surrender out of court, the copyhold estate passeth to the lord under a secret condition that it be presented at the next court according to the custome of the mannor. And therefore if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good (1), and if it be presented at the next court *ce' a que use* shall be admitted thereunto; but if it be not presented at the next court according to the custome, then the surrender becometh void (2), and so was it cleerly holden Pasc. 14. Eliz. in the court of Common Pleas which I my selfe heard.

(4. Co. 29. b)

Sect. 80.

ET issint est ascavoir, que en divers seignories, et divers manors, sont plusors et divers customes en tielx cases, quant a prender tenements, et quant a pleder, et quant as autres choses et customes a faire; et tout ceo, que nest pas encounter reason, poit bien estre admitte et allow.

AND so it is to be understood, that in divers lordships, and in divers mannors, there be many and divers customes in such cases, as to take tenements, and as to plead, and as to other things and customes to be done; and whatsoever is not against reason may well be admitted and allowed.

SONT plusors et divers customes.

This was cautiously set downe, for in respect of the variety of the customes in most mannors, it is not possible to set down any certainty, only this incident inseparable every custome must have, *viz.* that it be consonant to reason, for how long soever it hath continued, if it be against reason, it is of no force in law.

(4. Co. 31. Cro. Cha. 220)

Enconter reason.

This is not to be understood of every unlearned man's reason, but of artificiall and legal reason warranted by authority of law: *Lex est summa ratio.*

Sect. 81.

Ils sont apelles tenants per base tenure. Of this sufficient hath been spoken before.

ET tiels tenants que teignent solonque le custome dun seignorie ou dun manor, coment que ils ont estate denheritance solonque le custome del seignory ou manor, uncore pur ceo que ils nont ascun

AND these tenants which hold according to the custome of a lordship or mannor, albeit they have an estate of inheritance according to the custome of the lordship of mannor, yet because

frank-

(1) But vide Trin. 7. Car B. R. Rot. 373. Adjudged M. S. Crook n. 27. Burgoin and Spurling. A surrenders to the steward out of court to the use of B on condition, and before the next court surrenders to the steward to the use of C in fee; the condition is performed, and then he surrenders to the use of D in fee by the hands of the steward; and at the next court all are present. Ruled, that C shall have the land, for by the surrender the interest is bound, but the estate doth not pass till presentment, but remained fully in A, and so the surrender to C is good when the surrender to B is avoided by performance of the condition before the court. Hal. MSS.—See note 2. in 60. 2. See also as to the commencement of the surrenderee's estate Jeffereys's case in Will. vol. 1. part 2. page 13. In that case one having surrendered to the use of his will devised a copyhold to Miss Jeffereys in fee; and she being attainted of felony and hanged before admittance, the question was whether her interest in the copyhold was such as to intitle the lord by forfeiture. The whole court inclined against the lord, but did not give an absolute opinion.

(2) See further as to the time of presenting surrenders, Vin. Abr. Copyhold U. 2. Com. Dig. Copyhold F. 10:

franktenement per le cours del common ley, ils sont appellees tenants per base tenure.

they have no freehold by the course of the common law, they are called tenants by base tenure.

Sect. 82.

TENANT ET divers diversities y sint peren-
a volunt ties y sint peren-
solonque le ter tenant a volunt, que
custom puit est eins per lease son les-
aver estate sor per le course del com-
denheritance, mon ley, et tenant solonque
etc. Here note le custome del manor en
that Littleton al- le forme avandit. Car ten-
loweth, that by ant a volunt solonque cus-
the custome of the tom puit aver estate denhe-
manor the copi- ritage (come est avantdit.)
holder hath an al volunt le seignior solon-
inheritance, que le custome et usage
and consequently del manor. Mes si home
the lord cannot put him out without cause.

Mes si home, ad terres ou tenements,
Ec. voile les- queux ne sont deins tiel
ser terres ou manor ou seigniorie,
tenements a ou tiel custome ad este
un auter a use en le forme avantdit,
aver et tener et voile lesser tiels terres
a luy et ses ou tenements a un auter,
heires a vo- a aver et tener a luy et a
lunt le lessor, ses heires a le volunt le
ceux parols(a lessor, ceux parolx (a les
les heires de le heires de le lessée) sont
lessée) sont voi- voids. Car en cest case si
des, car en cest le lessée devie et son heire
case si le lessée enter, le lessor avera bon
devie, et son action de trespas envers
heire enter, le luy; mes nemy issint en-
lessor avera vers l'heire le terre per le
action de trespas custome en ascun cas, Ec.
passe envers pur ceo que le custome de
luy, Ec. By le manor en ascun cas

10. F. 4. 18. 22. E. 4. 13. 2. R.
2. barre 237. 11. H. 7. 22. 21.
11. 7. 12.

which it is proved, that by the death of the lessee the lease is absolutely determined, which is

proved by this, that if the heire enter the lessor shall have an action of trespass, *quare vi et armis*, before any entry made by the lessor.

AND there are divers diversities between tenant at will, which is in by lease of his lessor by the course of the common law, and tenant according to the custome of the manor in forme aforesaid. For tenant at will according to the custome may have an estate of inheritance (as is aforesaid) at the will of the lord, according to the custome and usage of the manor. But if a man hath lands or tenements, which be not within such a manor or lordship, where such a custome hath beene used in forme aforesaid, and will let such lands or tenements to another, to have and to hold to him, and to his heires at the will of the lessor, these words (to the heires of the lessee) are void. For in this case if the lessee dieth, and his heire enter, the lessor shall have a good action of trespass against him; but not so against the heire of tenant by the custome in any case, &c. for that the custome of the manor in some case may aide him to barre his lord in an action of trespass, &c.

*Pur ceo que le custome de le manor en ascun case luy puit aider de bar-
rer son seignior en action de trespassse, &c.* Hereby it appeareth, that by the opi-
nion of Littleton the lord against the custome of the manor cannot oust the copiholder.

Sect. 83.

*ITEM lun tenant
per le custome en
ascuns lieux doit re-
pairer et susteiner ses
measons, et lauter te-
nant a volunt nemy.*

ALSO the one tenant
by the custome in
some places ought to
repaire and uphold his
houses, and the other
tenant at will ought
not.

PER le custome. For
what a copiholder may or
ought to doe, or not doe, the
custome of the manor [a] must
direct it, for *consuetudo mane-
rii est observanda.* [b] But if
there be no custome to the con-
trary, waste either permissive (1)
or voluntary of a copiholder is
a forfeiture of his copihold (2).

[a] Brañton lib. 2. fol. 76.

[b] Vid. 4. Co. 21. 22. &c. in
Cases de Copiholds.

Sect. 84.

*ITEM lun tenant
per le custome
ferra fealtie, et lauter
nemy. Et plusors au-
ters diversities y sont
perenter eux.*

ALSO the one tenant
by the custome
shall do fealty, and the
other not. And many
other diversities there
be betweene them.

*LUN tenant per le
custome ferra fe-
altie, et lauter nemy.*

And the doing of fealty by a
copiholder, proveth that a
copiholder, so long as he ob-
serves the custome of the
manor and payeth his servi-

Vide Sect. 131.

(Post 93. b.)

ces, hath a fixed estate. For tenant at will, that may be put out at pleasure, shall not doe fealty. For to what end should a man sweare to be faithfull and true to his lord, and should beare faith to him which he claimeth to hold of him, and that lawfully he shall doe his customes and services, &c. when he hath no certaine estate, but may be put out at the pleasure of the lessor, or he himselfe may determine it at his pleasure. Of these kind of customary tenants, and of many things concerning them, you may read more in the fourth booke of my Reports, fol. 21, 22, 23, &c. Thus much, as I have here set downe, may suffice, for the understanding of such cases and opinions as Littleton hath expressed (3).

4. Co. 21. 22. 23. &c.

Finis Libri primi.

(1) Formerly it was a question, whether waste *permissive* was a forfeiture by the *general* law in respect to copyhold estates, and according to a case in Noy a *special* custom is necessary. Noy 51. But the principal authorities are with lord Coke. See Ow. 17. 1 Ro. Abr. 508. pl. 16. and the case of Eastcourt and Weekes in 1. Lutw. 799. 1. Freem. 516. and 1. Salk. 186. In this last case the causes of forfeiture were making a lease without licence and want of repairs, and it appears to have been agreed by all, that *permissive* waste was a forfeiture; and the great point was, whether after the death of one of two coparceners, who were seized of the manor at the time of the forfeiture, it was not too late to enter and take advantage of it. Three judges held, that it was, because according to them lease and waste do not operate like alienations by fine recovery or feoffment with livery, which are *immediate* forfeitures and extinguish the copyholder's estate without any act by the lord, but are only forfeitures at the election of the lord in whose time they happen, and unless he enters the copyholder's estate continues; and they thought, that the right of election was not in its nature either divisible or descendible, and therefore that in the case of coparceners all must join in the election, and if one of them dies it is too late to make it. But Powel justice differed. He assented to the distinction between forfeitures operating by immediate extinguishment of the copyhold and forfeitures at the lord's election, and agreed that waste *permissive* was of the latter kind; but then he thought, that the lease for years without licence was as much an extinguishment of the copyhold as an alienation for a greater estate, and he seemed to be of the same opinion as to waste *voluntary*. Note that Powel took another distinction between waste *voluntary* and waste *permissive*, and said, that if waste *permissive* is repaired before the lord's entry, the forfeiture is purged, and advantage cannot be taken of it. Note also that in the same case Treby ch. j. doubted, whether lord Coke's doctrine, that if there be two coparceners of a reversion, and waste is committed, and one of them dies leaving a daughter, the aunt and niece shall join in waste, is law. See ante 53. b. and 1. Lutw. 803. This observation of Treby ought to have been mentioned before.

(2) But the court of chancery will sometimes relieve against a forfeiture for waste, and compel the lord to re-admit on receiving satisfaction for the injury he has sustained. Such relief is particularly given, where the waste is committed through ignorance, or where the waste is merely *permissive* and there has not been an obstinate perseverance in neglecting to repair after notice. 1. Cha. Caf. 95. and Prec. in Chanc. 568. Another instance, in which relief against forfeiture for waste is said to be proper, is where the lessee of a copyholder commits waste without his direction or privity. Toth. Cha. 237. But in this latter case it may be doubted, whether the waste is a forfeiture. See Mo. 49.

(3) See further on the subject of copyhold estates Kitchin on Courts, Coke's Copyholder and the Supplement, the book intitled the *Surveior's Dialogue*, Calthrope's Reading on Lord and Copyholder, Hughes on Original Writs 247. to 259. the title *Copihold* in the Abridgments, the *Lex Custumaria*, and the several other treatises on copyhold law, particularly those by Shepherd and Nelson.

T H E
S E C O N D B O O K
O F T H E
F I R S T P A R T
O F T H E
I N S T I T U T E S
O F T H E
L A W S O F E N G L A N D.

Chap. I.

Homage.

Sect. 85.

HOMAGE est le plus honorable service, et plus humble service de reverence, que franktenant puit faire a son seignior. Car quant le tenant ferra homage a son seignior, il ferra discinct, et son test discover, et son seignior seera, et le tenant genulera devant luy sur ambideux genues, et tiendra ses maines extendes, et joyntes ensemble enter les maines le seignior, et issint dirra: Jeo

HOMAGE is the most honorable service, and most humble service of reverence, that a franktenant may doe to his lord. For when the tenant shall make homage to his lord, he shall be ungirt, and his head uncovered, and his lord shall sit, and the tenant shal kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his lord, and shall say thus: I become your man

OUR author having taught us in his former booke the several distinct estates of lands and tenements as most necessary to be knowne, for the understanding of these two other bookes, doth in this second book treat of the tenures (1) and services, whereby the said lands and tenements be holden; which he divideth into twelve parts, viz. Homage, Fealty, Escuage, Knight service, Socage, Frankalmoine, Homage Auncestrell, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage, and into Rents. Wherein his method is most excellent (2), for he beginneth with Homage, because it is the most humble service of reverence, expressing the duty of the tenant to his lord, and the affectionate love and protection of the lord towards his tenant, as hereafter shall appeare. Secondly, Fealty, a sacred service, expressing by oath

(4. Co. 8. a. Bevil's case.)

(1) It is scarce possible to have a just and proper idea of our law of tenures, the greater part of which is founded on principles strictly feudal, without the aid of some previous information concerning the origin of feuds in general, and the time and manner of their introduction into this country. This interesting subject seems to have entirely escaped the attention of lord Coke; for though he writes so learnedly and minutely in explaining the nature of each tenure, and its fruits and incidents, yet there is not any thing like an historical illustration with the least reference to the general doctrine of feuds, or to the means by which they were established in England; a silence the more unaccountable, because the subject exercised the pens of several cotemporary writers, and the great antiquary of our English laws, Sir Henry Spelman, had actually published the first part of his Glossary, in which he discourses largely on feuds, near two years before the first edition of the Commentary on Littleton. To supply the deficiency here imputed to lord Coke, as far as the compass of an annotation will allow, it shall be attempted to state shortly some of the principal opinions, which occur on the subject, and to refer to some of the books in which they are respectively advanced or controverted.

As to the first institution of feuds, some writers deduce them from the earliest ages of the world, and suppose, that the idea of giving land on the terms of doing military service for it, which it must be confessed was the grand principle of the feudal system, must have been common to the most ancient nations, when they emigrated to form new settlements, and was the natural result of such a situation. See Niell. Disputat. Feud. cited in Voet. ad Pandect. lib. 38. Digress. de Feud. 1. Gen. 47. But this opinion has been generally disapproved of as fanciful, and founded on a narrow and incomprehensive notion of feuds, and depending on resemblances too faint and remote to warrant a just comparison. Inter. de Feud. Imper. c. 1. s. 2. Spelman. Posthum. 2. Others think, that they discover the origin of feuds in the institution of patron and client by Romulus on the first founding of the Roman state. Zasius Epit. Feud. &c. cited in Inter. de Feud. Imper. c. 1. s. 3. But the slightest examination shews this connection to have been widely different from that between lord and vassal; the latter merely arising from land, and, according to the strict and pure notion of feuds, being ever accompanied with services of a military kind and also with a jurisdiction;

oath his fidelity to his lord.

Thirdly, *Escuage*, which is *servitium scuti*, the service of the shield.

Fourthly, *Knights service*, for the defence of the realme against outward hostility and invasions, which the better might be effected, if such duty fidelity and love were betwene lords and tenants, as ought to be, and as the law expecteth.

Fifthly, *Socage*, the service of the plough, aptly placed next knights service; for that the ploughman maketh the best souldier, as shall appeare in his proper place.

Sixtly, *Frankalmoigne*, service due to Almighty God, placed towards the middest for two causes: first, for that the middest is the most worthy and most honorable place; and secondly, because the first five preceding tenures and services, and the other fixe subsequent, must all become prosperous and usefull, by reason of God's true religion and service; for *nunquam prospere succedunt res humanae, ubi negliguntur divina*. Wherein I would have our student follow the advice given in these ancient verses, for the good spending of the day.

Sex horas somno, totidem des legibus æquis.

Quatuor orabis, des epulisque duas.

Quod superest ultro facris largire camænis.

Seventhly, *homage auncestrell*, ancient families enjoying, with their blood, the ancient inheritance of their forefathers, as a great blessing of the Almighty.

8. & 9. *Serjeanty grand et petit*, due to the king only, to whom the highest and most eminent honor, ligeance, and reverence of all kinde is due; which hath two notable effects. First, *imperii majestas est tutela salus*, according to the old rule; and secondly, it is an assured means of long continuance of houses and families in prosperous estate, whereof our author speaketh in the chapter before.

10. Then followeth the tenure of Burgage, of ancient burghes and cities, &c. which are to be supported for the honour of the king, and for the maintenance of trade and traffique, the life of all common wealths, especially of islands.

11. Villenage, for the performance of service, yet necessary service for the cleansing of cities, boroughes, mannors, &c. and for the better manuring of arable grounds, and increase of husbandry.

12. And lastly, tenure by Rents, which are called *vini redditus*, because the lords and owners thereof do live by them; which they shall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and necessary, holden up and fillable at a reasonable value. And now understanding his method, let us peruse our author's words.

And as our author beganne his first booke with fee simple, which is the most principall and worthiest estate, so he beginneth his second booke with homage, which is the most honorable and humble service.

[a] Glanv. li. 9. ca. 1. Bract. fo. 78. 80. Brit. fo. 170. 172. 173. Flet. li. 3. c. 16. Mir. c. 3. de Homage, et l. 5. Sect. 1.

Homage, is derived of [a] *homo*, and it is called *homage*, because when he doth this service, he saith, *jeo deveigne vostre home*. And in English homage is called manhood, so as the manhood of his tenant, and the homage of his tenant is all one. *Mutua quidem debet esse dominii et homagii fidelitatis connexio, ita quod quantum homo debet domino ex homagio, tantum illi debet dominus ex dominio præter solam reverentiam.*

[b] Lib. Rub. ca. 55.

Foyal et loyal. These words are of great extent, for they extend to the observation of the lord's counsell in whatsoever is honest and profitable. [b] *Omnis homo debet fidem domino suo de vita et membris suis, et terreno honore, et observatione consilii sui per honestum et utile* (comprehended under these words *foyal et loyal*) *salva fide Deo et terra principi.*

Service.

(1) Nota, in ancient times by *hommes* or *men*, homagers, whom we now call freeholders, were intended; as in grants, that he and his men should be free from toll. 14. H. 6. 12. 13. Aff. 35. 33. E. 3. 88. 31. E. 3. Barr. 161. Hal. MSS.—In the famous controversy, which began between Dr. Brady and others some few years before the revolution about the origin of the house of Commons, one point in dispute was the sense of the words *homines* and *liberè tenentes* as used in writs of summons to parliament before the reign of Henry the third and in other ancient records; the doctor endeavouring to confine the word to the king's tenants in capite, and his competitors on the other hand being as strenuous to comprehend within the description of *homines* any free subjects of the king, and within that of *liberè tenentes* all freeholders in general, whether they held immediately of the king or not. See voc. *Liberi homines* in the Gloss. at the end of Brad. Introd. to English Hist. Tyrrel. Biblioth. Politic. 300. 308. 322. 326. 352. 369. 537. and Lord Lyttelt. Hen. 3. 8vo. ed. vol. 3. p. 337. However Mr. Tyrrel allows the word *homines* to be equivocal, and to vary in the sense according to the occasion on which it is used.

(2) The words *de vie et de membre et de terrene honor* are not in L. and M. but the Roh. and subsequent editions have them.

(3) Vid. in Rot. Parl. 18. H. 6. n. 58. a special act of parliament to excuse the kissing in the case of homage made to the king by reason of pestilence. Hal. MSS.

tion; which circumstances are quite foreign to the former, and seem of themselves so essentially to distinguish the two, as to render the labour of seeking for other differences wholly unnecessary. See Bodin. de Repub. lib. 1. c. 7. Crag. Jus Feud. lib. 1. Dieges. 5. et Duck de Ul. Jur. Civ. cap. 6. Others again have suggested, that the grants of forfeited lands to the veteran soldiers of Sylla, Julius Cæsar, and the Triumvirs, in the latter times of the Roman republick, gave rise to feuds; but it has been sensibly observed by a very ingenious writer, that such lands were given, not on the condition of future but as rewards for past military

Service. [c] *Servitium in lege Angliæ regulariter accipitur pro servitio, quod per tenentes Dominis suis debetur ratione feodi sui.* But *servitium est duplex, spirituale*, whereof more shall be said in the chapter of frankalmoigne; *et temporale*, whereof our author here treateth. And he beginneth with homage, first, because it is most honourable, for, *honor plus est in honorante, quam in honorato.* 2. It is *plus humble de reverence*, and both of these for five causes on the part of the tenant. First, the tenant when he doth his homage is *discinctus*, disarmed or unguarded. Secondly, *nudo capite*, bare headed. Thirdly, *ad pedes domini super genua projectus*. Fourthly, *ambas manus junctas inter manus domini porrigit*. Fifthly, *per verba omni supplici veneratione plena*, he saith, *Jeo deveigne vostre home, &c.* And for three causes on the part of the lord: first, the lord doth sit. Secondly, he incloseth his tenant's hands betweene his owne. Thirdly, the lord sitting kisseth the tenant. Prudent antiquity did, for the more solemnity and better memory and observation of that which is to bee done, expresse substances under ceremonies.

Nil sine prudenti fecit ratione vetustas.

Jeo deveigne vostre home de vie et de member. And therefore he is *discinctus*, for that he must never be armed against, or opposite to his lord, but both life and member must be ready for the lawfull defence of his lord.

2. *De terrene honor.* Expressed by kneeling at the feet of his lord.

3. *Debet quidem tenens manus suas utrasque ponere inter manus utrasque domini sui, per quod significatur ex parte domini protectio defensio et varrantia, et ex parte tenentis reverentia et subjectione.* So as the holding up of the tenant's hands betokeneth reverence and subjection, and the lord's inclosing of his tenant's hands between his own betokeneth protection and defence.

4. *Et a vous ferra foyal et loyal, et foy a vous portera, &c.* This saith, *fides*, or *foedus perpetuum*, this perpetuall league betweene the lord and the tenant is expressed by the lord's kissing of the tenant. And some say, that *foedus dicitur à fide, quia fides interponitur.* And so firme and strong was this league betweene them, that by the ancient law of England, *nihil facere potest tenens propter obligationem homagii, quod vertatur domino ad exheredationem, vel aliam atrocem injuriam. Nec dominus tenenti è converso. Quod si fecerint, dissolvitur et extinguuntur homagium omnino et homagii connexio et obligatio, et erit inde justum judicium cum venerit contra homagium et fidelitatis sacramentum, quod in eo in quo delinquant puniantur, s. in persona domini, quod amittat dominium, et in persona tenentis, quod amittat tenementum.*

Des tenements queux jeo claime a tener de vous. Britton saith, that [a] in doing of homage he must name the lands or tenements for which he doth homage in certaintie, and the reason is, *ne in captione homagii contingat dominum per negligentiam decipi vel per errorem.*

For the better understanding of that which shall be said hereafter, it is to be knowne, that first, there is no land in England in the hands of any subject, (as it hath been said) but it is holden of some lord by some kind of service, as partly hath been touched before (1).

Secondly, all the lands [b] within this realme were originally derived from the crowne, and therefore the king is soveraign lord, or lord paramount, either mediate or immediate of all and every parcell of land within the realme (2).

Thirdly, that in ancient time lords upon the creation of their tenures did not onely reserve rents, services, and profit, &c. for which they might disteine and have other remedy, but also tooke an humble submission of his tenant by promise and oath, (for to homage fealty is incident) to be true and faithfull to him for the tenements holden of him, which submission is called homage and fealty, according to the tenure reserved.

Salve le foy que jeo doy a nostre seignior le roy. Both because there is *homagium ligum*, which is due to the king onely, and also because he is soveraign lord over all (3). I have seene an ancient record in Anno 6. Edw. 1. in these words. *Michael de North, qui sequitur pro Rege, queritur, quod cum Dominus Rex ratione regie dignitatis et coronæ suæ tale habeat privilegium quod nullus in regno suo de aliquo qui sit in regno Angliæ alicui homagium facere debeat, vel aliquis hujusmodi homagium ab aliquo recipere debeat, nisi facta mentione de homagio Domino regi debito eidem domino regi fideliter observand. Walterius Exon' Episcopus, in contemptu domini regis, et ad manifestam quoad privilegium prædictum ipsius domini regis exheredationem, et ad damnum et dedecus ipsius domini regis ad Valentiam decem Mill' librarum, de Henrico de Pomeray, Thoma de Kane, Johanne de bello prato, Laurentio filio Ric. Johanne le Soer, Willielmo de Alex', Eudone*

Glanvil. lib. 9. c. 1. Mir. c. 3. de Fealty. Bract. ubi supr. Brit. ubi supr. Inter Inquis. apud Lancaster. anno 6. E. 1. Cornub. in Thef.

(1) According to this position, of which the truth is undeniable, all the lands in England, except those in the king's hands, are feudal. This universality of tenures, if not quite peculiar to England, certainly doth not prevail in several countries on the continent of Europe, where the feudal system has been established, and it seems, that there are some few portions of allodial land in the northern part of our own island. In France they still have their *franc-aleu*, which is the name by which allodial land is distinguished, as well as their *fiefs*; and in some provinces, such as Provence Languedoc and others, which not having any *coutume* or system of customary law adopt the *written* or *Roman* law, the country is so far from being wholly feudal, that all inheritances are presumed to be quite free from feudal dependance till the contrary is proved, and therefore are called *franc-aleu sans titre*, that is, free without the possessor's being obliged to prove them so. Instit. Droit. Franc. par Argou. l. 2. c. 3. Decif. Nouv. par Denifart. tit. *Franc-aleu* and *Droit-ecrit*. Even in Normandy, from which country our ancestors borrowed at least some parts of our law of tenures, and where the feudal policy with its utmost rigors is supposed to have been so early and so completely introduced, a remnant of allodial land is still to be found, and their reformed *coutumier* expressly divides their estates into *franc aleu* and *tenures*. Littelt. par Houard. v. 1. p. 196. and Cout. Reform. Norman. par Berrault. Art. 102. The German and Dutch lawyers make the like distinction with respect to lands in their countries; and they must almost necessarily have a considerable proportion of allodial land, as the rule of their courts of justice is to presume in favour of it, whenever the quality of the land appears doubtful. Heinecc. Elem. Jur. Germ. lib. 2. tit. 1. §. 35. Dar. Inst. Jur. Priv. German. sect. 705. 706. and Voet ad Pandect. lib. 38. Digres. de Feud. sect. 4. As to Scotland, lord Stair expresses himself rather ambiguously on the subject; for he says that there remains *little of allodial land in Scotland*, but in a few lines after observes, that the glebes of the clergy, which seem to come nearest to allodials, are more properly *mortified*, or as we should call them, *mortmain* fees. Sta. Inst. b. 4. l. 3. f. 4. However other respectable authors rank the manes and glebes of the Scotch clergy amongst things allodial; and write as if they thought, that the law of fiefs had not yet pervaded the Orkneys. Ersk. Princ. Law Scotl. 126. Ess. Brit. Antiq. 19.—(2) See ante fol. 64. a. note 1. and fol. 1. b. note 1.—(3) Vid. as to the homage by the king of England to the king of France

military services, after the donation of them were of the nature of other Roman estates. Sullivan's Lectures 25. See also Clark. Connect. of Roman Saxon and English Coins 440. Some compare the *coloni et gleba adscriptii*, of which

Eudone de Tranael, Rogero le gros, Jobanne le Lunge, Rado' de Bevill, Guidone Norant, Willielmo de Rouherrek, et Hen. Cannel, accepit servitia contra privilegium prædict', nulla facia mentione de homagio et fidelitate domino regi debitis. And judgement in the end was given against the said bishop.

Roy. Our ancestors the Saxons termed him *Coning* or *Cynig*, a name signifying power and skill, which by way of contraction we now call king. This name the Saxons with a small alteration had from the Brittaines who called him *Koningh* or *Koninke*. In French he is called *Roy*, in Italian *Re*, in Spanish *Rey*, all derived from the Latine (*Rex*), of the true signification whereof you shall read [d] plentifully in our old bookes.

So as homage is divided first in *homagium ligeum*, et *non ligeum* (1).

2. In *homagium antecessorium*, et *non antecessorium* (2). It is here necessary to be knowne, what tenant, that holdeth by homage, shall doe homage. [e] *Item videndum, quis potest homagium facere.* Sciendum est, quod quilibet liber homo, tam masculus quam femina, clericus et laicus, major et minor; dum tamen electi in episcopos post consecrationem homagium non faciant, quicquid fecerint ante, sed tantum fidelitatem (3). *Conventus autem homagium non faciet de jure, sicut nec Abbas, nec Prior, eo quod tenent nomine alieno, scilicet nomine ecclesiarum.*

[g] One within the age of 21 yeares may doe homage; but Bracton saith he cannot doe fealty, because in doing fealty he ought to be sworne, which an infant cannot be (4). But some opinions be in our bookes to the contrary, viz. that an infant shall doe fealty; but I take it to be meant of homage, and herewith [b] agreeth Britton who saith, et tout soit que enfant deins age fait homage, pur ceo ne volons nous my que il face serement de fealty, j'esque a taunt que il soit de pleine age; et tout soit ceo comon dit del people que fait de enfant fait deins age ne soit fait my a tener estable. Volons neque dent, que chescun home et chescun feme, de quel age que ils soient, facent homage a leur seignior selonque lestatut de la grand charter.

Glanvill saith, [i] women shall not do homage; but Littleton saith that a woman shall doe homage, but she shall not say, *Jeo deveigne vostre feme*, but *Jeo face a vous homage*; and so is Glanvill to be understood, that she shall not doe complete homage.

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[d] Glanvill lib. 1. cap. 9. in fine. Britton lib. 2. 78. Bracton cap. 68. Fleta lib. 3. ca. 16.

[i] Vid. Sect. 96 & 133.

NO man of religion, when [k] he hath homage shall say, *Jeo deveigne vostre home*; because he hath professed himselfe the man of God, yet shall he doe homage, and shal say, [l] *Jeo face a vous homage*, et à vous ferra foyall et loyall, &c. and note, that here religion is taken largely, for it extends not only to regular persons as abbots and the like, but also to all ecclesiasticall persons, as bishops, deanes, or any other sole ecclesiasticall body politike; and so it is in use at this day, which also appears in our old bookes.

And it is to be observed, that in old bookes and records, the homage, which a bishop, abbot or other man of religion doth, is called fealty, for that it wanteth these words, (*Jeo deveigne vostre home*.) But yet in judgement of law it is homage; because he saith, I doe to you homage, &c. and so of a woman.

MES si un abbe, ou un pryor, ou auter home de religion, ferra homage a son seignior, il ne dirra, *Jeo deveigne vostre home*, &c. pur ceo que il ad luy professe pur estre tant solement le home de Dieu. Mes il dirra issint, *Jeo vous face homage et a vous ferra foyall et loial, et foy a vous portera des tenements que jeo teigne de vous, salve la foy que jeo doy a nostre seignior le roy.*

BUT if an abbot, or a pryor, or other, man of religion, shall doe homage to his lord, he shall not say, I become your man, &c. for that he hath professed himselfe to be onely the man of God. But he shall say thus, I doe homage unto you, and to you I shall be true and faithfull, and faith to you beare for the tenements which I hold of you, saving the faith which I doe owe unto our lord the king.

Sect.

France for the dutchy of Aquitain, &c. It was doubted, whether the homage ought to be liege; but at length it was resolved, that it should be liege; and for that purpose writs patent were made by the king of England, settling it in this way, viz. that the king of England duke of Guyen should hold his hands between the hands of the king of France, and he who should speak for the king of France should address his words to the king of England duke of Guyen, and should say thus, Do you remain a liege man of the king of France, my lord who is here, as duke of Guyen and peer of France, and promise to bear him faith and loyalty? say yes; and that the said king duke and his successors dukes of Guyen should say yes; and that then the king of France should receive the said king of England and duke to the said homage and faith and with a kiss saving his right and the other's. 1. Pars Pat. 5. E. 3. m. 19.—For the homage done to the pope by king John, see M. Paris 237. Hal. MSS.—For a full account of the circumstances, which attended Edward's homage for Guienne, &c. see 1. Tind. Rap. fol. ed. 412. See also Froiss. l. 1. c. 25. and 4. Rym. Feod. 383. to 390. there cited, and Du Fresn. Gloss. voc. Homagium. Mr. Tindal in a note on Rapin observes, that liege or full homage is done with head bare and sword ungirt, as if that was the thing which chiefly distinguished homage ligeum from homage non ligeum. But in truth that formality was incident to both, and the difference between the two was of a more essential kind, and Philip de Valois of France and our Edward the Third knew this, or probably there would not have been so much difficulty in adjusting the ceremony between them. Homage ligeum was without any saving or exception of the faith due to king or other lords; but homage non ligeum had such an exception. The former properly came from the subject to the sovereign; the latter from one subject to another. The former generally and in strictness included allegiance as a subject, and could not be renounced; though sometimes, when done by one who was himself a sovereign prince as a mark of feudal dependance in respect not of his whole dominions but only of a part of them, it was not understood with so much latitude; but the latter never imported any thing more than a connection in the way of tenure, which the homager might at any time free himself from by renouncing the land he was invested with. See Du Fresn. Gloss. voc. Hominum et legius, and Spelman. Gloss. voc. Homagium et ligantia.

(1) See note 3. in 65. a.—(2) That is, *auncesirel* and not *auncesirel*, as to which see Post 100. b.—(3) Homage done to the king by a bishop salvo suo ordine. M. Paris 101. Hal. MSS. See what is said by lord Coke infra.—(4) Infant casts ejus of being in the king's

which there is such frequent mention both in the Theodosian code and in that of Justinian, with feudatories; but nothing can be more strongly marked than the distinction between the two, for the former were adstricted to the soil, were employed in cultivating it, and in performing other rural services for the owner, and in short approached nearer

Sect. 87.

Pur ceo que nest convenient, &c. By this it appeareth, [m] that *argumentum ab inconvenienti plurimum valet in lege*, as often shall be observed hereafter. *Non solum quod licet, sed quid est conveniens est considerandum.* *Nihil, quod est inconveniens, est licitum* (1). [m] For like reasons ab inconvenienti, vide Sect. 138. 139. 231. 269. 440. 478. 665. 722. 730. 21. H. 7. 13. F. N. B. 230. d. 16. H. 7. 9.

ITEM si feme sole ferra homage a son seignior, el ne dirra, Jeo deveigne vostre feme; pur ceo que nest convenient, que feme dirra, que il deviendra feme a ascun home, forsque a sa baron, quant el est espouse. Mes el dirra, jeo face a vous homage, et a vous ferra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, Salve la foy que jeo doy a nostre seignior le roy.

ALSO if a woman sole shall doe homage, she shal not say, I become your woman; for it is not fitting, that a woman should say that she will become a woman to any man, but to her husband, when she is married. But she shall say, I do to you homage, and to you shall be faithfull and true, and faith to you shall bear for the tenements I hold of you, Saving the faith I owe to our soveraign lord the king.

Sect. 88. (2)

ITEM home puit veier un bone note en M. 15. E. 3. Pou un home et sa feme fierent homage et fealty en le common banke, quel est escrie en tiel forme. Nota, que I. Leukner et Elizabeth sa feme fierent homage a W. Thorpe en cest maner: lun et lautre tiendront jointment leur mains enter les mains W. T. et le baron dit en cest forme: Nous vous ferromus homage, et foy a vous porterons, pur les tenements, que nous teignomus de A. votre conusor, que a vous ad graunt nostre services en B. et C. et auters villes, &c. encountre tous gents, salve la foy que nous devons a nostre seig-

ALSO a man may see a good note in M. 15. E. 3. where a man and his wife did homage and fealty in the common place, which is written in this forme. Note that I. Lewknor and Eliz. his wife did homage to W. Thorpe in this manner: the one and the other held their hands joynly betweene the hands of W. T. and the husband faith in this forme: We doe to you homage, and faith to you shall beare for the tenements which we hold of A. your conusor, who hath granted to you our services in B. and C. and other townes, &c. against all nations (3), saving the faith which we owe to our lord the king and to his heires, and to our

IN this [n] record three things are to be observed. [n] Mich. 15. E. 3. tit. Avowrie 109.

1. How necessary, and profitable records and observations are; albeit they were not published in print, for at the time when Littleton wrote, this record was not printed.

2. That the husband and wife doing homage, the husband shall speake the words for them both, viz. we doe to you homage, &c.

3. That the homage which the husband and wife doe, is the very homage which the wife should doe alone. But this joint homage, done by the husband and wife, is intended to be before issue had betweene them, whereof more shall be sayd hereafter. And it is to be observed, that very few cases ruled or resolved in the reigne of Edward the Third, but the same or the like had

king's service for another. 21. E. 3. 33. He shall do fealty. 24. E. 3. 63. 64. Hal. MSS.—In casting an essoin *de servitio regis*, the essoinor, that is, he who casts the essoin for the absent person, must swear to the truth of the essoin; which explains the object of the case cited by lord Hale. See 2. Inst. 314. See further as to the swearing of an infant Post 158. a.

(1) Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasoning is nearly on an equipoise ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist upon inconveniences; nor can it be true that nothing which is inconvenient is lawful, for that supposes in those, who make laws, a perfection of which the most exalted human wisdom is incapable of attaining, and would be an invincible argument against ever changing the law.—(2) In the Rohan edition and in those of Pynson and Redman, this section is transposed to the chapter of Fealty.—(3) Lord Coke's translation of the word *gents* is erroneous; for as Mr. Madox justly remarks, though the *Roman word gens*

nearer to *slaves* than to *free-men soldiers* and *feudal tenants*. See Iter. Feud. Imper. cap. 1. sect. 3. 5. One civilian of the first character seems to deduce fiefs from the *procuratores pradiorum*, the *emphyteuticarii*, and others of a similar description, who are well known to the Roman law. Cujac. Observ. lib. 8. c. 14. and De feud. lib. 1. princip. But it should be recollected, that the *procuratores pradiorum* were properly only bailiffs and servants to the owners of the land, and that the *emphyteuticarii* were merely occupiers of land under contracts of hiring; and therefore one may differ from the great author of this opinion, without forgetting the respect justly due to so high an authority. In truth, the possessions of the *former* do not appear to have been like any fief, and those of the *latter* at the utmost only come near to a resemblance of fiefs of the *pradial* and *improper* kind, such as our *socage* tenure, and other deviations from the original feudal establishments. Consequently it is not in the least probable, that pure and genuine fiefs, which were the price of *military* service only, and gave rise to the great system of *tenures*, should be the offspring of such parents. The same observation may be applied to the *pradia stipendiaria*, which some writers cite from the books of the Roman law as instances of fiefs, but which were, as I apprehend, only a species of the *emphyteusis*, or land let to hire. See Iter. de Feud. Imp. cap. 1. sect. 3. 5. Heinecc. Syntagm. Antiq. Rom. lib. 3. tit. 3. f. 13. and the word

had been ruled or resolved in the reigns of Edward the second, Edward the first, or before, as for example for warrant hereof, *vide* Hill. 17. E. 2. Rot. Parl. &c.

Hill 17. E. 2. Rot. Parl. &c.

nior le roy, et a ses heires, et a nostre auters seigniors : et lun et l'auter luy baseront. Et puis ils fierent fealtie, et lun et l'auter tyendront lour mains sur un livre, et le baron dit les parolx, et ambideux baseront le livre.

other lords, and both the one and the other kissed him. And after they did fealtie, and both of them hold their hands upon the booke, and the husband said the words, and both kissed the booke.

Sect. 89.

Et a mes auters seigniours. This saving for other lords is good for explanation, albeit the homage is referred onely to the tenements which he holdeth of him to whom he doth the homage.

NOTA si un home ad severall tenancies, queux il tient de severall seigniors, scilicet chescun tenancy per homage, donque quant il fait homage a un des seigniors, il dirra en le fine de son homage fait, *Salve la foy que jeo doy nostre seignior le roy, et a mes auters seigniors* (1).

NOTE if a man hath severall tenancies, which he holdeth of severall lords, that is to say, every tenancy by homage, then when he doth homage to one of his lords, he shall say in the end of his homage done, Saving the faith which I owe to our lord the king, and to my other lords.

Sect. 90.

EN droit dun auter.

As the husband and wife in the right of his wife, the bishop in right of his bishopricke, &c. the abbot or prior in right of his monastery, &c. But no corporation aggregate of many persons capable, be the same ecclesiasticall or temporall, can doe homage, as a deane and chapter, maior and commonalty, and such like, albeit they be seised in fee of lands holden by homage, yet shall not they doe homage. And the reason is, because that homage must be done in person, and a corporation aggregate of many cannot appeare in person; for albeit the bodies naturall, whereupon the bodie politique consists, may be seene, yet the bodie politique or corporate itselfe cannot be seene, nor doe any act but by attorney, and homage must ever be done in person, &c. (3) And albeit an

NOTA que nul ferra homage, mes tiel que ad e-

state en fee simple, ou en fee taile, et son droit demesne, ou en droit dun auter. Car il est un maxime en ley, que il, que ad estate forsque pur terme de vie, ne ferra homage, ne prendra homage. Car si feme ad terres ou tenements en fee simple, ou en fee taile, queux il tient de son seignior per homage, et prent baron, et ont issue, donque le baron en la vie la feme ferra homage (2),

NOTE, none shall do homage but such, as have an estate in fee simple, or fee taile, in his owne right, or in the right of another. For it is a maxime in law, that he, which hath an estate but for terme of life, shall neither doe homage or take homage. For if a woman hath lands or tenements in fee simple, or in fee taile, which she holdeth of her lord by homage, and taketh husband and have issue, then the husband in the life of the wife shall doe ho-

pur

gens signifies sometimes a nation, and sometimes a family, and *gens* is Romanick or bastard Roman, and derived from *gens*, yet like many other Romanick words it acquired a new import, and according to that denotes men or persons. See Mad. Bar. Angl. 167. and Hist. Excheq. in Pref. p. 13.

(1) This expresse saving of the faith due to the king was formerly of consequence, being calculated to prevent that intire dependance of the tenant on his immediate lord, the idea of which in times, when the feudal institutions were in their full vigour, operated very strongly, and tended to depress the authority of the sovereign. See a sensible note on this subject in Litt. par Howard. v. 1. p. 114. and 121. In another place lord Coke cites an instance of an information on the part of the crown against a bishop, for receiving homage from his tenants without any saving of the faith due to the king; but it doth not appear by the extract which lord Coke gives of the record, how this contempt of the royal authority was punished. See ante 65. a. — (2) Vid. F. N. B. 257. Husband alone doth fealty before the having of issue. Nota, before issue the avowry for homage shall be on the husband and wife, and not only on the wife. 29. E. 3. 15. But after issue the avowry for homage shall be on the husband. But till the lord hath notice of the having issue, he may avow upon both. 7. E. 4. 27. The husband only shall do the homage, quia si dominus adiret prælum, vir consecutus esset eum, non mulier. 13. E. 1. Avowry. 234. Hal. MSS. — (3) 2. E. 3. 10. Accord. Hal. MSS.

word *spendiaria* in the Lexicons of the Roman law. As to the *soldurii*, who were the companions and followers of the princes and chieftains amongst the ancient Gauls and are by some writers considered as feudal vassals, their attachment was independent of land, and this of itself is sufficient to shew, that the connection was not the same as that which is the result of tenure. However it may be proper to observe, that a like sort of union between the princes of the ancient Germans and their *comites* is agreed

pur ceo que il ad title daver les tenements per le curtesie Dengleterre sil servesquist la feme, et auxy il tient en droit de sa feme. Mes si la feme devy devant homage fait per le baron en la vie sa feme, et le baron soy tient eins come tenant per le curtesie, donques il ne ferra homage a son seignior, pur ceo que el adonque nad estate forsque pur terme de vie.

Plus ferra dit de homage en le tenure per homage auncestrel.

mage, because he hath title to have the tenements by the curtesie of England if he surviveth his wife, and also he holdeth in right of his wife. But if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himselfe in as tenant by the curtesie, then he shall not doe homage to his lord, because he then hath an estate but for terme of life.

More shall be said of homage in the tenure of homage ancestrell.

gether. [i] But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his wife; and the reason is, because he by having of issue is intitled to an estate for terme of his owne life, in his owne right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life. But if his wife dye, then he hath onely but an estate for life, and then he cannot receive homage. Yet tenant for life or yeares of a feignory [u] shall have ward, marriage, and reliefe, and shall suppose that the tenant died in the fealty of the pl. [x] *Fieri possunt homagia libero homini tam masculo quam femina, tam majori quam minori, tam clerico quam laico.*

Et ount issue, donque le baron en la vie la feme ferra homage. The reason hereof is rendred before, and also that after the death of his wife he being but a bare tenant for life shall doe no homage; for regularly it is true, that he, that cannot receive homage in respect of the weaknesse of his estate in the feignory, shall not doe homage, if he hath a like estate in the tenancy.

If a man hold of the king, and hath issue divers daughters, and dyeth, the king shall have homage of every one of these daughters. And this [a] appeareth by the statute *de Hibernia anno 14. H. 3.* to be the common law, for that act saith, *in regno nostro Angliæ talis est lex et consuetudo, quod si quis tenuerit de nobis in capite, et habuerit filias hæredes, ipso patre defuncto, antecessores nostri habuerunt et semper nos habuimus et cepimus homagium de omnibus hujusmodi filiabus, et singulæ earum tenent de nobis in capite in hoc casu.* And therefore where by the [b] statute *De prærogativa Regis*, it is provided, *Si una hæreditas, &c.* that is but an affirmance of the common law. [c] But this is to be understood where the coheirs be of full age; for if they be within age and in ward to the king, *Primogenita tantum faciet homagium pro se et sororibus suis, et aliæ sorores, cum ad ætatem pervenerint, facient servitia domini feodorum per manum primogenitæ.* [d] Add therefore if a man holds of a common person by the service of homage, and hath issue divers daughters and dyeth, the eldest daughter onely shall doe homage for her and all her sisters. And this appeareth also by the statute of *Hibernia. Primogenita tantum faciet homagium domino pro se et omnibus sororibus suis.* And the reason is there rendred afterward, *Quia omnes sorores sunt quasi unus hæres de una hæreditate.* [e] But if the coparceners in that case make partition, then every one shall doe homage, because now it is not *una sed diversa hæreditas.* [f] And so it is if one make a feoffment in fee

abbot and covent is a corporation aggregate of many, yet because the covent are all dead persons in law, the abbot alone in nature of a sole corporation shall doe homage,

Un maxime en ley.

A maxime is a proposition, to be of all men confessed and granted without prooffe, argument, or discourse. *Contra negantem principia non est disputandum.* But of this somewhat hath beene said before.

Il que ad estate forsque pur terme de vie.

[g] A parson or vicar of a church, that hath a qualified fee, [r] and yet to many intents upon the matter but an estate for life, can neither receive (1) homage nor doe homage, as a bishop, an abbot, or any such like, that hath a fee absolute, may. [s] So if a man and his wife be seised in fee of a feignorie in the right of his wife, the husband shall not receive homage alone, but he and his wife to-

(Ante 10. b. Post 343. a.)

[g] Glanvil lib. 9. cap. 2. Britton fol. 170. Temps E. 1. tit. Juris utrum 13. (Post 341. b.) [r] 8. E. 4. 28. 39. E. 3. 15. 3. E. 3. Avowry 175.

[s] 2. E. 2. Avowrie 183. F. N. B. 257. 13. E. 3. gard. 39.

[i] 27. Aff. p. 51. F. N. B. 257. 13. H. 6. Avowrie 21. 43. E. 3. 13. 44. E. 3. 41. 3. E. 3. Avowrie 175. 13. E. 3. 2. gard. 39. 22. E. 3. fol. 19. gard. 44.

[u] 6. E. 2. garl. 122. 13. E. 3. gard. 39. 22. E. 3. gard. 44. [x] Glanvil lib. 9. cap. 3. 18. E. 3. 7. 43. E. 3. 13. 44. E. 3. 41. 13. H. 6. Avowrie 21. 8. H. 6. 13. 7. E. 4. 27. F. N. B. 257.

[a] 14. H. 3. tit. Prærog. 5.

[b] Prærog. Regis cap. 5. [c] Statut. de homagio capiendo Temps E. 1. (2)

[d] Glanvil lib. 7. cap. 3. & lib. 9. cap. 2. Bract. lib. 1. de homag. capiend. & lib. 2. fo. 78. 80. Britton fol. 168. b. 171. 172. Fleta lib. 3. cap. 16. & lib. 2. ca. 60. & lib. 5. cap. 9. F. N. B. 161. 15. 259. Stanf. prærog. 23. 24. (Post 164. b.)

[e] F. N. B. 162. Vide 11. E. 3. Avowrie 101.

[f] 45. E. 3. 23. 24. E. 3. 73. Marlbridge cap. 9. F. N. B. 162.

(1) Lord Coke in another place, where he explains for what purposes a parson hath a fee and for what an estate for life only, says, that he may receive homage, and cites Bro. Abr. temps E. 1. Encumbent 19. But the book referred to agrees with the doctrine here.

(2) This seems to be the same as is now called 17. E. 2. ft. 2. and is printed in our statute books by the title of *Modus faciendi homagium et fidelitatem*. But Mr. Madox with reason observes, that it is not a statute. but only a precedent of the form of doing homage. Mad. Bar. Angl. 272. A like remark is made by Mr. Barrington. See Observat. on Ant. Stat. 2d ed. p. 159.

agreed by those who refer the origin of fiefs to a much later period, to have been one of the many causes which accelerated the progress of fiefs. Itter. de Feud. Imper. cap. 1. sect. 4. 5. Another opinion as to the beginning of fiefs is, that the use of them may be dated from the time of the emperor Alexander Severus, who, about the middle of the third century granted out large districts taken from the enemy on the frontiers of the Roman empire to the *duces limitanei* and others of his officers and soldiers, under the conditions of military service, and on those terms declared the land transmissible to heirs. Seld. Tit. of Hon. 2d ed. c. 2. f. 23. p. 332. Duck de Uf. Jur. Civ. lib. 1. c. 6. Itter. de Feud. Imper. c. 1. f. 3. and Clarke's Connect. Rom. Sax. and Engl. Coins 440. These grants, and some few others of a like kind, which are attributed to succeeding Roman emperors, give the semblance of probability to the conjecture of those, who consider the feudal establishments, so common in the subsequent times, as mere imitations of these examples and extensions of the same policy; and it must be owned, that they at least seem to justify

[g] 2. E. 2. Avowrie 179. (2.
Ro. Abr. 514. F. N. B. 135.)

[b] 7. E. 4. 27. 28. 14. H. 4.
38. 1. H. 5. grant 43. 31. E.
3. gard. 116.
[i] 48. E. 3. 8. 15. E. 4. 13. 5.
E. 4. 3.

[k] 22. E. 4. 22.

[l] 3. E. 2. Avowrie 187. 13. H.
4. 5. 13. R. 2. tit. Avowrie 89.
8. H. 3. tit. Prescription 38.
Hill. 22. E. 1. coram Rege Rot.
43. (Post 73. a.)

fee (which is a partition in law for that part) the feoffee shall doe homage, for every tenant in common shall doe severall services. And it hath been adjudged [g] in our bookes, that if the eldest coparcener doe homage to the lord, and afterward the younger sister maketh a feoffment in fee of her part, the lord shall have homage for the part of the younger sister, for that which was *una hæreditas*, one inheritance by law, by the alienation, which is her act, is (as hath beene said) divided and become in grosse, and the coparcenary defeated.

But if tenant in feeoffe divers men in fee jointly, [b] all these jointenants shall jointly doe their homage, and their fealty also. [i] If homage be due by the tenant, and he maketh a feoffment in fee, the feoffor shall not doe homage; because albeit he is supposed to be tenant in some cases, *quant al avowrie*, yet the feoffee is very tenant, and homage shall ever be done by the very tenant, but that very tenant needeth not to be very tenant of the land, and therefore the mesne because he is very tenant to the lord paramount (though he be not tenant of the land) shall doe homage. And so it is of the disseisee, and of tenant in taile, after a feoffment in fee, for in that case the donee is very tenant to the donor.

If a tenant that holdeth by homage maketh a feoffment in fee of part, [k] that feoffee shall doe homage, and so shall every feoffee of what part soever.

If there be two coparceners or jointenants of a feignory, if the tenant doth homage and fealty to one of them, [l] he shall be excused against the other.

If homage be parcell of a tenure, it is a presumption that the tenure is by knights service, unlesse the contrary be proved, but of itselfe it maketh not knights service. And yet by custome the heire of him that holds by homage onely may be in ward.

More shall be said of homage in the title of Homage Ancestrell (1).

CHAP. 2. Sect. 91.

Fealty.

FEALTY in French is *seaulty*, and is [a] derived of the Latin word *fides*, or *fidelitas*.

Et quant frank-tenant. Every freeholder, except tenant in frankalmoigne shall doe fealty. [b] And yet some that are not tenants of any freehold shall doe fealty, as a tenant for years shall do fealty (2).

Bracton saith, *De nullo tenemento, quod tenetur ad terminum, fit homagium, fit tamen inde fidelitatis sacramentum.*

Que a vous serra foial et loial, &c. et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous serra les customes et services, &c.

FEALTY, idem est quod fidelitas in Latin. *Et quant franktenant serra fealtie a son seignior, il tiendra sa maine dexter sur un lievre et dirra issint; Ceo oyes vous mon seignior, que jeo a vous serra foyal et loial, et foy a vous portera des tenements que jeo claime a tener de vous, et que loialment a vous serra les customes et services, queux faire a vous doy, as termes assignes, sicome moy aide Dieu et ses Saints; et basera le lievre. Mes il ne genulera quant il fait fealty, ne serra tiel humble reverence, come avant est dit en homage.*

FEALTY is the same that *fidelitas* is in Latine. And when a freeholder doth fealty to his lord, he shal hold his right hand upon a booke, and shall say thus, Know ye this my lord, that I shall be faithfull and true unto you, and faith to you shall beare for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his Saints; and he shall kisse the book. But he shall not kneele when he maketh his fealty, nor shall make such humble reverence as is aforesaid in homage.

[c] Fealtie

(1) See Post 100. b.—The statute of 12. Cha. 2. c. 24. which was made to free the subject from the burthen of knight's service and the oppressive consequences of tenures in capite, amongst other provisions wholly discharges all tenures from the incident of homage; not because homage itself was any grievance, but because, though not wholly, yet it was more properly an incident to knight's service, which the statute abolishes. But whilst homage continued, it was far from being a mere ceremony, for the performance of it, where it was due, materially concerned both lord and tenant in point of interest and advantage. To the lord it was of consequence, because till he had received homage from the heir he was not intitled to the wardship of him and of his land; unless the lord had the feignory for life or years only, in which case he could not take homage and therefore was allowed wardship without. *Dominus* (as Magna Charta expresses it) *non habeat custodiam ejus, nec terra sue antequam homagium ceperit*; which words it is said import, not that the lord could not have the wardship of the heir unless he had actually received homage from the ancestor, but only that he could not have it till it was received from the heir. See 9. H. 3. cap. 3. and 2. Inst. 10. To the tenant the homage was scarce of less importance; for antiently every kind of homage when received, but not before, bound the lord to acquittal or warranty, that is both to keep the tenant free from distress entry or other molestation for services due to the lords paramount, and to defend his title to the land against all others; though in subsequent times this implication of acquittal and warranty became peculiar to homage *ancestral*. See Post fol. 100. a. 101. a. 2. Inst. 11. Such being the effect of homage, it was necessary to provide the means of compelling the tenant to do and the lord to receive it; and accordingly our law gave the remedy by *distress* for the former purpose, and the writ *de capiendo homagium* for the latter. Post 105. a. 2. Inst. 11. However when it was settled, that implied acquittal and warranty were only incident to homage *ancestral*, the writ *de capiendo homagium* fell into disuse; for it did not lie in the case of other homage, the reason of the law, which gave it to the tenant that he might intitle himself to acquittal and warranty, having ceased with respect to that, and homage *ancestral* being very rare, if not entirely worn out, in the time of lord Coke. See 2. Inst. 11.—See further on the effect of homage in Littlet. par Houard v. r. p. 519. Mad. Baron. Angl. 269. and Sulliv. Lect. 128. particularly the latter book. See also as to homage in general. Spelm. Gloss. voc. *Hominium*, and Du Fresn. Gloss. voc. *Hominium* et *Vassalaticum* and Post 68. b.—(2) Tenant at will should be added to the exception. See Post 93. Also according to 5. H. 3. 12. and 10. H. 6. 13. tenant for years is not compellable to do fealty; but Littleton sect. 132. is expressly with lord Coke. See too the other authorities cited in the margin and an observation on the 10. H. 6. 13. in Kitch. on Courts ed. 1592. fo. 132. a.

tify Mr. Selden in observing, that *some* use of fiefs may very properly be referred to the time of Alexander Severus. But that opinion,

[c] Fealtie is a part of homage (1), for all the words of fealtie are comprehended within homage (2), and therefore fealtie is incident to homage.

[e] *Mirror esp. 3. de sez. & de fealtie. (4. Co. 8. b.)*

Sicome moy aide dieu. As homage is the more honourable service, so fealty is a service more iacred, because he is sworne thereunto. And the reason wherefore the tenant is not sworne in doing his homage to his lord is, for that no subject is sworne to another subject to become his man of life and member but to the king onely, and that is called the oath of allegiance or *homagium ligeum* (3). And those words for that purpose are omitted out of fealtie, which is to be done upon oath. And Littleton said wel (when a freeholder doth fealtie); [d] for the fealtie of him, that holdeth in villenage, differeth from the fealtie of the freeholder. For the villaine holding his right hand upon the booke shall say thus to his lord, Hear you my lord A. that I A. B. from this day forward shall be to you true and faithful, and shall owe you fealtie for the land that I hold of you in villenage, and shall be justified by you in bodie and goods, so help me God, &c. as by the act (4) appeareth.

(7. Co. Calvin's case.)

[d] Stat. de 17. E. 2. tit. Homage in le Abridgment.

Sect. 92.

ET grand diversite y ad per enter fealsans de fealtie et de homage; car homage ne poit estre fait forsque al seignior meme; mes le seneschal de court le seignior, ou bailife, puit prender fealtie pur le seignior.

AND there is great diversitee betwene the doing of fealty, and of homage; for homage cannot be done to any but to the lord himselfe; but the steward of the lord's court, or bailife, may take fealty for the lord.

BRACON lib. 2. fo. 80. *Sciendum est, quod non per procuratores nec per literas fieri poterit homagium; sed in propria persona, tam domini quam tenentis, capi debet et fieri.*

Bracton lib. 2. fo. 8. 21. E. 4. 17. acc. 2. E. 3. 10. 32. H. 6. 23. 9. Co. 76.

Mes le seneschal, &c. ou bailife poit prender fealtie. This is so evident, as it needeth no explanation.

[e] Vid. For the signification of Seneschal and Bailife Sect. 78. 79. 248. & 379.

Sect. 93.

ITEM tenant a terme de vie ferra fealtie, et uncore ilne ferra homage. Et divers autres diversities y sont perenter homage et fealtie.

ALSO tenant for terme of life shall doe fealtie, and yet he shall not doe homage. And divers other diversities there be betwene homage and fealty.

THE tenant must doe fealtie in person; because he must be sworne unto it, and no man can sweare by the common law by attorney or proctor. (5)

9. Co. 76.

Sect. 94.

ITEM home poit veir 15. E. 3. coment home et sa feme fieront homage et fealtie en common banke, que lest escript devant en tenure de homage.

ALSO a man may see in 15. E. 3. how a man and his wife shall doe homage and fealty in the common place, which is written before in the tenure of homage.

THIS is evident and appeareth before; and if lords knew what benefit they may reape by receiving of homage and fealty, they would not neglect them; [e] for by the receiving of either of them, it is a sufficient seisin of all manner of services, as by the words [f] of either of them appeareth (6). Now if it be demanded,

[e] 4. Co. 8. & 9. Co. Bevil's case. 13. E. 4. 5.

[f] Vid. Sect. 118. 130. 131. 138.

(1) In some countries on the continent of Europe homage and fealty are blended together so as to form one engagement, being so intire that one cannot be without the other; and therefore foreign jurists frequently consider them as synonymous. But lord Coke, notwithstanding his saying, that fealty is a part of homage, apparently doth not mean to confound them; for in our law, whilst both continued, they were in some respect distinct, and though fealty was an incident to homage and ought always to have accompanied it, yet fealty, as lord Coke himself tells us, might be by itself, being sometimes done where homage was not due and would have been improper, and in the two next sections Littleton strongly marks the difference between the two. In short by our law homage was inseparable from fealty, but fealty was not so from homage. See ante 67. b. Post 150. b. 151. a. and Wright's Ten. 55. note (o) and Du Fresn. Gloss. voc. *Hominium et Fidelitas*.—(2) This is not strictly accurate; for the words *So help me God and the saints*, which constitute the oath and are therefore of the essence of fealty were not comprehended in the form of homage, nor were the words *I will lawfully do to you the customs and services which I ought to do to you at the terms assigned*. Another difference between the two in point of expression was, that the person doing fealty did not say, *I become your man*, words so significant of the nature of the engagement by homage. Also in fealty there is not any exception of faith to the king or other lords, which seeming to be intended as a qualification of the peculiar words of homage, *I become your man*, might perhaps on that account be thought unnecessary in fealty.—(3) See ante 65. a. and note 1. in 66. b. and Post n. 1. in 68. b.—In note 1. of 66. b. it is observed, that it doth not appear by the extract from the record of the bishop of Exeter's case, what punishment was inflicted on the bishop for receiving homage without the exception of faith to the king. But this was a mistake, for the extract mentions the suit to have been for 10,000l. and so Dr. Sullivan states it to have been; though in his book no authority is vouched. See Sulliv. Lect. 129. It is observable, that there is a want of reference to authorities through the whole of the same ingenious book; a deficiency very much to be lamented, as it renders that work, which is particularly valuable for the copiousness of the author's historical deductions in respect to fiefs, much less useful than it would otherwise be.—(4) See the note on this supposed statute in 67. b. ante.—(5) Vid. *fealty done by attorney*. Patricius de Graham miles regis Scotiæ sacramentum fidelitatis fecit regi Angliæ in nomine ipsius regis Scotiæ pro omnibus terris de Penreth Tindal et Sourby. Parl. E. 1. 137. Hal. MSS.—This amongst us is a singular instance of fealty by attorney, and certainly by our law was an irregularity; for even in Bracton's time, homage could not be done by attorney, and much less could an oath be taken in that way. See *supra*. However in some countries they are not so strict, particularly in France, where both homage and fealty may be done by proxy, if the lord gives his consent, and by the custom of some of the French provinces without. See tit. *Foy et Homage* in Denif. Nouvel. Decif.—(6) Vid. *that seisin of fealty doth not estop the tenant from traversing the seisin of other services*. 41. E. 3. 25. 50. *John Lillburne's case*. Hal. MSS. See further as to the advantages accruing from the receiving of homage and fealty, ante 67. b. and Post 93. a. and b. and note 5. in 68. b.

opinion, which seems to have the most probability and is adapted by the generality of the best writers, particularly those of the

what difference is betweene the oath of fealtie, when it is done to the king in respect of a tenure, and the oath which everie subject ought to take in respect of his allegiance, Littleton here setteth downe the oath of fealtie. Now the

[g] oath of allegiance is thus, you shall sweare, &c. (1) Then it may be demanded, where and when is this oath to be taken, and it is answered, that whosoever is above the age of twelve yeares, is to be sworne in the tourne, unlesse he be within some leet, and then in the leet (2): and I reade amongst the lawes of Saint Edward (3), *Quod hanc legem invenit Arthurus, qui quondam fuit inclitissimus rex Britannorum, et ita consolidavit et confederavit regnum Britannia universum semper in unum. Hujus legis auctoritate expulit Arthurus prædictus Saracenos et inimicos à regno. Lex enim ista diu sopita fuit et sepulta, donec Eadgarus rex Anglorum excitavit, et erexit in lucem, et illam per totum regnum observari precipit.* Which law in some manner is observed at this day (4). But to returne to Littleton (5).

[g] Brit. ca. 29. Calvin's case 7. Co. 6. b. 12. H. 7. 18.

Lambert 135.

Plus ferra dit de fealtie en le tenure en focage, et en le tenure en frankalmoigne, et en le tenure per homage auncestrel.

More shall be said of fealtie in the tenure in focage, and in frankealmoigne, and in the tenure by homage auncestrell.

CHAP. 3. Sect. 95. (6)

Escuage.

[a] Mir. ca. 1. sect. 3. Brit. fo. 162. &c. Ockam cap. Quid sit scutagium. (F. N. B. 83. C. 2. Ro. Abr. 507. 4. Inst. 192. Post 87. a. 106. b.)

ESCUAGE. [a] In Latine Scutagium (id est) Servitium scuti, service of the shield. Hereby it appeareth that right interpretations and etymologies are necessary: for, *ad recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet.*

(Post 86. b. 177. a.)

Nomina si nescis, perit cognitio rerum.

And herewith agreeth that which is said, *Primo excutienda est verbi vis, ne sermonis vitio obstruetur oratio, sive lex sine argumentis.*

[b] Bract. li. 2. fo. 36. a. Flet. li. 3. ca. 14. Ockam ubi supra. 27. Alf. 52. 31. Alf. 38.

Scutum in French is Escue, and thereof commeth the Escuer, (i.) Scutifer, which we usually call Armiger. [b] Of this Bracton faith, *Item scutagium dicitur, quod talis præstatio pertinet ad scutum, quod assumitur ad servitium militare.* And Fleta faith, *Sunt quedam servitia forinseca, et dici possunt regalia, quæ ad scutum præstantur, et inde habemus scutagium, et ratione scuti pro feodo militari reputatur:* and Ockam faith, *Hæc itaque summa, quia nomine scutorum solvitur, scutagium nuncupatur* (7).

(Post 74. b.)

ESCUAGE est appell en Latine Scutagium, ce-
stascavoir, Servitium
scuti. Et tiel tenant,
qui tient sa terre per
escuage, tient per ser-
vice de chivaler. Et
auxy il est commune-
ment dit, que ascun
tient per un fee de ser-
vice de chivaler, et
ascun per le moity
dun fee de service de
chivaler, &c. Et il est
dit, que quant le roy
face voyage royal en
Escoce pur subduer
les Scotas, donques
il, que tient per un
fee de service de
chivaler, covient estre
oue le roy per 40
jours, bien et coven-
ablement array pur le
guerre. Et celuy, que
tient sa terre per le

ESCUAGE is called in Latine Scutagi-
um, that is, service of
the shield; and that
tenant, which holdeth
his land by escuage,
holdeth by knights
service. And also it is
commonly said, That
some hold by the ser-
vice of one knight's
fee, and some by the
halfe of a knight's
fee. And it is sayd,
That when the king
makes a voyage royall
into Scotland to sub-
due the Scots, then he,
which holdeth by the
service of one knight's
fee, ought to be with
the king fortie dayes,
well and conveniently
arrayed for the war.
And he, which hol-
deth his land by the
moitie of a knight's

moity

(1) The form of the old oath of allegiance may be seen in the books cited in the margin; but it has been changed by several statutes made since the revolution, and these indulge quakers with signing a declaration of fidelity instead of taking the oath. See Burn's Justice tit. Oaths and Com. Dig. tit. Allegiance. In lord Hale's History of the Pleas of the Crown, there is a very learned dissertation on the old oath of allegiance, in which his lordship explains how it differs from the oath of fealty to the king by reason of tenure. He also discourses largely on the subject of homage, and points out the several distinctions between *homagium simplex*, *homagium ligeum*, and *homagium mixtum*. See 1. Hal. Hist. P. C. 61. to 75. This curious part of lord Hale's works did not occur, till it was too late to give the benefit of it to the notes in the chapter of Homage.—(2) How the taking of the oaths of allegiance is regulated by modern statutes, see Com. Dig. tit. Allegiance and Burn's Just. tit. Oaths.—(3) As to the laws of Edward the Confessor, the authenticity of those in print is controverted by the famous Dr. Hickes. See Hick. Thesaur. Ling. Septentrion. Dissert. Epist. 95.—(4) Mr. Lambard, who published the first edition of the Anglo-Saxon Laws, informs his reader, that those called Edward the Confessor's were printed from two manuscripts, and that one of them was very ancient, but the other not so old; and it appears, that this strange tale, about king Arthur's consolidating the whole island of Britain into one kingdom, was not in the more ancient manuscript. See Lamb. Archaionom. 124. a. A learned writer on British antiquities, who appears to have taken great pains to point out the real transactions of Arthur, though a warm advocate for great part of his history, doth not profess to vouch for this tradition concerning him. See Whitak. Manchestr. 4to ed. v. 2. p. 31.—(5) The law with respect to fealty continues the same as when lord Coke wrote; for it is not varied as I apprehend by the 12. Ch. 2. c. 24. or any other statute made since his time. But it is no longer the practice to exact the performance of fealty. In the case of copyholders, it is become a thing of course on admitting them to enter a respite of fealty; but with respect to such as hold by other tenures, it is never thought of. However it may not be amiss to remember, that the title to fealty still remains; that it is due from all tenants except tenants by frankalmoigne and such as hold at will or by sufferance, and if required must be iterated on every change of the lord, it differing in this respect from homage, which except in special cases is only due once; that the receiving of it is at least attended with the advantage of preserving the memory of tenures, which though perhaps sufficiently done in the case of copyholds by the admittances and by the payment of fines and quit-rents and continual render of other services, may be very necessary in cases, where fealty is the only service due; and lastly, that the law for compelling the performance of fealty has provided the remedy by distress, which is an inseparable incident to all services due by tenure, and in the case of fealty cannot, as it is said, be excessive. See ante 68. a. and Post 103. b. 104. a. b. 152. b. and Kitch. ed. 1592. fo. 70. b. and 131. b. 2. Inst. 107. and 4. Co. 8. b. See further as to fealty, Sulliv. Lect. 68. where the oath of fealty is learnedly commented upon, and the words *fidelitas et sacramentum* in the Gloss. by Spelman and Du Fresne.—(6) Mr. Madox in his Baron. Angl. 217. animadvertes upon this section of Littleton; as to which see note n. 2. of 62. a. ante and the note at the end of this chapter of escuage Post 74. b.—(7) In a former place, a doubt is expressed as to the book by Ockam

the present times, attributes the origin of the feudal establishments principally to the northern nations, which in the fourth and fifth

moitie dun fee de chivaler, covient este oue le roy per 20 jours; et il, que tient son terre per le quart part dun fee de chivaler, covient este oue le roy per 10 jours; et issint que pluis, pluis, et que meins, meins.

fee, ought to be with the king twentieth dayes; and he which holdeth his land by the fourth part of a knight's fee, ought to be with the king ten dayes; and so he that hath more, more, and he that hath lesse, lesse.

[c] Et tiel tenant que tient son terre per escuage tient per service de chivaler.

[c] *Mirr. cap. 1. sect. 3.*

[d] For as fealty is incident to homage, so homage and knights service be incident to escuage, and by the grant of services escuage passeth with the rest. Every tenure by escuage is a tenure by knights service; but every tenant, that holdeth by knights ser-

[d] 2. E. 3. 8. b. 19. E. 3. A. vovry 294. 26. H. 8. 1. a. 20. E. 3. Per quæ servic. 11. 43. E. 3. 22. F. N. B. 83. 84. (4. Inst. 192.)

(Post. 82. b.)

vice, holdeth not by escuage, as shall be said hereafter (1). But note here the wisdom of antiquity, [e] *Maxime enim princeps, domesticos quam stipendiarios bellicis apponere casibus*, that is, to be served in his warres by his owne subjects, rather than by stipendary forainers.

[e] Lib. rub.

Un fee de service de chivaler. [f] There is great diversity of opinions concerning the contents of a knight's fee, that is, how much land goeth to the livelyhood of a knight. For some say that a knight's fee consisteth of eight hides, and every hide containeth an hundred acres, and so a knight's fee should containe 800 acres. Others say, that a knight's fee containeth 680 acres. Others say, that an oxgang of land containeth 15 acres, and eight oxgangs make a plowland; by which account a plowland containes 120 acres; and that *virgata terræ*, or a yard land, containeth 20 acres. But I hold, that a knight's fee, an hide or plowland, a yardland or oxgang of land, doe not containe any certaine number of acres (2); but a knight's fee is properly to be esteemed according to the qualitie, and not according to the quantity of the land, that is to say, by the value, and not by the content (3). And therefore it is very true, which Master Camden in his *Britannia* page 136. saith, *viz. Subsequenti ætate ex censu ut colligitur facti fuerunt equites, &c.* And antiquity thought, that twenty pound land was sufficient to maintaine the degree of a knight, as appeareth in the ancient treatise *De modo tenendi Parliamentum* (4) *tempore regis Edw. filii regis Etheldredi*, where it appeareth that comitatus (to wit) an earledome, *constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas; baronia constat ex 13 feodis, et 3 parte unius feodi militis* (5) *secundum computationem prædictam; unum feodum militis constat ex terris ad valentiam 20l.* Which antiquity I cite, for that it concurrith with the act of parliament, anno 1. E. 2. *de militibus* (6); by which act *Census militaris* the state of a knight is measured by the value of xx pound per annum, and not by any certaine content of acres; and with this agreeth the statute of W. 1. cap. 35. and F. N. B. fol. 82. where twenty pound of land in socage is put in equipage of a knight's fee; and this is the most reasonable estimate, for one acre may be better than many others, so as he, which hath 680 or 800 acres of some barren land, had not according to the ancient account a sufficient revenue to maintaine the degree of a knight, and he, which had a lesse number of acres of some land of the value of xx pound per annum, had a sufficient livelihood in those daies for the maintenance of a knight (7). So antiquity thought that 400 markes of land per annum was a competent livelihood for a baron, and 400 pound per annum, *ad sustinendum nomen et onus* of an earle, and of late time 800 markes per annum of a marquess, and 800 pound per annum of a duke; so that their yearly revenue was estimated by the value and not by the content. And one plow land, *carucata terræ*, or a hide of land, *bida terræ*, (which is all one) is not of any certain content, but as much as a plough can by course of husbandry plow in a yeare. And therewith agreeth Lambert *verbo Hide*. And a plowland may containe a messuage, wood, meadow, and pasture, because that by them the plowmen and the cattell belonging to the plow are maintained. *Vide Temp. E. 1. tit. Briefe 860. 4. E. 3. 47. Pl. Com. in Hill and Grange's case, fol. 168. Vide 6. E. 3. fol. 42. and 39. H. 6. 8. a.* And venerable Beda calleth a plowland *familiam* a family; because it containeth necessary things for the maintenance of a family. And Prifot well saith in 35. H. 6. fol. 29. that a plow may till more land in a yeare in one country than in another; and therefore it stands with reason, that a plowland should be lesse in one place than in another. 41. E. 3. tit. Fine 40. and 13 E. 3. Fine 67. A fine shall not be received *de una virgata terræ* for the uncertainty, *vide 39. H. 6. 8.* But an acre of land is certaine by the statute *de terris mensurandis*. Note also (reader) that every plowland of ancient time was of the yearely value of five nobles per annum, and this was the living of a plowman or yeoman; and *ex duodecim carucatis constabat unum feodum militis*, which amount to 20 pound per annum. And this you may see *Termino pacis. anno 3. E. 1. Coram Rogero de Seyton et sociis suis iusticiariis apud Westm.*

[f] 9. Co. 122. in Lowe's case. Vide 7. Co. 33. 34. Nevil's case. (Sid. 128.)

(2. Ro. Abr. 515. 516. F. N. B. 82. c.)

Ockam to which lord Coke so frequently refers. See ante 58. note 1. But on looking into the Dialogue of the Exchequer I find the passage here attributed to Ockam *verbatim* in the chapter *quid sit scutagium*, which lord Coke himself cites a little above in this page; from which it seems very plain, that by Ockam's book lord Coke means that Dialogue. Mr. Madox, who first published the Dialogue of the Exchequer, thinks, that it was written or finished soon after the 24th year of Hen. 2. and that, Richard bishop of London, and son of Nigell, who was bishop of Ely and treasurer to Hen. 1. was the author; and this opinion he supports with his usual learning and accuracy. See Dissertat. Epist. ad fin. Mad. Hist. Exch. What was lord Coke's reason for attributing this dialogue to Ockam, it is not easy to guess.—Note, that there seems to be great confusion in most books, when the *Black Book* the *Red Book* and the *Dialogue of the Exchequer* are mentioned; and this proceeds from the want of a settled distinction between the three. Even bishop Nicholson, to whose labours all who study either our history or the antiquities of our laws are so greatly indebted, expresses himself with inaccuracy on the subject of these three books. He writes, as if he took the *Black Book* and the *Dialogue* to be the same; for writing of the former he says, *Mr. Madox, who has given us a correct edition of this treatise, is of opinion that Richard Nigelli filius, &c. was the author.* Nicholf. Engl. Hist. Libr. 2d ed. p. 215. But this is a misconception of Mr. Madox's words, the sum of his account being, that the *Dialogue* is both in the *Red* and *Black Book*, but is only a part of each, and that, though Alexander de Swerford was compiler of the *Red Book*, not he, but Richard son of Nigell was author of the *Dialogue*. As to the name of the compiler of the *Black-Book*, Mr. Madox is wholly silent. Another thing proper to mention is, that it seems uncertain whether the *Black* and *Red Book* are not in point of contents the same. Mr. Hearne, who first published a copy of the *Black-Book* thinks, that they partly differ and partly agree in their contents, but he doth not write quite positively, or pretend to say, that he had seen the two originals in the exchequer. Hearne. Lib. Nig. ed. 1771. Præf. 17. As to Mr. Madox, he is silent on the subject.

(1) See as to this Post 82. b.—(2) T. 21. E. 1. Rot. 26. Ebor. coram rege. *Eight acres make an oxgang in the fields of Doncaster.* Hic fol. 5. a. Vid. Seld. Tit. Hon. pars 2. c. 5. f. 4. In Cranfield 48 acres make a yard-land and 4 yard-lands make a hide; so that oxgang yard-land and hide or plough-land are altogether uncertain according to the diversity of places. Hal. MSS.—See further infra and also ante 5. a. and note 11. there. In fol. 5. lord Hale gives the following note on the uncertainty of the word *oxgang*.—Breve de una bovata marisci is ill. 13. E. 3. Briefe 241. Hal. MSS. See infra a like case as to the uncertainty of *virgata*.—(3) Mr. Selden insists, that a knight's fee was estimable, neither by the value nor the quantity of the land, but by the services or number of knights reserved. Seld. Tit. Hon. 2d ed. part 2. c. 5. f. 26.—(4) See a note on this treatise Post 69. b.—(5) This notion of there being a certain number of knights fees in an earldom and barony is controverted by Mr. Selden; and he cites instances of earldoms and baronies with a less as well as with a greater number than lord Coke mentions. Seld. Tit. Hon. 2d ed. part 2. c. 5. f. 26.—(6) Lord Coke in another place observes, that the 1. E. 2. *de militibus*, though called a statute, was only a writ granted by the king in the time of parliament and therefore entred of record. 2. Inst. 393.—(7) Nota quoad preceptum de militibus faciendis variatim se habet census communis militaris. Omnes laici qui tenent integrum feodum militis fiant milites

and fifth centuries over-run the western part of the Roman empire, and at length out of its ruins formed the principal of the various

West. Ebor. Ro. 10. Radulphus de Normanville petens in brevi de medio queritur contra Luciam de Kyme, quod cum ipsa teneat de ipso duas carectas terre in Conington per homagium et servitium militare, unde duodecim carucate terre faciunt unum feodum militis pro omni servitio, ipsa distrinxit ipsum ad faciendam sectam ad curiam suam de Thorneton in Craven, &c. (1).

And it is to be observed, that the reliefe of a knight and all above him which be noble, is the fourth part of their yearly revenue, as of a knight five pound, which is the fourth part of 20 pound. So una baronia constat ex 13 feodis militum et de 3 parte unius feodi militis, which amount to 400 markes, and therefore his reliefe is the fourth part of this, viz. 100 markes: and an earledome consists of twenty knights fees, which amount to 400 pound (as before it appeareth by the said ancient record de modo tenendi parliamentum, &c. (2).) and therefore his reliefe is 100 pound. And this also appeareth by the statute of Magna Charta, cap. 2. and by the equity of this statute, inasmuch as a marquisdome, which consists of the reveaue of two baronies which amount to 800 markes, shall pay according to that just proportion for his reliefe 200 markes; and because a dukedome consists of the revenues of two earledomes, viz. 800 pound per annum, a duke shall pay 200 for a reliefe, which is also the fourth part of his revenue; and with this agree the records of the Exchequer.

Note (reader) at the time of the making of the statute of Magna Charta 9. H. 3. there was not any duke, marquesse, or viscount in England, and therefore the statute could not make mention of them, and Edward the eldest sonne of king E. 3. called the Black Prince was the first duke in England after the Conquest, and Robert earle of Oxford in the reigne of R. 2. was the first marquesse, Sic enim inter ordines Anglie in sua Britannia testatur Camden ubi supra. Et titulus Marchionis serius ad nos devenit, nec ante R. 2. tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias suas primum Marchionem Dubliniæ designavit, merumque erat honoris nomen. Hæc ille. And before the reigne of H. 6. there was not any viscount. Sic enim idem author ubi supra asserit. Post comites vicecomites ordine sequuntur. Viscounts nos vocamus. Hæc vetus officii sed nova dignitatis appellatio, et H. 6. tempore ad nos primum audita. Hæc ille. Et dominus de Bello monte was the first viscount created by king H. 6. Vide Cassianum in gloria mundi parte 4. confid. 55. that this dignity of a viscount is of great antiquity in other realmes.

Bracton lib. 2. 36. Item sunt quedam servitia, quæ dicuntur forinseca, quævis sunt in carta de feoffamentis expressa et nominata, et quæ ideo dici possunt forinseca, quia pertinent ad dominum regem, et non ad dominum capitalem, nisi cum in propria persona profectus fuerit in servitio, vel nisi cum pro servitio suo satisfecerit domino regi, &c.

Voyage Royal. A voyage royall is not onely, when the king himselfe goeth to warre, as Littleton here saith, but also when his lieutenant or deputy of his lieutenant goeth. And what shall be said a voyage royall shall be adjudged in this case by the judges of the common law as an incident to escuage, and not by the constable and marshall, or any other: et sic de similibus.

There is also another kind of voyage royall, viz. when one goeth with the king's daughter beyond sea to be married, &c. for such a voyage is for the good of the whole realme, (for more profit for the realme cannot be then to make alliance with another nation); but of this voyage royall Littleton speaketh not here, but onely of the voyage royall to warre: so as there is a voyage royall of warre, and a voyage royall of peace and amity. And it is to be observed, that he that holdeth by castle gard or cornage holdeth by knights service, and yet he shall pay no escuage, because he holdeth not to goe with the king to warre (3).

En Escocce. In Scotiam, this is put but for an example, for if the tenure be to goe in Walliam, Hiberniam, Vasconiam, Pictaviam, &c. it is all one. See an ancient record, Rot. & finibus Termino Mich. 11. E. 2. Sir Rich. Rockesley knight did hold lands at Seaton by serjeanty to be Ventrarius Regis, that is to be the king's fore-foot-man when the king went into Gascoigne, donec persus fuit pari solutarum precii 4 d. that is, untill he had worne out a paire of shooes of the price of foure pence. And this service, being admitted to be performed when the king went to Gascoigne to make warre, is knights service.

Il que tient per un fee de service de chivalier covient estre ove le roy per 40 jours. But this is to be understood of a tenant that holdeth of the king immediately; for every man is bound by his tenure to defend his lord, and both he and his lord the king and his country; and therefore if the lord goeth not, his tenant is excused. But yet if the tenant peravaille goeth with the king, it excuseth all the mesnes.

And it is to be observed, that for every pound of the ancient value of a knight's fee accounting twenty pound land, the tenant must goe with the king two dayes, which commeth just to 40 dayes for a whole knight's fee. By the statute of Magna Charta it is provided, that scutagium de cetero capiatur sicut capi consuevit tempore Hen. regis avi nostri. Sect.

Lib. Rub. in Scacc. 47. 48. 19. R. 2. Gard. 95. 6. R. 2. Protection 46. 6. H. 3. Avowry 242. Vide Rot. Claus. 8. H. 3. & Fin. 8. H. 3. & Patent. 9. H. 3. multi solverunt scutagium pro exercitu in Walliam. memb. 30. & ante Claus. 6. H. 3. memb. 3.

Magna Charta cap. 37. Fleta lib. cap. 60.

lites. 1. pars Claus. 9. H. 3. m. 24. dorf. Claus. 16. H. 3. m. 4. dorfo. Postea fiant milites, qui habent 15 l. per annum vel feodum militis. Rotulo respect. militie 40. H. 3. tempore E. 1. Qui habent viginti librant, fiant milites rot. hundredi 3. E. 1. Et sic continuavit usque 2. E. 2. et postea. Sed demum qui habent 40. librat. terre fiant milites. Claus. 6. E. 2. m. 27. Et sic continuavit usque 17. regis Caroli. Vid. Rot. Parl. 18. H. 6. n. 43. 28. H. 6. n. 12. and vid. Claus. 6. E. 2. m. 27. 19. E. 2. m. 9. E. 3. m. 17.—Hal. MSS.—Before and in the time of Charles the first it was apprehended, that the king might lawfully compel all men, who were of full age and seised of lands to the value of 40 l. a year, either to take upon them the order of knighthood, or to pay fines for being excused. An attempt to exercise this power, which lord Coke himself allows to have been a prerogative of the crown, was one of the many expedients, used by that unfortunate prince to raise a revenue without the aid of parliament; and it terminated accordingly, for it was the occasion of a statute, which provided against the future exercise of any such power. See 16. Cha. 1. c. 20. 2. Inst. 593. Blackst. Comment. ed. 5. v. 1. p. 402. and v. 2. p. 61. and Barringt. Ant. Stat. ad ed. 144.

(1) 4. E. 2. Avowry 200. Viginti virgata terre faciunt unum feodum militis. M. 13. & 14. E. 1. Rot. 17. Glouc. Quadraginta carucat. terre faciunt unum feodum militis. 8. E. 3. 49. Duodecim carucate et duæ bovate terre faciunt unum feodum militis. Vid. apud Math. Paris in Vitis 23. abbatum fol. 131. Abbas Sancti Albani debet regi sex milites. Et ibi recensentur numeri hidarum ad quodlibet feodum militis. Alibi quinque, alibi sex, alibi septem hidæ faciunt feodum militis. Hal. MSS.—See further as to the contents of a knight's fee, Post 76. a. and 83. b. and 2. Inst. 596.—(2) Vide Seld. Tit. Hon. parte 2. c. 5. f. 26. ubi autoritas authoris libri modi tenendi parl. et ista opinio de certa proportionem annui valoris feodi militaris, baroniz, et comitatus, optime refutantur. Vid. infra 83. b. Hal. MSS.—The modus tenendi parliamentum, according to the title as given in lord Coke's preface to his ninth book of Reports, imports to be an account of the manner of holding the English parliaments in the time of Edward the Confessor, and that it was approved of by the first William, and conformed to in his time and in that of his successors. To this modus lord Coke frequently refers as to a most undoubtedly genuine piece of antiquity; and in his fourth Institute he tells us, that Henry the Second after having conquered Ireland lent a transcript of this modus into that country as a model for parliaments there; and that in the reign of Hen. 4. this transcript, which is known by the name of the Irish modus, fell into the hands of Sir Christopher Preston, and was then exemplified by infleximus under the great seal of Ireland. But notwithstanding all this, the reasons of Mr. Selden and Mr. Pryn, of whom the former supposes it to have been an imposture of the time of Edward the Third, and the latter makes it an invention as late as the 31. H. 6. seem to furnish unsurmountable objections against the authority of the English modus; and so convinced of their force was an able advocate for the existence of the commons as a constituent part of parliament before the 49. Hen. 3. that he candidly gives up its antiquity, though if it could have been defended, it would have decided the controversy in his favour, for it expressly mentions citizens and burgesses as well as knights of the shire. See 4. Inst. 12. Seld. Tit. Hon. 2d ed. part 2. c. 5. f. 26. Pryn on 4. Inst. 1. and Tyrr. Biblioth. Polit. 270. 406. However Dr. Dopping bishop of Meath, who in 1692 first published the Irish modus, feebly endeavours to defend the antiquity of the supposed transcript in the time of Hen. 2. and two other writers deservingly of great credit seem inclined the same way. See Molyn. Case of Ireland and Harr. Edit. of Ware's Hist. and Antiq. of Irel. 84. Mr. Selden mentions, that in his time there were many copies of the English modus; but I am not aware, that any one is in print.—As to lord Coke's account of the computation of reliefs by the yearly revenue, which lord Hale observes to have been also refuted by Selden, see Post 83. b.—(3) Vid. Sæpissime temporibus H. 2. R. 1. Johann. B. 3. 1. E. 2. Scutagium pro exercitu regis

various states and governments, into which we now see Europe divided. Many reasons might be adduced in favour of this opinion,

Sect. 96.

MES il appiert per les plees et arguments faits en un bon plee sur brieve de detinue de un escript obligatorie port per un H. Gray, T. 7. E. 3. que ne be-joigne a celui, que tient per escuage, de aler oue le roy luy mesme, sil voile trouver un auter person able pur luy convenablement array per le guerre, de aler oue le roy. Et ceo semble estre bon reason. Car poit estre, que celui que tient per tiels services est languissant, issint que il ne poit aler ne chivaucher. Et auxy un abbe, ou auter home de religion, ou feme sole, que tient per tiels services, ne doit en tiel cas aler en proper person. Et Sir W. Herle, adonque chiefe justice de common bank, disoit en tiel plee, que escuage ne ferra graunt mes lou le roy alast luy mesme en son proper person. Et fust demurre en judgement en mesme le plee, le quel les xl. jours seront accompts de le primer jour del mu-

BUT it appeareth by the pleas and arguments made in a plea upon a writ of detinue of a writing obligatorie brought by one H. Gray, T. 7. E. 3. that it is not needfull for him, which holdeth by escuage, to goe himsele with the king, if he will finde another able person for him conveniently arrayed for the warre to goe with the king. And this seemeth to be good reason. For it may be, that he which holdeth by such services is languishing, so as he can neither go nor ride. And also an abbot or other man of religion, or a feme sole, which hold by such services, ought not in such case to goe in proper person. And Sir William Herle then chiefe justice of the common place said in this plea, that escuage shall not be granted but where the king goes himsele in his proper person. And it was demurred in judgement in the same plea, whither the 40 dayes should be accounted from the first day of

TR. 7. E. 3. &c. This is T. 7. E. 3. fol. 29. the first booke at large that our author hath cited. (9. Co. 130. 2. Ro. Atr. 509.) And it is to be observed, that this point is not debated in the said booke, but onely it is there admitted, and yet is good authority in law; for our author saith, that it appeareth by this booke. Now both by Littleton himsele, and by the booke of 7. E. 3. it is apparant, that albeit the tenure is, that he which holdeth by a whole knight's fee ought to be with the king, &c. to do a corporall service, yet he may finde another able man to do it for him.

By the statute of Magna (4. Co. 88.) Charta, cap. 20. it is provided, that no knight, that holdeth by castle-gard, shall be distreyned to give money for the keeping of the castle, *Si ipse eam facere voluerit in propria persona sua, vel per alium probum hominem faciet, si ipse eam facere non possit propter rationabilem causam.*

Some have thought, that he that holds by escuage is taken by the equity of this statute that speaketh onely of castle-gard. But it is holden, (6. Co. 20.) that this statute is but an affirmation of the common law. For where that act saith, (*propter rationabilem causam*) that reasonable cause is referred to the tenant's own discretion and choyce, and the cause is not materiall or issuable no more then in the case that Littleton here putteth, as hereafter appeareth. And I would advise our student, that when he shall be enabled and armed to set upon the yeare bookes, or reports of law, that he be furnished with all the whole course of the law, that when he heareth a case vouched and applyed either in Westminster hall, (where it is necessary for him to be a diligent hearer, and observer of cases of law) or at readings or other exercises of learning, he may finde out and read the case so vouched;

in Ireland, Wales, Poitou, Bretagne, Normandy, Gascony, &c. though territories of the king. Quoad escuage nota. Though in some cases the subject was chargeable for defence of the realm, yet clearly for foreign invasion none were chargeable but by tenure, and therefore service of chivalry was called forinsecum servitium. Rot. Parl. 20. E. 3. n. 13. 21. E. 3. n. 16. 44. 25. E. 3. n. 23. 5. R. 2. n. 67. &c. 1. H. 5. n. 17. 5. H. 5. pars 2. n. 9. The first thing requisite to escuage was the proclamation and summons of service, which prefixed the day and place of rendezvous of the army, and commanded the lords, &c. nominatim and others by proclamation quod ad diem et locum veniant ad regem cum equis et armis et toto servitio regi debito, which is called summonitio servitii vel summonitio exercitus. Claus. 1. E. 2. m. 2. Claus. 3. E. 2. m. 1. Claus. 7. E. 2. m. 14 et sepius alibi. Vide pro scutagiis captis occasione diversarum expeditionum. Tempore H. 2. scutagium bis assessum ante annum quintum, tertium scutagium 7. H. 2. pro exercitu Tholosæ duas marcas, quartum pro eodem exercitu unam marcam, quintum 18. H. 2. pro exercitu Hiberniæ 20 s. sextum pro exercitu Galloway 20 s. Tempore Richardi primi, primum scutagium pro exercitu Walliæ anno secundo ad 10 s. secundum anno sexto ad 20 s. pro quolibet feodo pro redemptione regis, tertium 8. R. 1. pro exercitu Normanniæ ad 20 s. Tempore Johannis anno primo scutagium assessum ad duas marcas, secundum anno tertio pro exercitu Normanniæ ad duas marcas, tertium consimile pro consimili, quartum consimile pro consimili, quintum consimile pro consimili, sextum consimile pro consimili, septimum consimile, octavum anno duodecimo regis pro Hibernia duas marcas, nonum anno decimo tertio pro exercitu Walliæ ad duas marcas, decimum pro exercitu Scotiæ, undecimum anno decimo sexto Johannis pro

opinion, and to evince that pursuing the history of these nations from their first successful irruptions into the Roman empire is

ed; for that will both fasten it in his memory, and be to him as good as an exposition of that case. But that must not hinder his timely and orderly reading, which (all excuses set apart) he must bind himselfe unto; for there be two things to be avoyded by him, as enemies to learning, *præpostera lectio*, and *præpropera praxis*. But let us now heare what our author will say.

Et ceo semble bone reason, &c. Here Littleton sheweth three reasons wherefore the tenant should not be constrained to doe his service in person.

First, it may be the tenant is sicke, so as he is neither able to goe nor ride. And ever such construction must be made in matters concerning the defence of the realme or common good, as the same may be effected and performed. To the former disability may be added where a corporation aggregate of many, as deane and chapter, maior and commonalty, &c. or an infant being a purchaser, for these also must finde an able man. But it may be objected, that in these particular cases the tenant might finde a man, but not when he himselfe is able without all excuse or impediment. To this it is answered, that *Sapiens incipit à fine*. And the end of this service is for defence of the realme, and so it be done by an able and sufficient man, the end is effected.

Secondly, seeing there are so many just excuses of the tenant, it were dangerous, and tending to the hindrance of the service, if these excuses should be issuable, *Multa in jure communi contra rationem disputandi pro communi utilitate introducta sunt*.

Lastly, both Littleton, and the booke in the seventh of Edward the Third, giveth the tenant power, without any cause to be shewed, to finde an able and sufficient man, and oftentimes *jura publica ex privato promiscue decidi non debent*.

Un abbe ou auter home de religion. Note, that if the king had given lands to an abbot and his successors to hold by knights service, this had beene good, and the abbot should doe homage and find a man, &c. or pay escuage, but there was no wardship or reliefe or other incident belonging thereunto. And though the law saith, that this was a mortmaine, that is, that they held fast their inheritances, yet if the abbot, with the assent of his covent, had conveyed the land to a naturall man and his heires, now wardship and reliefe and other incidents belonged of common right to the tenure. And so it is, if the king give lands to a maior and commonalty and their successors, to be holden by knights service, in this case the patentees (as hath beene said) shall doe no homage, neither shall there be any wardship or reliefe, onely they also shall find a man, &c. or pay escuage. But if they convey over the lands to any naturall man and his heires, now homage, ward, marriage, and reliefe, and other incidents belong hereunto. And yet this possibility was *remota potentia*; but the reason hereof is, *Cessante ratione legis cessat ipsa lex*, the reason of the immunity was in respect of the body politique, which by the conveyance over ceaseth, which is worthy of the observation.

And it is to be observed, that every bishop in England hath a baronie (2), and that barony is holden of the king *in capite*, and yet the king can neither have wardship or relief.

If two joyntenants be of land holden by knights service, if one goeth with the king, it sufficeth for both, and both of them cannot be compelled to goe, for by their tenure one man is onely to goe.

If the tenant peravaille goeth, it dischargeth the mesne; for one tenancy shall pay but one escuage.

Ou auter home de religion. Here this word (religion) is taken largely, *viz.* not onely for regular, or dead persons, as abbots, monkes, or the like, but for secular persons also, as bishops, parsons, vicars, and the like; for neither of them are bound to goe in proper person. For *nemo militans Deo implicetur secularibus negotiis*.

Languishant. So it may be said of an ideot, a mad man, a leper, a man maymed, blind, deafe, of decrepit age, or the like.

Ou fem sole. Seeing that a fem sole, that cannot performe knights service, may serve by deputy, it may be demanded wherefore an heire male being within the age of 21 years

(Post. 99. a.)

6 H. 3. Avowry 242. F. N. B. 83. 84.

pro exercitu Britanniae ad tres marcas sed non solutum. Nota temporibus Henrici tertii scutagium Ludowici duas marcas anno secundo, Byham 10 s. anno quinto, Montgomery duas marcas anno octavo, Bedford duas marcas anno octavo, Kerry duas marcas anno decimo tertio, Bretanny 40 s. anno decimo quarto, Pictavia 40 s. anno decimo quinto, Elam 20 s. anno decimo sexto, Gascoigny 40 s. anno viceffimo secundo, Guyen 40 s. anno viceffimo nono, Wallia 40 s. anno quadragesimo secundo. Hal. MSS. For a more particular account of the scutages assessed in the several reigns mentioned by lord Hale, see Mad. Hist. Excheq. chap. 16. where the whole subject of escuage is fully explained from the records. See also Post 72. a. and b.

(1) Mr. Madox observes, that Sir William Herle's position, that escuage should not be granted but where the king goes to the war in person, is fallacious. Mad. Baron. Angl. 226.

(2) Lord chief justice Hale, in a manuscript treatise on the *Jura Corona*, gives it as his opinion, that the bishops do not hold their possessions *per baroniam*, and that they sit in the house of peers by *custom* and usage, and not as barons by *tenure*. But the propriety of this doctrine has been ably controverted by a writer of very great eminence now living. See Warburt. *Alliance between Church and State*, 4th edit. 149.

is the only true way of exploring the source of the feudal institutions; but this is not the place for a minute discussion of a subject

yeares may not serve also by deputie, being not able to serve himselfe.

To this it is answered, that in cases of minoritie, all is one to both sexes, viz. if the heire male be at the death of the ancestor under the age of one and twenty, or the heire female under the age of 14 they can make no deputy, but the lord shall have wardship as an incident to the tenure: therefore Littleton is here to be understood of a feme sole of full age, and seised of land holden by knights service either by purchase or descent.

Covenablement arraié pur le guerre. So as here are foure things to be observed.

First (as hath been said) that he may find another.

Secondly, that he that is found must be an able person.

Thirdly, he must be armed at the costs and charge of the tenant, and herein is to be noted, *Quod non definitur in jure*, with what manner of armor the souldier shall be arrayed with, for time place and occasion doe alter the manner and kind of the armour (1).

Fourthly, he must have such armor, as shall be necessary, and so appointed in readinesse.

Ferdwit is a Saxon word et significat quietanciam murti in exercitu. *Worfcott* is an old Eng- Fleta lib. 1. cap. 42.
lish word and signifieth liberum esse de oneribus armorum.

It is truly said, *quod miles hæc tria curare debet, corpus ut validissimum et pernicissimum habeat*, Livius.
arma apta ad subita imperia, cætera Deo et imperatori curæ esse.

Sapiens non semper it uno gradu, sed una via, non se mutat sed aptat. Qui secundos optat even- Vegetius.
tus, dimicet arte non casu. In omni conflictu non tam prodest multitudo, quam virtus.

Est optimi ducis scire et vincere, et cedere prudenter tempori. Multum potest in rebus humanis Polibius.
ocasio, plurimum in bellicis.

Quid tam necessarium est, quam tenere semper arma, quibus testus esse possis. But I will take my Vegetius.
leave of these excellent authors of art military, and referre them to those that professe the same, and will returne to Littleton.

Muster. I finde this word in the statute of 18. H. 6. cap. 19. and the ancient military order is worthy of observation; for before and long after that statute, when the king was to be served with souldiers for his warre, a knight or esquire of the country, that had revenues farmors and tenants, would covenant with the king, by indenture inrolled in the exchequer, to serve the king for such a terme with so many men (specially named in a list) in his warre, &c. an excellent institution that they should serve under him, whom they knew and honoured, and with whom they must live at their returne. These men being mustered before the king's commissioners, and receiving any part of their wages, and their names so recorded, if they after departed from their captaine within the terme contrary to the forme of that statute, it was felony. But now that statute is of no force; because that ancient (3. Inst. 86. Cro. Cha. 77.)
and excellent forme of military course is altogether antiquated: but later statutes have provided 6. Co. 27. the souldiers case,
for that mischief.

To muster is to make a shew of souldiers well armed and trained before the king's commissioners in some open field. *Ubi se ostendentes præludunt prælio.* In Latine it is *cenfere, seu lustrare exercitum.*

By the law before the conquest musters and shewing of armour should be *uno eodem die per* Lamb. fo. 135. b.
universum regnum, ne aliqui possint arma familiaribus et notis accommodare, nec ipsi illa mutuo accipere, ac justitiam domini regis defraudare, et dominum regem et regnum offendere.

Concerning the point in law, demurred in judgement, in the seventh of Edward the third, here mentioned by our author, the law accounteth the beginning of the fortie dayes after the king entreth into the foreine nation; for then the war beginneth, and till he come there, he and his host are said to goe towards the warre, and no militarie service is to be done till the king and his host come thither.

Sir William Herle. A famous lawyer constituted cheife justice of the Common Pleas by letters patent dated, 2 die Martii anno 5. E. 3. It appeareth by Littleton, and by the record, that he was a knight, against the conceit of those, that thinke, that the cheife justices of the court of Common Pleas were not knighted till long after.

Our student shall observe, that the knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reacheth deepest, he seeth the amiable, and admirable secrets of the law, wherein, I assure you, the sages of the law in former times, (whereof Sir William Herle was a principall one) have had the deepest reach. And as the bucket in the depth is easily drawne to the uppermost part of the water, (for *nullum elementum in suo proprio loco est grave*) but take it from the water, it cannot be drawne up but with great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth, it is delightfull, easie, and without any heavy burthen, so long as he keepe himselfe in his owne proper element.

Justice.

(1) Vide pro assisa armorum.—27. H. 2. Quicumque habet feodum unius militis, habeat loriam cassidem clipeum et lanceam. Quicumque liber laicus habuerit in catallo vel reditu ad valentiam sexdecim marcarum, habeat loriam lanceam clipeum et cassidem. Quicumque liber laicus habuerit in catallo ad valentiam decem marcarum, habeat halbergellum et capelet ferri et lanceam. Omnes burgenfes, et tota communia liberorum hominum, habeant wanbais, et capelet ferri, et lanceam. Et si quis hæc arma habens obierit, arma sua remaneant hæredi; et fiat inquisitio de his, qui has habent facultates, et faciant eos jurare ad ista arma habenda et ad ea tenenda in servitio regis. Hoveden 614. This assise continued till the time of king John, and then was a little altered. And this assise made in the time of king John was repeated and again commanded, and men were compelled to be sworn to it. Clauf. 14. H. 3. m. 5. dorso. Commissioners were assigned to cause men to be sworn and assised to arms, as they were sworn in the time of king John, in this form. Quisquis habet feodum militis integrum, habeat loriam; qui habet dimidium feodi militis, habeat haubergellum; qui habet catalla ad valentiam quindecim marcarum, habeat loriam; qui habet catalla ad valentiam decem marcarum, habeat haubergellum; qui habet catalla ad valentiam decem librarum, habeat capellum ferreum perpunctum et lanceam; qui habet ad valentiam viginti solidorum, habeat arcum et sagittas. In qualibet villa sit unus constabularius, in quolibet burgo plures, ad quorum summonitionem omnes ad arma jurati in warda sua conveniant ad imbreviandum distincte nomina et arma singulorum, ita quod singuli habeant prompta sua arma ad defensionem regni. This assise, as it seems, continued till the 26. of Hen. 3. and then another assise was ordained. In Clauf. 26. Hen. 3. pars 2. m. 10. many articles are ordained, which differ little from the statute of Winton. Amongst others there is this article. Singuli vicecomites, cum duobus militibus ad hoc assignatis, faciant cives, burgenfes, liberos homines, villanos, et alios à quindecim
ad

so extensive and difficult.— It is necessary to postpone the conclusion of this note, as also note 2. of 64. a. to another place, on account of the length of the note from lord Hale's MSS. concerning the assise of arms. They shall be given at the end of the chapter of knights service.

Glanville lib. 2. cap. 6. &c.

Justice. In Glanvil he is called *justitia in ipso abstracto*, as it were justice itself; which appellation remains still in English and French, to put them in mind of their duty and functions. But now in legal Latin they are called *justiciarii tanquam justii in concreto*, and they are called *justiciarii de banco*, &c. and never *judices de banco*, &c.

Comon banke. Banke is a Saxon word, and signifieth a bench or high seat, or a tribunal, and is properly applyed to the justices of the court of Common Pleas, because the justices of that court set there as in a certaine place: for all writs returnable into that court are *coram justiciariis nostris apud Westmon.* or any other certaine place where the court set; and legall records tearme them *justiciarii de banco*. But writs returnable into the court called the King's Bench are *coram nobis (i. rege) ubicunque fuerimus in Anglia*; and all judiciall records there are stiled *coram rege*. But for distinction sake it is called the King's Bench; both because the records of that court are stiled (as hath beene sayd)

26. Aff. p. 24. 4. E. 3. fo. 19.
Brafton lib. 3. fol. 105. b. Brit-
ton fol. 1. & 2. Fleta lib. 2. cap.
2. Mirror cap. 5. sect. 1. For-
tescue cap. 51. See in the Preface
to the third part of my Reports.

coram rege, and because kings in former times have often personally set there (1). For the antiquity of the court of Common Pleas they erre, that hold that before the statute of Magna Charta there was no court of Common Pleas, but had his creation by or after that charter; for the learned know, that in the sixe and twentieth yeare of Edward the Third, the abbot of B, in a writ of assize brought before the justices in Eire claimed consuance and to have writs of assize, and other originall writs out of the king's court by prescription, time out of mind of man, in the raignes of Saint Edmond, and Saint Edward the Confessor before the conquest. And on the behalfe of the abbot were shewed divers allowances thereof in former times in the kings courts, and that King Henry the first confirmed their usages, and that they should have consuance of pleas, so that the justices of the one bench or the other should not intermeddle. And the statute of Magna Charta erecteth no court, but giveth direction for the proper jurisdiction thereof in these words. *Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco.* And properly the statute saith, *non sequantur*, for that the king's bench did in those dayes follow the king *ubicunque fuerit in Anglia*, and therefore enacteth that Common Pleas should be holden in a court resident in a certaine place. In the next chapter of Magna Charta (made at one and the same time) it is provided; *Et ea, quæ per eosdem (i. justiciarios et itinerantes) propter difficultatem aliquorum articulorum terminari non possunt, referantur ad justiciarios nostros de banco, et ibi terminentur.* And in the next to that, *assise de ultima presentacione semper capiuntur coram justiciariis de banco, et ibi terminentur.* Therefore it manifestly appeareth, that at the making of the statute of Magna Charta there were *justiciarii de banco*, which all men confesse to be the court of Common Pleas. And therefore that court was not erected by or after that statute (2). For the authority of this court, it is evident by that which hath beene said, that it hath jurisdiction of all Common Pleas. But let us returne to Littleton.

Mirror cap. 5. sect. 2. Fleta lib.
2. cap. 54.

(Doc. Pla. 115. 5. Co. 104.)

Demurre en judgement. A demurrer commeth of the Latine word *demorari* to abide; and therefore he, which demurreth in law, is said, he that abideth in law. *Moratur* or *demoratur in lege*. Whensoever the counsell learned of the party is of opinion, that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgement of the court, and therefore well saith Littleton here, *demurre en judgement*, the words of a demurrer being *quia narratio, &c. materiaque in eadem contenta minus sufficiens in lege existit, &c.* and so of a plea, *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.* But if the plea be sufficient in law, and the matter of fact be false, then the adverse partie taketh issue thereupon, and that is tryed by a jury; for matters in law are decided by the judges, and matters in fact by juries, as elsewhere is said more at large.

(5. Co. 69. Hob. 164.)

Now as there is no issue upon the fact, but when it is joyned betweene the parties, so there is no demurrer in law, but when it is joyned; and therefore when a demurrer is offered by the one party as is aforesaid, the adverse party joyneth with him, (for example) saith, *quod placitum prædictum, &c. materiaque in eodem contenta bonum et sufficiens in lege existit, &c. et petit judicium*, and thereupon the demurrer is said to be joyned, and then the case is argued by counsell learned of both sides; and if the poynts be difficult, then it is argued openly by the judges of that court, and if they or the greater part concur in opinion, accordingly judgement is given; and if the court be equally divided, or conceive great doubt of the case, then may they adjourne it into the exchequer chamber, where the case shall be argued by all the judges of England, where if the judges shall be equally divided, then (if none of them change their opinion) it shall be decided at the next parliament by a prelate, two earles, and two barons, which shall have power and commission of the king in that behalfe; and by advice of themselves, the chancellor, treasurer, the justices of

Vid. Braft. lib. 5. fo. 352. b.

14. E. 3. cap. 5. Statut. 1.

(1) But though formerly our kings did *actually* sit in the court of King's Bench, and the law still intends that the king is present there, yet the *judicature* belongs to the judges only, as lord Coke elsewhere observes. 4. Inst. 73. See further on the subject 3. Black. Comm. 5th ed. 41. and Mad. Hist. Excheq. fol. ed. 58. 64. 68. and 553.

(2) From the whole of lord Coke's observations here and in the preface to his eighth book of Reports, it seems to have been his opinion, that the court of Common Pleas was not only a *distinct* court at the time of making the Magna Charta of the 9th of Hen. 3. but also existed as such before the conquest. But according to Mr. Madox, whose inquiries into the subject were certainly more minute and particular, the origin of the court of Common Pleas is of a much later date. He so far agrees with lord Coke

ad sexaginta annos, assideri et jurari ad arma secundum quantitatem terrarum et catallorum, scilicet, ad quindecim librata terræ, unam loriam unum capellum ferreum gladium cultellum et equum; ad decem librata terræ, unum haubergellum capellum ferreum gladium lanceam et cultellum; ad quinque librata terræ, unum per punctum capellum ferreum gladium lanceam et cultellum; ad quadraginta solidos et amplius ad quinque librata, gladium arcus sagittas et cultellum; qui minus habet quam quadraginta solidos, falcem gisformas et cultellos et alia minuta arma; ad catalla sexaginta marcarum, unam loriam capellum gladium et equum; ad catalla quadraginta marcarum, unum capellum haubergellum gladium et cultellum; ad catalla decem marcarum, gladium cultellum arcum et sagittas; ad catalla quadraginta solidorum et infra decem marcas, falcem gisformas et alia minuta arma. Omnes item alii, qui possunt habere, arcus et sagittas habeant. In singulis civitatibus et burgis jurati ad arma sunt intendentes majores, vel ballivi ubi non sunt majores. In singulis villis aliis constituantur unus

the one bench and the other, and other of the king's counsell, as many and such as shall seeme convenient, shall make a good judgement, &c. And if the difficulty be so great as they cannot determine it, then it shall be determined by the lords in the upper house of parliament⁽¹⁾. See the statute, for it extends not onely to the case abovesaid, but also where judgements are delayed in the Chancery, King's Bench, Common Bench, and the Exchequer, the justices assigned, and other justices of Oyer and Terminer, sometime by difficulty, sometime by divers opinions of justices, and sometime for other causes. [a] Before which statute, if judgements were not given by reason of difficulty, the doubt was decided at the next parliament, (which then was to be holden once every yeare at the least⁽²⁾). [b] *Si autem talia nunquam prius evenierint, et obscurum et difficile sit eorum iudicium, tunc ponatur iudicium in respectum usque ad magnam curiam, ut ibi per concilium curie terminetur.* But hereof thus much shall suffice. [c] He that demurreth in law confesseth all such matters of fact, as are well and sufficiently pleaded. If there be a demurrer for part and an issue for part, the more orderly course is to give judgement upon the demurrer first; but yet it is in the discretion of the court to try the issue first, if they will. After demurrer joyned in any court of record, the judges shall give judgement according as the very right of the cause and matter in law shall appeare, without regarding any want of forme in any writ, returne, plaint, declaration, or other pleading, proces, or course of proceeding, except those onely which the party demurring shall specially and particularly set downe and expresse in his demurrer⁽³⁾. [a] Now what is substance and what is forme you shall read in my Reports.

And in some cases a man shall alledge speciall matter, and conclude with a demurrer; [b] as in an action of trespassse brought by I. S. for the taking of his horse, the defendant pleads that he himselfe was possessed of the horse untill he was by one I. S. dispossessed, who gave him to the plaintife, &c. the plaintife saith that I. S. named in the barre and I. S. the plaintife were all one person, and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law, and the court did hold the plea and demurrer good, for without the matter alledged he could not demurre. Now as there may be a demurrer upon counts and pleas, so there may be of aid prier, voucher, receipt, waging of law, and the like. [c] By that which hath been said it appeareth, that there is a generall demurrer, that is, shewing no cause, and a speciall demurrer which sheweth the cause of his demurrer. Also by that which hath beene said, there is a demurrer upon pleading, &c. and there is also a demurrer upon evidence. [d] As if the plaintife in evidence shew any matter of record, or deeds or writings, or any sentence in the ecclesiasticall court, or other matter of evidence by testimony of witnesses, or otherwise, whereupon doubt in law ariseth, and the defendant offer to demurre in law thereupon, the plaintife cannot refuse to joine in demurrer, no more then in a demurrer upon a count, replication, &c. and so *converso* may the plaintife demurre in law upon the evidence of the defendant.

But if evidence for the king in an information or any other suite be given, and the defendant offer to demurre in law upon the evidence, the king's counsell shall not be inforced to joine in demurrer: but in that case, the court may direct the jury to finde the speciall matter.

En judgement. For the signification of this word, *Vide* Sect. 366.

Sect. 97.

ET apres tiel voyage royal en Escoce, il est communement dit, que per autoritie de parliament lescuage sera assesse et mis en certaine; scil. certaine somme d'argent, quant chescun, que tient per entier fee de service de chivaler, quel ne fuit

AND after such a voyage royall into Scotland, it is communly said, that by authority of parliament the escuage shall be assessed and put in certaine; scil. a certayne summe of money, how much every one, which holdeth by a whole knight's fee,

APRES voyage royal, &c. il est communement dit, que per authority de parliament escuage sera assesse. *Nota*, here is a secret of law included, that albeit escuage incertaine be due by tenure, yet because the assessment thereof concerned so many and so great a number of the subjects of the realme, it could not be assessed by the king or any other but by parliament: [a] and

Coke, as to admit, that the *Magna Carta* of Henry the 3d rather confirmed than erected the bank or common pleas, and that such a court was in being several years before the *Magna Carta* of the 17th of king John, though it was then first made *stationary*. But in other respects lord Coke and Mr. Maddox differ widely; for the latter thinks, that for some time after the conquest there was one great and supreme judicature called the *curia regis*, which he supposes to have been of Norman and not Anglo-Saxon original, and to have exercised jurisdiction over common as well as other pleas; that the common pleas and exchequer were gradually separated from the *curia regis* and became jurisdictions wholly distinct from it; and that the separation of the common pleas began in the reign of the first Richard, or early in the reign of John, and was completed by Henry the third. See *Mad. Hist. Excheq.* fol. ed. 63. and the chapter on the division of the king's courts 539. See further 3. *Blackst. Comment.* 5th ed. 37. 4. *Inft.* 99. *Lamb. Archeion* ed. 1635. p. 24. to 34. and the books cited in *Pryn.* on 4. *Inft.* 52.

(1) See further, as to the adjourning of causes into the exchequer chamber in order to have the opinion of all the judges, 4. *Inft.* 110. 118. and *Warraine and Smith* 2. *Bulfr.* 146. in which case the court refused to grant a motion for such an adjournment.

(2) See 4. *Inft.* 9. and *Com. Dig. Parliament* C.

(3) See 27. *Eliz.* c. 5. and 4. *An.* c. 16.

unus vel duo constabularii secundum numerum inhabitantium. In singulis vero hundredis unus capitalis constabularius, ad cuius mandatum omnes jurati ad arma de hundredo conveniant, et ei sint intendentes ad faciendum ea quae spectant ad conservationem pacis. Omnes vero constabularii capitanei intendentes sint vicecomiti et duobus militibus praedictis, ad veniendum ad mandatum eorum, et faciendum per praepcepta eorum ea quae spectant ad conservationem pacis nostrae, &c. And so two knights were assigned in every county to perform the premises. The next assise of arms was in the 13. of Edw. 1. by the statute of Winton,

Rot. Parlia. 14. E. 3. nu. 31. a proceeding in Sir John Stanton's case upon difficulty in the court of Common Pleas. *Vide* Britton fol. 41. 21. E. 3. 37. 38. 39. E. 3. fo. 1. 21. 35. 40. E. 3. 34. 13. H. 4. 3. 4.

[a] 4. E. 3. ca. 14.

[b] *Bracton* lib. 1. cap. 2. nu. 7. *Brit.* fol. 41. 1. E. 3. 7. 8. 2. E. 3. 6. 7.

[c] 17. E. 3. 50. b. 47. E. 3. 13. 14. 5. H. 7. 1. 13. E. 4. 7. b. *Pl. Com.* 85. 411. 172. (5. Co. 69. b. 1. *Sid.* 10. *Post* 125. *Hob.* 232. 233. *Doc. Pla.* 115. 116.)

48. E. 3. 15. 2. R. 2. inquest. 2. 38. E. 3. 25. 11. H. 4. 5. 75. 3. E. 4. 2.

[d] 3. Co. 57. *Line. Coll.* case. 5. Co. 74. *Wymek's* case. 10. Co. 88. usque 98. *Doctor Leyfield's* case.

(1. *Leon.* 178. *Doc. Pla.* 116. 117.)

[e] 13. E. 4. 7. 31. E. 3. *Eschequer* 244. 33. H. 6. 9. 10. 22. E. 4. 50. 1. H. 7. 21.

[f] 14. H. 4. 31. 37. H. 6. 6.

[g] 5. Co. 104. 2. *Baker's* case.

[h] 38. H. 8. *Dyer* 53. (*Cro. Eliz.* 752.)

Lib. 2.

Cap. 3.

Of Escuage.

Sect. 98.

[a] 13. H. 4. 5.

[b] 8. H. 3. Rot. Claus. & Rot. finium. memb. 30. & ante.

Staff. P. 14. E. 1. de banco.

F. N. B. 84.

Braft. lib. 2. 36. a.

F. N. B. 84.

Rot. Parl. 9. R. 2. nu. 40.

[a] and this was by the common law (1).

[b] No escuage was assessed by parliament since the reign of Edward the second, and in the eight years of his reign escuage was assessed (2).

If the tenant goeth with the king, and dyeth in exercitu, in the host or armie, he is excused by law, and no escuage shall be demanded.

And it is to be observed, that if he, that holds of the king by escuage, goeth, or findeth another to goe for him with the king, &c. then he shall have escuage of his tenants that hold of him by such service (3), which must be assessed by parliament.

But if the king's tenant goeth not with the king, then he shall pay for his default escuage, and shall have no escuage of his tenants (4). Richard the Second making a voyage royall into Scotland, at the petition of his commons pardoned the payment of escuage.

per luy mesme, ne per un auter pur luy ou le roy, paiera a son seignior, de que il tient la terre, per escuage. Sicome mittomus, que il fuit ordaine per autoritie de la parliament, que chescun, que tient per entiere fee de service de chivaler, que ne fuit ou le roy, payera a son seignior 40 s. donque celuy, que tient per moitie dun fee de chivaler, ne payera a son seignior forsque xx. s. et celui, que tient per la quart part de fee de chivaler, ne payera forsque x. s. et sic que plus, plus, et que meins, meins.

who was neither by himselfe, nor by any other, with the king, shall pay to his lord of whom he holds his land by escuage. As put the case, that it was ordained by the authoritie of the parliament, that every one, which holdeth by a whole knight's fee, who was not with the king, shall pay to his lord fortie shillings; then he, which holdeth by the moitie of a knight's fee, shall pay to his lord but twentie shillings, and he, which holdeth by the fourth part of a knight's fee, shall pay but x. s. and he, which hath more, more, and which lesse, lesse (5).

Sect. 98.

Vid. Sect. 120.

Ascuns teignent per custome, &c.

Nota, that escuage is directed by custome.

Mes auterment est de escuage certaine.

Here it appeareth, that escuage is twofold, viz. escuage incertaine, whereof Littl. here speaks; and escuage certain.

Quemadmodum incertitudo scutagii facit servitium militare, ita certitudo scu-

Et ascuns teignent per la custome (6), que si lescuage

courge per autoritie de parliament a ascun somme de money, que ils ne pairont forsque la moitie de ceo, et ascuns teignent que ils ne payeront forsque le quart part de ceo. Mes pur ceo que lescuage, que ils paieront, est non certain, pur ceo que nest certaine coment le parliament

AND some hold by the custome, that if escuage be assessed by authoritie of parliament at any summe of mony, that they shal pay but the moitie of that summe, and some but the fourth part of that summe. But because the escuage that they should pay is uncertaine, for that it is not certain how the parliament will asseffe the escuage, they hold by knights fer-

asseffera

(1) The Magna Charta of king John provides, that escuage shall not be imposed except by the consent of parliament; but some respectable writers think, that it was an arbitrary payment before. Blackit. Comment. 5th ed. v. 2. p. 74. Wright's Ten. 128. 133.

(2) See ante 69. b. note 3.

(3) Vid. claus. 26. H. 3. part 2. m. 10. dorf. Rex vicecomiti. Precipimus, quod de omnibus feodis militum, quæ tenentur de tenentibus de nobis in capite, qui brevia nostra non tulerint de habendo scutagio suo, et similiter de feodis militum quæ tenentur de wardis in manu nostra, scutagium nostrum colligi facias, ita quod habeas ad satisfaciendum, &c. Hal. MSS.

(4) According to Mr. Madox's account it seems, that the lord, though he did not go in person, or send a deputy, was intitled to escuage from his tenants, if he paid or was duly charged with escuage to the king; and perhaps lord Coke did not mean to intimate the contrary. Mad. Hist. Excheq. fol. ed. 469. See however note 4. infra.

(5) It seems, that if A held land of the king by 4 knights fees, and A before the statute of quia emptores had created diverse mesuagies and reserved 20 knights fees, and A had done the king's service, he should have had the escuage of 20 fees. But if A did not do the king's service, the king should have had the escuage of 4 fees and also of 20 fees or at least of 16. Vid. Rot. Parl. 8. m. 4. dorf. et lib. Parl. 14. E. 2. petitiones magnatum inde. Claus. 16. H. 3. m. 17. Rex vicecomiti Cornubiæ precepit, quod nullum distinguat nisi pro tot feodis, quod regi tenetur reddere. Hal. MSS.

(6) The words in L. and M. and Roh. are *ascun tenantes teignent*, and the words *per la custome* are omitted.

Winton, which commands, that every one shall be sworn to armor according to the value of their lands and goods, viz. from lands of 25 pounds and chattels of 40 marks, ad haubergellum capellum ferreum gladium cultellum et equum; from land of 10 l. and goods of 20 marks, ad haubergellum capellum ferreum gladium et cultellum, from land of 5 l. ad gladium cultellum et capellum ferreum; from

asseffera lescuage, eux teignent per service de chivaler. Mes autrement est de lescuage certaine, de que ferra parle en le tenure de socage.

vice. But otherwise it is of escuage certain, of which shall be spoken in the tenure of socage.

tagii facit socagium. But more of this in the chapter of Socage, Sect. 120.

Per parliament. Of the antiquitie and authoritie of this court, see Sect. 164.

Sect. 99.

ET si home parle generalment descuage, il ferra entendue per le common parlance descuage noncertaine, que est service de chivaler. Et tiel escuage trait a luy homage, et homage trait a luy fealtie; car fealtie est incident a chescun manner de service forsque a le tenure en frankalmoigne, come ferra dit apres en le tenure de frankalmoigne. Et issint il, que tient per escuage, tient per homage fealtie et escuage.

AND if one speake generally of escuage, it shal be intended by the common speech of escuage incertaine, which is knights service. And such escuage draweth to it homage, and homage draweth to it fealtie; for fealtie is incident to every manner of service, unlesse it be to the tenure in frankalmoigne, as shal be said afterward in the tenure of frankalmoigne (1). And so he, which holdeth by escuage, holds by homage, fealty and escuage (2).

ET si home parle generalment descuage, il ferra intend per le common parlance descuage non certain.

Verba equivoca et in dubio posita intelliguntur in digniori et potentiori sensu. Tenure in capite ex vi termini is a tenure in grosse, and it may be holden of a subject; but being spoken generally, it is secundum excellentiam intended of the king, for he is caput reipublice.

Et tiel escuage trait a luy homage, et homage trait a luy fealtie; car fealtie est incident a chescun manner de service forsque a tenure en frankealmoigne.

(1. Inst. 485. 6. Co. 20. Post 78. b. 189. a. 381. b. 1. Sid. 265. 11. Co. 39. a.) Entendments en Ley Sect. 100. 110. 367. 377. 393. 406. 462. 463. 5. E. 2. Resceit 165. 20. H. 6. 23. 21. H. 6. 8. 37. H. 6. 29. 13. H. 4. 4. 6. El. Dyer 236. 10. E. 4. 11. 32. E. 3. Gard. 31.

Brit. sc. 163.

40. E. 3. 21. S. H. 7. 4.

Sect. 100.

This is gathered by the effects of their tenure, for essences are found out by properties, fountains by rivers, and causes by effects: for amongst others, the lords shall have escuage of their tenants, &c. as it followeth.

ET est ascavoir, que quant escuage est tielment asseffe per autoritie de parliament chescun seignior, de que le terre est tenu per escuage, avera lescuage issint asseffe per parliament; pur ceo que il est in-

AND it is to be understood, that when escuage is so asseffed by autoritie of parliament, everie lord, of whom the land is holden by escuage, shal have the escuage so asseffed by parliament; because it is intended by the law, that at

tendus

(1) See acc. Mad. Baron. Angl. 166.

(2) From this and the next preceding section it seems, that, notwithstanding Littleton's expressing himself in other places as if escuage was a distinct tenure or service, he did not consider it as such. Escuage must be either *certain* or *uncertain*, and Littleton expressly writes, that being the former it is *socage*, and being the latter it is *knight's service*. This tends to confirm the propriety of the observation by Mr. Madox, who will not allow escuage to be a tenure or service of itself, and insists, that, wherever it was payable, like homage and fealty, it was a mere *incident* to tenure. See note 2. of fol. 64. a. However a late learned judge was not satisfied with considering escuage in this limited way, and endeavours to shew, that though in general escuage uncertain

tain

from 40 s. to land of 5 l. ad gladium cultellum arcum et sagittas; et qui minus, juratur ad gisarmas cultellos et alia minuta arma; et qui minus habuerit quam viginti marcas bonorum, habeat gladios cultellos et alia minuta arma; et omnes alii arcum et sagittas; et in quolibet hundredo duo constabularii eligantur ad faciendum visum armorum. *This assise was observed in the times of Edward the 1st and Edward the 2d. In 9 E. 2. the statute of Winton was put into execution sub poena forisfacturæ omnium bonorum et catallorum pro prima vice, et secunda vice sub poena captionis terrarum in manus regis et imprisonment corporum, and it was also commanded, quod citra festum, &c. in forma prædicta armati parati sint ad proficiendum cum rege versus Scotos cum victualibus necessariis pro quadraginta diebus, suorum et aliorum de partibus suis sumptibus providendis. Vid. Claus. 9. E. 2. m. 25. dorso. This assise received some change about the 8. of E. 3. and in Claus. 8. E. 3. m. 3. dorso there is the following precept. Proclamationem facias, quod omnes de balliva tua, qui habent quadraginta librata terræ vel redditus, licet milites non sunt, equitatura et armis competentibus iuxta statum suum, viz. unusquisque eorum pro se et altero ad minus; et omnes, qui habent viginti librata terræ, cum equitatura et armis pro seipsis ad minus, faciant sibi provideri: et illi, qui minus habent, assideantur juxta statutum Wintoniæ. But in progress of time the statute of Winton fell into disuse, and commissions issued to array men*

Lib. 2. Cap. 3. Of Efcuage. Sect. 100, 101.

tendus per la ley, que al commence- ment tiels tenements fuerent dones per les seigniors a les tenants, de tener per tielx services a defendre lour seigniors, auxy bien come le roy, et mitter en quiet lour seigniors et le roy de les aforesaid. Scotcs avandits.

Sect. 101.

LES seigniors averont lescuage, &c.

This is evident.

Briefe le roy. This cometh of the Latine word *Breve*.

Fitzh. in his preface to his N. B. saith of them, that they be those foundations, whereupon the whole law doth depend.

[a] Bracton describeth a writ thus. *Breve quidem, cum sit formatum ad similitudinem regule juris; quia breviter et paucis verbis intentionem proferentis exponit, et explanat, sicut regula juris rom, quæ est, breviter enarrat. Non tamen ita breve esse debeat, quin rationem et vim intentionis contineat.*

Of writs some be original, *brevia originalia*, and some be judicall, *brevia judicialia*.

Also of originals, *quædam sunt formata sub suis casibus et de cursu, et de communi consilio totius regni concessa et approbata, quæ quidem nullatenus mutari poterint absque consensu et voluntate eorum; et quædam sunt magistralia, et sæpe variantur secundum varietatem casuum, factorum et querelarum*, as for example actions upon the case, which varie according to the varietie of everie man's case, and the like; and these being not of course, the matters being learned men did make. *Item brevium originalium alia sunt realia, alia personalia, alia mixta. Item brevium originalium, alia sunt patentia seu aperta, et alia clausa.* Certaine it is, that the originall writs are so artificially and briefly compiled, as there is nothing redundant or wanting in them, of which an honourable secretary of state once said, that it was not possible to comprehend so much matter so perspicuously in fewer words. Of all these kinds of writs you shal read plentifully in the Register, whereof Littleton maketh mention in this place, and also in Fitz. N. B.

Sicome appiert per le register. Register, is the name of a most antient booke and of great authoritie in law, containing all the originall writs of the common law; of which booke see more in the preface to the ninth part of my Reports, and containeth also *brevia judicialia, quæ sæpius variantur secundum varietatem placitorum proponentis et respondentis* (1).

Also it appeareth by the Register, that the king shal have escuage of his tenants, which hold of him as of a manor which he hath in ward (2), or by reason of a vacation of a bishopricke.

And so shall a common person, if he hath an estate for life or for yeares of a seigniory.

Sect.

F. N. B. 84. Register. 88. de Scutagio habendo.

[a] Bracton lib. 5. fol. 413. Fleta lib. 2. cap. 12. Britton ubi fol. 122. 227. (1. Sid. 187.)

(7. Co. 4. a. 4. Inst. 10.)

(Plowd. 228. a. 4. Inst. 73.) Bracton ubi supra. Britton ubi supra. Regist. 88. F. N. B. 84.

F. N. B. 84.

tain was a fine or sum of money payable as a commutation for personal service, yet antiently a payment in money, bearing a certain proportion to the escuage assessed from time to time on tenants by knights service, and on that account called escuage, was sometimes a service originally reserved, and then escuage was itself the tenure and so denominated to distinguish it from the genuine and proper tenure by knights service. See Wright's Ten. 121. to 127. But this distinction, it is allowed, is not hinted at by Littleton, and it is even conjectured, that in his time it might be lost in the general notion of escuage, to which only Mr. Madox meant to apply his animadversion on Littleton and Coke for considering it as a tenure. See further 2. Blackst. Comm. 5th ed. 75.

(1) See further as to the Register of Writs, Nicholf. Engl. Histor. Libr. 2d ed. 205.

(2) See ante 72. b. note 3.

juxta status sui exigentiam et facultates. Vid. Claus. 43. E. 3. m. 24. et sæpiissime. This commission was afterwards regulated and confirmed in parliament. Rot. Parl. 5. H. 4. n. 24. And now the statute of Winton is repealed by the 21. Jam. chap. 28. But this doth not relate to military service, and is only a certain military provision for the peace of the kingdom, and concerned burgeses and sokemen as well as tenants by knight's service. And according to this difference, the commission of array extended both to tenants by knight's service and others; but the writ, which is called summonitio servitii, respected tenants by knight's service only. And as to this latter, 1. It is to be observed, that the service was estimated by the number of fees; and so he, who held per baroniam vel comitatum, was attendant only according to the number of knight's fees, by which the barony or earldom was held, as clearly appears in Selden's Titles of Honor,

Sect. 102.

ITEM en tiel case
avandit, lou le
roy face un voyage
royall en Escocce⁽¹⁾, et
lescUAGE est assesse per
parliament, si le seig-
nior distreine son te-
nant, que tient de luy
per service dentier fee
de chivaler, pur les-
cuage issint assesse, &c.
et le tenant plede, et
voit averrer, que il
fuit ou le roy en E-
scoce, &c. per xl.
jours, et le seignior
voit averrer le con-
trarie, il est dit, que il
ferra trie per le certi-
ficat del marshall del
host le roy⁽²⁾ en escript
sout son seale que, ser-
ra mis a les justices.

ITEM, in such case
aforesaid, where the
king maketh a voyage
royall into Scotland,
and the escuage is as-
sessed by parliament, if
the lord distraine his
tenant, that holdeth of
him by service of a
whole knight's fee, for
the escuage so assessed,
&c. and the tenant
pleadeth, and will aver,
that he was with the
king in Scotland, &c.
by 40 dayes, and the
lord will averre the
contrary, it is sayd, that
it shall be tryed by the
certificat of the marshall
of the king's host in
writing under his seale,
which shall be sent to
the justices.

ET voit averrer,
que il fuit ove le
roy en Escocce per 40
jours, &c. [a] il est dit,
que il ferra trie per le
certificat del marshall.

This is a tryall appointed by
the law, *ne curia regis deficeret
in justitia exhibenda.* [b] Here-
with agreeth the Register,
where the marshall is called
constabularius exercitus nostri.

**Marshall de hoste le
roy.** *Marescallus exercitus,
in Saxon Marischalk. i. equi-
tum magister.* This word
Marshall is either derived of
Mars, or of Marc an horse, and
schalc, which signifieth in the
Saxon tongue, a master or
governor. [c] In the lawes
before the conquest it is said,
*Marescalli exercitus seu ducto-
res exercitus Heretoches per An-
glos vocabantur. Illi ordina-
bant acies densissimas in præliis
et alas constituebant, prout de-
cui, et prout ei melius visum
fuerit ad honorem coronæ et ad
utilitatem regni.* [d] And here
it is to be observed, that his

(6. Co. 21.)
[a] 2. E. 4. 11. 4. E. 4. 10. 21.
E. 4. 10. F. N. B. 85. 11. H.
7. 5. 9. Co. 32. Cate de Strat.
Marc.

[b] Regist. 88. F. N. B. 84. 2.
E. 4. 1. 4. E. 4. 10. 9. H. 4.
3. 11. H. 7. 5. 21. H. 6. 50.
33. H. 6. 1. 45.

[c] Lomb. fo. 136.

[d] 2. E. 4. 1. b. 4. E. 4. 10.
23. E. 4. 47. F. N. B. 85. (2.
Inst. 428. Post 261. a.)

[e] 4. E. 4. 10.

[f] 5. E. 4. 37. 21. E. 4. 16.
(2. Ro. Ab. 579.)
[g] 10. H. 6. 10. (Fortesc. cap.
32.)

(12. Co. 67.)

(4. Inst. 124.)

Stat. de 1. H. 4. cap. 14. 23. H.
4. fol. 5. Vid Rot. Parliam. 3.
H. 6. nu. 38. Stanf. pl. Cor. fo.
65.

certificate in this case is a triall in law. I read of fixe kinds of certificates allowed for trials
by the common law; the first whereof Littleton here speaketh of, in time of warre out
of the realme. 2. In time of peace out of the realme. [c] As if it be alledged in avoy-
dance of an outlawrie, that the defendant was in prison at Burdeaux in the service of the
maior of Burdeaux, it shall be tryed by the certificate of the maior of Burdeaux. 3. For
matters within the realme, [f] the custome of London shall be certified by the maior and
aldermen by the mouth of the recorder. 4. By certificate of the sherife upon a writ to him
directed [g] in case of priviledge, if one be a citizen or a forreiner. 5. Tryall of records
by certificate of the judges in whose custody they are by law. All these be in temporall
causes. 6. In causes ecclesiasticall, as loyalty of marriage, generall bastardie, excom-
mencement, profession. These and the like are regularly to be tryed by the certificate of the
ordinarie.

And there be divers other trialls allowed by the common law, then by a jury of 12 men,
which you may reade at large in the ninth booke of my Reports, fol. 30, 31, &c. in the
case of the abbot of Strata Marcella, which are as plainly set downe there, as they can be
here. And in this case, if the triall should not be by certificate, it should want triall, which
should be inconvenient. Onely in this place I will adde something of a forreine triall which
I finde not in any of the treatises lately published against single combats; because it may de-
terre men from that ungodly and unlawfull kinde of revenge, whereupon many murders have
ensued, and prevent all hope of impunity for default of triall in that case.

If a subject of the king be killed by another of his subjects out of England in any for-
reine country, the wife or he that is heire of the dead may have an appeale for this mur-
der or homicide before the constable and the marshall, whose sentence is upon testimony
of witnesss or combate. And accordingly, where a subject of the king was slaine in Scot-
land

(1) It is very clear, that escuage was due for service out of the realm, which was the reason of its being called *servitium fo-
rinsicum*; but I do not find it precisely ascertained by any writer, whether it could be claimed on all foreign expeditions, or
whether it was confined to expeditions into particular countries. When indeed on the creation of the tenure the personal
service, in lieu of which escuage became payable, was expressly limited to certain places, there could be no room for doubt;
but the difficulty is to know, what the construction of law was, when knights service was reserved generally. Littleton men-
tions only Scotland, other writers add Wales; but in general both are named merely as instances. Lord Coke observes as
much, and says, that escuage was also due on expeditions into Ireland, Gascony, Poictou, &c. if the tenure was to go into
those countries: but there is a shortness in this manner of expression, which leaves an obscurity; for the words do not ex-
plain what the rule of law was, when no place was named. See ante fol. 69. a. One ancient author absolutely restrains escuage to
Scotland and Wales, and in direct terms excludes all other territories. Old Ten. tit. Escuage. But of this restriction it is sufficient
to say, that the records concerning escuage, which mention Ireland, Normandy, Poictou, Bretagne and Thoulouse, as well as
Scotland and Wales, are full evidence to the contrary. See the records cited by lord Hale in note 3. of fol. 69. b. and also
Seld. Notes on Hengham, 12mo. ed. 114.

(2) In L. and M. the words are *constable de la hoste le roy.*

(3) In L. and M. there is an &c. after *seal* and the words *que sera mis a les justices* are omitted.

(4) See further as to trial by certificate Com. Dig. tit. Certificate and title Trial in Viner and the other Abridgments.

Honor, part 2. chap. 5. sect. 26. where it is mentioned, that the barony de veteri ponte was holden by 5 knights fees, and that Clifford,
who had married one of the coheirs, acknowledged the service of two knights and an half. 2. On summons of the army on service at a
place and day certain, every knight by himself or his deputy came before the constable and marshall, and presented the number of his fees
and the persons by whom they were to be performed and their names which were registered before them. 3. He, who held by a whole
knight's

[*] Anno 25. Eliz.
(Post 261. Hutt. 3.)

land by others of the king's subjects, the wife of the dead had her appeale therefore before the constable and the marshall. And so it was [*] resolved in the raigne of queen Elizabeth in the case of Sir Francis Drake, who strook off the head of *Dorvte in partibus transmarinis*, that his brother and heire might have an appeale. *Sed regina noluit constituere constabularium Anglie, &c. et ideo dormivit appellum.*

If a man be mortally wounded in France, and dyeth thereof in England, it is said that an appeale doth lie upon the said statute; for it is not punishable by the common law, and the proceeding there (as hath bene said) is upon witness or combate, and not by jurie, and the mortal wound was given out of the realme (1).

CHAP. 4. Sect. 103.

Knights service.

(6 Co. 73. b.)

[a] Glanv. l. lib. 7. cap. 10.

[b] Regist. 2. 30. E. 3. 24.

[c] Glanvil. lib. 7. cap. 14.

[d] Glanvil. lib. 7. c. 9. &c.
Fleta lib. 1. cap. 8. Bracton lib.
2. fol. 35. Britton fol. 162. &
fol. 28. & 95. Ockam in diver-
fis locis. Mirror cap. 1. sect. 3.
Sud. Diton.

[e] Bract. lib. 2. fo. 36. 37.
Britton fol. 164. 165. Fleta lib.
3. cap. 14. 19. E. 2. Avowry
224. 26. Aff. 65. 31. Aff. 30.
30. E. 3. 23. S. E. 3. 67. 7. H.
4. 19.

(Ante 68. b.)

SERVICE de chivaler: Nota, it appeareth by [a] the Register, that it is [b] said *unum feodum militis*, and not *feodum unius militis*, as it was said, [c] by some of old, and so *duo feoda militis*, &c. and sometime these fees are called *feoda militaria* [d]. Our author, having before treated of homage fealty and escuage, now cometh to knight service itselfe. In Domesday it is thus recorded, *episcopus Baieccensis, ille qui tenet de Modardo, reddit ei 50s. et servitium unius militis.*

Chivaler, .i. eques, knight is a Saxon word, and by them written *cnite*. *Chivaler* taketh his name from the horse; because they alwayes served in warres on horseback. The Latines called them *equites*, the Spaniards *cavalleros*, the Frenchmen *chevaliers*, the Italians *cavallieri*, and the Germans *reiters*, all from the horse. It is necessary to be seene by what names this service of a knight is called. It is called [e] *Servitium forinsecum*, quia pertinet ad dominum regem et non ad capitalem dominum, nisi cum in propria persona profectus fuerit in servitio; et nisi cum pro servitio suo satisfecerit domino regi, &c. Ideo forinsecum dici potest, quia fit et capitur foris, sive extra servitium quod fit

TENURE per homage fealty et escuage est a tener per service de chivaler, et trait a luy gard mariage et relief. Car quant tiel tenant morust, et son heire male est deins lage de 21 ans, le seignior avera la terre tenus de luy tanque al age del heire de 21 ans; le quel est appel pleine age, pur ceo que tiel home, per entendement del ley, nest pas able de faire tiel service de chivaler devant lage de 21 ans. Et auxy si tiel heire ne soit marie al temps de mort de tiel auncester, dunque le seignior avera le garde et le mariage de luy. Mes si tiel tenant devie, son heire female esteant dage de 14 ans ou de plus, dunque le seignior

TENURE by homage fealty and escuage is to hold by knights service, and it draweth to it ward, marriage and reliefe. For when such tenant dyeth, and his heire male be within the age of 21 yeares, the lord shall have the land holden of him untill the age of the heire of 21 yeares; the which is called full age, because such heire by intendment of the law is not able to doe such knight's service before his age of 21 yeares. And also if such heire be not married at the time of the death of his ancestor, then the lord shall have the wardship and marriage of him. But if such tenant dieth, his heire female being of the age of 14 yeares or more, then the lord

na-

(1) The office of high constable became extinct in the reign of Henry the eighth by the attainder of Stafford duke of Buckingham, in whom it was hereditary; and since his death there hath not been any permanent high constable, the practice having uniformly been to keep the office vacant except on particular occasions. In consequence of this it hath frequently been a subject of great controversy, whether during the vacancy of the office of high constable the jurisdiction incident to the court of chivalry can be exercised by the earl marshal only. Lord Coke's manner of stating Sir Francis Drake's case imports, that an appeal could not be prosecuted against him for want of a high constable, and Dr. Duck, in his excellent treatise on the use and authority of the civil law says, that the judges being consulted by Elizabeth were of that opinion. Duck lib. 2. cap. 8. pars 3. f. 16. In the reign of Charles the first the lord keeper and judges of the King's Bench were advised with on a like occasion, and held that the earl marshal could not take an appeal without a high constable; and accordingly the king appointed the earl of Lyndsey twice to the office, once to try an appeal by lord Rea against Mr. Ramsey for treason committed in Germany, and a second time to try an appeal by the widow of William Wise against William Holmes for the murder of her husband in the island of Terra nova in America. See Rushw. vol. 2. p. 106. 112. and Duck ubi supra. Hitherto only the right of the earl marshal to criminal judicature had been denied; but in 1640 the house of commons went further, for they resolved that the earl marshal can make no court without the constable. See Rushw. vol. 3. page 1056. However notwithstanding this declaration of the law by the house of commons, the court of king's bench soon after the restoration distinguished between the several branches of jurisdiction belonging to the court of chivalry, and held, that as to matters relative to arms and honor the court may be before the earl marshal only, but that as to matters of ordinary justice touching life and limb there must be a high constable as well as an earl marshal. 1. Lev. 230. But in a subsequent case before the house of lords, the coun-
sel

knight's fee ought to perform his service by one knight, or by himself in person, or per duos servientes five armigeros, who in value are equal to a knight. Seld. ubi supra. So he, who held by the moiety of a knight's fee, might perform all the service either 40 days per servientem

navera my le garde del terre, ne de corps; pur ceo que feme de tiel age poit aver baron able de faire service de chivaler. Mes si tiel heire female soit deins lage de 14 ans, et nient marie al temps de la mort son auncester, donque le seignior avera le garde de la terre tenus de luy, tanque al age de tiel heire female de 16 ans, pur ceo que il est done per le statute de Westm. 1. cap. 22. que per 2 ans prochein ensuant les dits 14 ans, le seignior poit tender convenable mariage sans disparagement a tiel heire female. Et si le seignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine des dits 2 ans poit enter et ouste son seignior. Mes si tiel heire female soy marie deins lage de 14 ans en la vie son auncester, et son auncester devy, el esteant deins lage de 14 ans, le seignior navera forsque la garde de la terre jesses a fine de 14 ans dage de tiel heire female, et donque

shall not have the wardship of the land, nor of the bodie; because that a woman of such age may have a husband able to doe knights service. But if such heire female be within the age of 14 yeares, and unmarried at the time of the death of her ancestors, the lord shal have the wardship of the land holden of him until the age of such heire female of 16 yeares. For it is given by the statute of W. 1. cap. 22. that by the space of two yeares next ensuing the sayd 14 yeares, the lord may tender convenable marriage without disparagement to such heir female. And if the lord within the said two yeares do not tender such marriage, &c. then she at the end of the said 2 yeeres may enter, and put out her lord. But if such heire female be married within the age of 14 yeeres in the life of her auncester, and her auncester dieth, she being within the age of 14 yeeres, the lord shall have only the wardship of the land untill the end of the 14 yeares of age of such

domino capitali. And it is called *scutagium*, as it appeareth [f] by Littleton and many authorities before recited; sometime *droit de espec.* Also it is called [g] *regale servitium*, quia specialiter pertinet ad dominum regem. Ut si dicatur in carta, *faciendo inde forinsecum servitium, vel regale servitium, vel servitium domini regis, quod idem est, &c.* And another saith: *Et sunt quedam servitia forinsecum, que dici poterunt regalia, que ad scutum prestantur; et inde habemus scutagium, et ratione scuti pro feodo militari reputatur, &c.* So as in respect of him that doth it, it is called *servitium militis*; but in respect of him for and to whom it is done, viz. to the king, and for the realme, it is called *servitium regale*, or *servitium domini regis, &c.* [b] In ancient time they which held by knights service were called *milites*, qui per loricas, &c. defendunt et deservunt, &c. and sometime this service is called *servitium bauberticum*. And in ancient time, such as held by knights service for the defence of the realme had many privileges granted to them by law: as for example they might have a writ *de effend' quiet' de tallagio*, the effect whereof was [i] *Si Tho. filius Ranulphi terram suam teneat per servitium militare, sicut domino regi monstravit, tunc nullum ab eodem Tho. capiant tallagium, nec pro eo dando ipsum distringant, vel homines suos qui per consimile servitium teneant.* And this agreeth with the ancient charter of king Henry the 1. before mentioned, which he made on the day of his coronation for the restitution of the ancient lawes. [k] *Militibus, qui per loricas terras suas defendunt et deservunt, terras dominicarum carucat' suarum quietas ab omnibus gildis, et omni opere, &c. concedo: and the reason thereof is there yielded, Sicut tam magno gravamine allevati sint*

[f] Bracton ubi supra. Fleta lib. 3. cap. 14.

[g] Britton fol. 187. Bracton ubi supra.

[b] Carta Hen. prim. Mat. Paris. Mirror. cap. 2. lect. 17.

[i] Rot. Claus. 19. H. 3. m. 23.

[k] Carta H. 1. in libro rub. fol. 41. in scaccario.

fel arguing against the earl marshal insisted generally, that by himself he could not hold any court; though it doth not appear from the printed report whether the judgment, which was there given against the jurisdiction of the earl marshal, was founded on that proposition, or on the other points of the cause. Such is the state of the authorities against the judicature of the earl marshal without a high constable. See Dr. Oldis's case. Show. Parliam. Cas. 58. On the other hand many strong arguments, drawn from the practice immediately after the attainder of the last hereditary high constable down to the latter end of the reign of James the first, as well as from the opinions of judges and others of high name, have been urged in its favour. These are well digested in a letter written soon after the revolution by Dr. Plott to lord Somers whilst he was attorney-general, and appear to have been collected by his desire. See Hearn. Disc. of Emin. Antiqu. 2d. ed. vol. 2. p. 250. One authority much relied on by Dr. Plott is an opinion of the lord keeper the master of the rolls and a great number of the privy council in the 20th of James the first, who after a solemn hearing declared, that the earl marshal had all the powers of judicature without the high constable during the vacancy of that office. Upon report of this to the king, he issued his commission under the great seal to Thomas earl of Arundel the then earl marshal, which, after reciting that the earl marshal had delayed to proceed in some causes before him on account of doubts of his authority, contains the following strong declaration of his judicial power. *We held it fit, says the king, in a case of so great weight to proceed with extraordinary deliberation, and having now both by ourselves and the whole body of our council received ample satisfaction by many and clear proofs, that the constable and marshal were joint judges together, and several in the vacancy of either, we do hereby authorize will and command you our earl marshal, that from henceforth you proceed in all causes whatsoever, whereof the court of constable ought properly to take cognisance, as judicially and definitively as any constable or marshal of this realm, either jointly or severally, heretofore have done.* A more explicit recognition of the earl marshal's jurisdiction could not be penned, nor one more full and unreserved; for it declares his judicial power to extend to all causes whatsoever of which the court of the constable and marshal ought properly to take cognisance, without one exception. How it happened, that so soon after this solemn hearing and declaration concerning the earl marshal, the lord keeper and judges of the King's Bench should advise the king that lord Rea's appeal could not be taken without a high constable, seems very extraordinary and unaccountable. To attribute their advice to that jealousy of jurisdictions conforming so much to the civil law, which our judges of the courts of common law sometimes may have indulged to an illiberal excess, would be unjust; because we are not now possessed of the reasons assigned for the opinion thus given to the crown: and on the other hand, the same want of information greatly lessens its weight and authority. Having thus exhibited a view of the controversy about the earl marshal's judicial powers, it may be proper to apprise the reader, that there is not the least intention of advancing any opinion in respect to it, further than by observing upon the distinction between the cases of honor and arms and those of life and limb, so far as it is founded on the 1. H. 4. c. 14. Though that statute provides, that all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal, yet it is apparent from the other parts of the same statute, that it was made, not to declare or regulate by whom the judicature of the court of chivalry should be exercised, but when

vientem or 20 days per seipsum vel militem. And so it was done by the abbot of Saint Alban, who held six knights fees of the king and

sint, ita equis et armis se bene instruant, ut apti et parati sint ad servitium meum, et defensionem regni mei. But these privileges and quittances are discontinued, and the charge remaineth.

[1] Glanvil lib. 7. ca. 9. 10. Fleta lib. 1. ca. 8. & 9. & lib. 3. cap. 16. 17. &c. Bracton lib. 2. cap. 16. Mirror cap. 5. text. 2. Britton 162. (4. Inst. 192.)

It is called commonly in [1] our bookes *servitium militare*, &c. or *servitium militis*. And this service was created and provided for the defence of the realme, to performe which service the heires are not accounted in law able till the age of one and twenty yeares. Therefore during their minority, the lord shal have the custody of them, not for benefit onely, but that the lord might see, that they be in their yong yeares taught the deeds of chivalry, and other vertuous and worthy sciences.

[m] Fortescue cap 44.

[m] *Si hereditas teneatur per servitium militare, tunc per leges infans ipse, et hereditas ejus, &c. per dominum feodi illius custodientur, &c. Quis putas, infantem talem in artibus bellicis, quos facere ratione tenuræ suæ ipse asstringitur domino feodi sui, melius instruere poterit, aut velit, quam dominus ille, cui ab eo servitium tale debetur, et qui majoris potentie et honoris asstimatur, quam sunt alii amici propinqui tenentis sui? Ipse namque, ut sibi ab eodem tenente melius serviatur, diligentem curam adhibebit, et melius in hiis eum erudire expertus esse censetur quam reliqui amici juvenis, &c. et revera non minimum erit regno accommodum, ut incolæ ejus in armis fiat experti, nam audacter quilibet facit, quod se scire ipse non diffidit.*

[n] Lamb. fol. 135. a.

[n] Amongst the lawes of Saint Edward the Confessor, it is thus provided, *Debent enim universi liberi homines, &c. secundum feodum suum, et secundum tenementa sua arma habere, et illa semper prompta conservare ad tuitionem regni, et servitium dominorum suorum juxta preceptum domini regis explendum et peragendum.* And William the Conqueror confirmed that law in these words; *Statuimus et firmiter precipimus, ut omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni*

son baron et luy poient enter en la terre et ouste le seignior. Car ceo est hors de cas de le dit estatute, entant que le seignior ne poit tender mariage a luy que est marie, &c. Car devant le dit estatute Westm. 1. tiel issue female, que fuit deins age de 14 ans, al temps de mort son auncesser, et puis que el avoit accomplish lage de 14 ans, sans ascun tender de mariage per le seignior a luy, tiel heire female donque puisset enter en le terre et ouste le seignior, sicome appiert per le rehersall et parolx de le dit statute; issint que le dit statute fuit fait en tiel cas tout pur ladvantage de seigniors, come il semble. Mes uncore ceo tous foits est entendue per les parolx de meme le statute, que le seignior naverá les deux ans apres les 14 ans, come est avantdit, mes lou tiel heire female soit deins lage de 14 ans nient marie al temps de mort son auncesser.

heire female, and then her husband and she may enter into the land, and oust the lord. For this is out of the case of the said statute, inso-much as the lord cannot tender marriage to her which is married, &c. For before the said statute of W. 1. such issue female, which was within the age of 14 yeares at the time of the death of her ancestor, and after she had accomplished the age of 14 yeares, without any tender of marriage by the lord unto her, such heire female might have entred into the land and ousted the lord, as appeareth by the rehearsall and words of the said statute; so as the said statute was made (as it seemeth) in such case altogether for the advantage of lords. But yet this is alwayes intended by the words of the same statute, that the lord shal not have these two years after the 14 yeares as is aforesaid, but where such heire female is within the age of 14 yeares, and unmarried at the time of the death of her ancestor (1).

when appeals should be brought there and when in the courts of common law, and further to put an end to the bringing appeals in parliament; and therefore it seems wholly unwarrantable to lay any stress on the statute's incidentally mentioning constable as well as marshal, who as all agree are joint judges, when both offices are full. As to the mode of trial in the case of appeals in the court of chivalry, some have apprehended, that it is ever by duel, if the party appealed elects that mode, and the appellant is not privileged from the duel by age sex or profession. But this, though it may be very true in respect to appeals in the courts of common law, is a mistaken notion as to appeals in the court military; for there duel is only the ultimate trial, and never resorted to unless there is a want of sufficient testimony to prove the offence, and even then it is said to be in the discretion of the court to grant or refuse the duel. See Rushw. v. 3. p. 113. In lord Rea's appeal against Ramsey in the 7. Cha. 1. being the last in which the duel was directed, the day of combat was prorogued; and in the mean time the king signifying his desire of not having the affair decided by duel, the court met and committed both the appellant and appellee till they should give security to the satisfaction of the king not to attempt any thing against each other, and immediately afterwards was dissolved by a revocation of the commission which had been granted for trial of the appeal. Rushw. v. 3. p. 127.—Before we leave this subject, it may not be amiss to hint the necessity of having the criminal jurisdiction of the court of chivalry, which is really of importance, duly regulated and reformed. From the preceding account it appears to be doubtful who can lawfully act as the judges, and besides the want of a trial by jury may be deemed a reasonable objection to the form of proceeding; and in consequence of these two circumstances the criminal jurisdiction of the court of chivalry hath long been in a dormant state, and is likely to continue in it, unless the legislature applies a remedy. This it would be easy to effect; for nothing more would be necessary, than to ascertain who should constitute the court in cases of appeals, to abolish the present mode of trial, and to substitute in its room the trial by jury on a plan like that, which has already been adopted by statute in respect to the criminal jurisdiction of the admiralty court. However it must not be taken for granted, that this court is the only jurisdiction for the trial of crimes committed in foreign countries; or that without resorting to it, there would be an absolute defect of justice in the case of all such crimes. For 1. the 33. of Hen. 8. c. 23. provides, that treason misprision of treason and murder, in whatever place committed, whether within the king's dominions or without, shall be triable before commissioners of oyer and terminer to be appointed for that purpose; and this statute, we are told, stands unrepealed as to murder, and hath accordingly been sometimes put into use. 2. As to treasons and misprisions of treason committed out of the realm, they by the 35. H. 8. c. 2. are triable either before the king's bench or commissioners. See 1. Hal. Hist. Pl. C. 283. It is also provided by the 26. of H. 8. c. 13. that the crimes made treason under that statute or being so before, if committed out of the realm, shall be indictable before commissioners and tried in the king's bench; but it is doubtful whether this statute is now in force. See farther as to the high constable and earl marshal Post 106. a. and 391. b.—Note as to *escuage*, it is expressly taken away by the 12. Cha. 2. c. 24. and had fallen into disuse long before; for there is no instance of parliament's assessing it since the reign of Edw. 2. See ante 72. b.

(1) In L. and M. and the Pap. MS. there is the following. *Item si un home tient un maner de un auter per serwyce de chivaler,*

performed the service per duos milites galeatos et lege militari decenter armatos et ceto armigeros, four of whom were equites cum

regni nostri prædicti habeant et teneant se semper in armis et in equis ut decet, et oportet, et quod sint semper prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum semper opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, &c.

Out of these two lawes the studious and learned reader will gather divers notable things. And therefore if after the lord hath the wardship of the body and the land, the lord doth release to the infant his right in the seigniorie, or the seigniorie descendeth to the infant, he shall be out of ward both for the body and the land; for he was in ward in respect he was not able to doe those services which he ought to doe to his lord, which now are extinct, and *cessante causa cessat causatum*. And our author saith, that the tenure by knights service draweth unto it ward, marriage, &c. so as there must be a tenure continuing. As if the consor in a statute merchant be in execution, and his land also, and the consor release to him all debts, this shall discharge the execution; for the debt was the cause of the execution, and of the continuance of it till the debt be satisfied, therefore the discharge of the debt which is the cause, dischargeth the execution which is the effect.

Et trait a luy gard, mariage, et reliefe. So as regularly there be fixe incidents to knights service, (*viz.*) two of honour and submission, as Homage and Fealtie. And foure of profit, *viz.* Esuage, whereof he hath treated before, Ward (*i.* wardship of the land) Mariage and Reliefe; of all which our author hath spoken. But there be other incidents to knights service besides these; [a] as *Aide pur faire fits chevalier, et aide pur file marier, &c.* which at the common law were uncertaine, and were called *rationabilia auxilia*, because if they were excessive and unreasonable in the judgement of the court where they were questioned, they ought not to be paid: but now as well in the king's case, as in the case of the subject, they are by acts of parliament reduced to certaintie, which are worthy your reading (1).

Gard, or Ward, in Latine custodia, and hereof the lord is called gardian, custos, and the minor is called a ward or one in ward. [b] And albeit (as our author saith) knight service draweth with it ward, &c. yet by custome the heire of him, that holdeth in socage, may be in ward.

Marriage. *Maritajum* betokeneth, not onely the copulation of man and wife in marriage, but also (as in this place here) the interest of the gardian in bestowing of a ward in marriage, which the law gave to the lord, not for his benefit onely, but that he should match him virtuously and in a good family without disparagement, as shall be said hereafter, which is the principall foundation of his estate.

[c] *Reliefe.* *Relevium* is derived from the Latine word *relevare*; for so [d] ancient authors say, and give this reason, *Quia hæreditas, quæ jacens fuit per antecessoris decessum, relevatur in manus hæredum, et propter factam relevationem facienda erit ab hærede quædam præstatio, quæ dicitur relevium.* And in Domesday it is called *relevamentum* and *relevatio*.

The reliefe of a whole knight's fee is five pound, and so according to that rate. And this reliefe was as some hold certaine by the common law; * but the reliefe of earles and barons were uncertaine, and therefore were called *relevia rationabilia*; but the statute of Magna Charta, cap. 2. limits them in certaine, and mentioneth also a knight's fee. But I reade in the book of Domesday, *Quod Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma sua, et equum unum cum sella et alium sine sella; quod si essent ei canes vel accipitres, præstabantur regi, ut si vellet acciperet.*

Since Littleton wrote [e] there is a good law made against fraudulent feoffements, gifts, grants, &c. contrived of fraud to hinder or defraud lords, &c. of their relieves and heriots amongst other things, for the exposition of which statute reade the authorities quoted in the margin. And it is to be observed, that the words of the said act of 13. Eliz. are, (*be it therefore declared, ordained, and enacted*) and therefore like cases, and infemlable mischief shall be taken within the remedie of this act by reason of this word (*declared*), whereby it appeareth what the law was before the making of this statute (2).

Son heire male. [f] For regularly by the common law the heire shall not be in ward, unlesse he claime as heire by descent. The statute of Merton, *de hiis qui primogenitos feoffare solent*, [g] did helpe feoffments by collusion in certaine cases. And Britton saith, that Robert de Walrand a sage of the law did advise the great lords of the realme to make the said statute, which when it was past, the same act tooke his first effect in the heire of Walrand's owne heire, whereof Britton maketh a speciall remembrance. But now [h] by the statutes of 32. and 34. H. 8. of wills, he which holdeth lands by knights service may by act executed in his life time, or by his last will in writing, dispose two parts as by the said acts appeareth. If he dispose all by act executed, then it shall stand good against the heire,

et il tient un auter maner de un auter home per un tiel serwayce, meiz il tient lun maner per priorite, &c. et l'auter maner per posteriorite, et ady issue file, et devue, et les maners descendent al file adonques esleant deinz lage de 14 auns, et le seignour de que un dez maners est tenu per priorite seist le garde del corps del heire et de le maner tenuz de luy, et l'auter seignour seist le garde del auter maner tenuz de luy, en cest case quant la file vient al age de 14 auns, ele entrera en le maner tenuz per posteriorite coment que ele soit adonques desmarie. Par les parols de meme lestatute de Westminster premier sont en tiel forme que ensuyv. Les heires femels, puis que eles ayront complie age de 14 auns, et le seignour, a qui le mariage appent, celes ne voudra marier, meiz per coventise de la terre celes voudra tener dismariez, purveu est que le seignour ne puisse aver ne tener per encheson de le mariage les terres de celes heires femels outre deux auns apres le terme dez avantdiz 14 auns, &c. per queux parols, il post estre prove, que apres les 14 auns null doit aver les terres en tiel case, &c. forsque celui, a qui le mariage appent, &c. et pur ceo que tiell maraige nappent a celui, de qui la terre est tenu per posteriorite, &c. tiell heir femel, quant ele vient al age de 14 auns, poet bien entre en tiel terre, quo issint est tenu per posteriorite, &c. — See 35. H. 6. 52.

(1) The aids *pur faire fits chevalier et pur file marier* are expressly abolished by the 12. Cha. 2. c. 24. — They were incident to socage as well as knights service. 2. Inst. 233. See further as to aids Wright's Ten. 40. 145. and 2. Blackst. Comment. 63.

(2) See a note on the subject of relief, Post 83. a.

complines et ferreis armis muniti, and two were ballistarii; and they were presented to the constable and marshal, and in constabulariis positi, that is, listed in their severall companies. And note, that ni milites et servientes were at their own proper expences in going,

See W. 1. cap. 48. The second part of the Institutes. (6. Co. 22. Post 248.)

20. Aff. p. 7. (2. Ro. Ab. 404. Doc. Pla. 106.)

[a] Grand. Cust. de Norm. cap. 35. Regist. orig. fo. 87. Glanvil lib. 9. ca. 8. 35. Fleta lib. 2. cap. 40. & lib. 3. ca. 14. Mirror ca. 1. sect. 3. Britton fo. 55. & 70. F. N. B. 82. b. W. 1. ca. 35. 25. E. 3. ca. 11. 11. H. 4. 34. 5 E. 3. 11. Vide sect. 110. [b] S. H. 3. Precept. 38. Pasch. 21. E. 1. Coram rege Rot. 43. Nota pro Hibernia Prior del St. Trinitie de Dublin's case.

[c] Vid. Sect. 112. [d] Bracton lib. 2. ca. 36. fol. 84. Fleta lib. 1. ca. 10. & lib. 3. ca. 16. 17. Britt. ca. 69. 70. Glanvil lib. 9. ca. 4. & lib. 7. ca. 9. Ockam de differentiis releviorum. (Ante 69. b. Post 83. a.) [e] Ockam ubi supra. Bracton lib. 2. fo. 85.

[f] 13. Eliz. ca. 5. 17. E. 3. Reliefe 3. 7. E. 3. ib. 11. 3. Co. 80. &c. Twine's case. 5. Co. 60. Gooche's case. 6. Co. 18. Pakeman's case. 10. Co. 56. b. See also the statutes of 3. H. 7. c. 4. & 50. E. 3. ca. 6. Vide Mich. 12. & 13. Eliz. Dier 295.

[g] Britton 168. Fleta lib. 1. ca. 9. [h] Merton ca. 6. (11. Rep. 23.) Bract. fo. 85. Brit. fo. 65. 9. H. 4. 6. 4. H. 7. ca. 17. 27. H. 8. 7. 89. Partridge's case. Pl. Com. 82. [i] 32. H. 8. ca. 1. 34. H. 8. ca. 5.

(10. Co. 80.)

[1] 3. Co. 25. 26. in Butler's case. 6. Co. 75. in Sir George Curson's case. 8. Co. 163. Might's case. Eod. lib. fo. 171. in Vill Parker's case.

[4] Mir. ca. 1. Sect. 3.

so as nothing shall descend unto the heire. But in case of a devise by his last will, a third part shall descend to the heire, though all be devised away: and if the tenant leave a third part to descend, then the devise is good for the residue. [i] But these things require so many diversities grounded upon evident reasons, and are so plainly expressed in my Commentaries, as they (being very long) shall not need to be repeated here. [k] And that the tenure by knights service draweth to it ward marriage and reliefe, is of great antiquity, for so it was in the time of king Alfred (1).

Quant tiel tenant mort.

Here Littleton speaketh not of a dying seised by the tenant, for in many cases the heire shall be in ward, albeit the tenant died not seised, &c. nor in the homage of the lord. As if the tenant maketh a feoffment in fee upon condition, and the feoffor dieth, after his death the condition is broken, the heire within age entreth for the condition broken, he shall be in ward, and yet the feoffor had no estate or right in the land at the time of his death, but onely a condition, and which was broken after his decease.

[*] But because the condition restoreth the tenant to the land in nature of a descent, (for he shall be in by descent) by the same reason shall it restore the lord to the wardship, seeing now (as Littleton saith) the heire of his tenant is within age, and not able to doe him service, and no default in the lord to barre him of his wardship.

[1] And so I doe take it, that if the heire within age recover in a *dum non fuit compos mentis*, or *formedon en descender*, or remainder as heire, or such like, the heire shall be in ward; for these be stronger cases then the former, for here a right doth descend to the demandant, which right being by course of law restored to the possession of the heire within age, by consequence the lord is to have the wardship of him, but in the case of the condition, no right at all descended to the heire, as hath beene said.

And so if tenant in taile, the remainder in fee, maketh a feoffment in fee, and dyeth leaving the issue in taile within age, if the feoffee infeoffe the issue in taile, whereby he is re-mitted, he shall be in ward to the lord; for as he is restored to the title of the land as heire, so is the lord restored to his title of wardship as lord of the fee. And as to this purpose herein I take no difference betweene a right of action and a right of entry descending, when by action the right of the land is lawfully recovered by the heire within age, to his tenant; and albeit he dyed not in his homage, yet there was a right of homage, and no default or laches was in the lord, or act done by him to prejudice himselfe thereof.

But if one levie a fine executorie (as *sur grant et render*) to a man and his heires, and he to whom the land is granted and rendred, before execution dieth, his heire being within age entreth, he shall not be in ward, for his ancestor was never tenant to the lord, and so there is a manifest diversitie betweene this and the other cases. *Et sic de ceteris*.

But if the tenant maketh a feoffment in fee of lands holden by knights service to the use of the feoffee and his heires, untill the time that the feoffor pay to the feoffee or his heires a hundred pounds, for the which a time and place is limited; the feoffee dyeth, his heire within age; the lord shall have the wardship of the bodie of the heire, and of the lands of the feoffee, conditionally, for he cannot have a more absolute interest in the wardship, than the heire hath in the tenancie: therefore if the feoffor pay the mony at the day and place, and entreth into the land, in this case both the wardship of the bodie and lands is devested, because the lord had no absolute interest in neither of them, but doth depend upon the performance or not performance of the condition.

[*] So if the consor of a fine executorie of lands holden by knights service dyeth his heire within age, the lord shall have the wardship of the bodie and land: but if the consor entreth, the heire is disherited, and the lord hath lost the whole benefit of his wardship.

If the disseisee dyeth his heire being within age, [m] the lord shall have the wardship of the heire of the bodie of the disseisee. [n] But put the case, that in that case the disseisor dieth seised, and his heire within age, the lord may seise the wardship of his heire also, and of the land also: but the doubt is, whether the heire of the disseisee shall, after the descent to the heire of the disseisor, continue in ward, for that after the descent the heire of the disseisor is become his lawful tenant, and the heir of the disseisee is not tenant unto him untill he hath recovered the land.

If *cesti que use* before the statute of 27. H. 8. had dyed, his heire within age, the lord [o] should have the wardship of his heire; and if the feoffee had dyed, his heire within age, the lord should have had the wardship of his heire also, and so a double wardship for one and same land, the one by the statute of 4. H. 7. the other by the common law.

[p] Tenant by knights service maketh a gift in taile, the remainder in fee, tenant in taile maketh a feoffment in fee, and dyeth, his heire within age, the lord shall have the wardship of him; and if the feoffee dieth, his heire within age, the lord shall have the wardship also of his heire, and of the land.

If

(1) This shews, that in lord Coke's opinion the feudal tenures were settled here before the conquest. But as to this controverted point, see note 1. of 64. a.

going, staying for 40 days, and returning. Note also that the 40 days are accounted from the day prefixed for the assembling of the army in the destined place, wherever it shall be, whether in the kingdom or out of the kingdom; and the day and place of the assembly of the army were prefixed in the writ de summonitione servitii. Observe, that great fines were frequently imposed on those, who were deficient in doing their service on the summons of the army. Vid. Claus. 27. H. 3. parte 1. m. 12. Thomas de Berclay was fined 60 marks for default of service in transretando cum rege. Claus. 16. E. 2. m. 36. The barons of the exchequer were commanded to compound with the archbishops, bishops, religious men, and others for the remission of their service in the next army summoned at Newcastle on the vigil of Saint James next ensuing, and to take for a fine forty pounds for every fee, and so pro rata. By Pat. 13. E. 2. it was directed that twenty pounds should be taken for a fine on every fee of a knight who should make default. Vid. fines 7. E. 2. m. 4. 5. On the summons of service for the army of Scotland, it was proclaimed, that ecclesiastical persons and women should do their service at the

(1. Co. 89.)

[*] 39. E. 3. 36. tit. Gard 92.

33. E. 3. Gard. 162. 11. H. 7.

12. 19. E. 3. Gard. 114. 18.

Aff. 18. 40. Aff. 36. 20. El.

362. 4. H. 6. 16. b. F. N. B.

143. 6 H 4. 4. a.

[1] 7. H. 4. 12. 1. H. 7. 12.

22. E. 4. 7. 6. 40. E. 3. 43. 4.

M. 136. 15. E. 4. 10. 11.

33. E. 3. Gard. 162.

(2. Ro. Ab. 38.)

11. H. 7. 12.

13. El. Dyer 298.

(Post 248. a)

[*] 12. H. 4. 16. per Thirning.

[m] 41. E. 3. 225.

[n] 15. E. 4. 11.

[o] 14. H. 8. 5. 4. H. 7. cap. 17.

[p] 41. E. 3. 26. tit. Avowrie

264. 23. H. 6. 9. 48. E. 3. 8. b.

10. l. 26. 31. E. 3. tit. Gard.

116. 18. E. 3. 7. 14. H. 4. 38.

1. H. 5. Grant 43. 5. E. 4. 3.

7. E. 4. 27. 15. E. 4. 13. 2. E.

2. Avow. 181.

If tenant by knights service maketh a gift in taile, and the donee maketh a feoffment in fee, and the donee dieth his heire within age, the donor shall have the wardship of him; because he is his tenant in right. [q] But if the feoffee dieth, his heire within age, the donor shall not have the wardship of his heire, but the lord paramount; because he is tenant *in fait* to him, neither shall the donor avow upon the feoffee or his heire for the services due unto him, because he must in his avowry shew the reversion in fee to be out of him by the feoffment, and consequently the services incident to the reversion are also out of him, but he shall avow upon the donee and his issues: [r] and thus are all the bookes that seeme to be at variance, either answered or reconciled.

[a] *La terre tenus de luy, &c.* Littleton here speaketh of lands holden of a subject: for if a man hold land of the king by knights service *in capite*, and other lands of other lords, and dieth his heire within age, the king shall have the wardship of all the lands by his prerogative: and this was due to the king by the common law, the fees of certaine excepted, as in the statute of *prærogativa regis cap. 1.* appeareth.

But if a man holdeth lands of the king by knights service, as of an honor or mannor, &c. [b] in that case the king shall onely have the lands holden of him, and not of any other. Yet by reason of tenures of the king by knights service of certaine honours, (while they were in the king's hands) the king (as some have said) had (as it were by prescription) his prerogative, viz. *Raleigh age net bonony* and *Peverel*, and so of lands holden by knights service of the duchy of Lancaster in the county palatine (1).

[c] When an heire hath bin in ward to the king by reason of a tenure *in capite*, after his full age he must sue livery, which is halfe a yeare's profit of his lands holden. But if he be of full age at the time of the death of his ancestor, then he shall pay for lands in possession a whole yeare's profit for *primer seisin*: but if it be of a reversion expectant upon an estate for life, as tenant in dower, tenant by the curtesie, or tenant for life, then he shall pay but the moiety of one yeare's profit.

[d] If the heire be in ward by reason of a tenure of an honour or mannor, (except as before) he shall not sue livery, but an *ouster le maine cum exitibus*, albeit he never made tender.

[e] And if he be of full age, the king shall have no *primer seisin*, but reliefe. But where the tenure is *in capite*, there the king shall have the meane profits untill the tender be made; and if the tender be made, and not duly pursued, the king shall also have all the meane profits.

[f] He that holdeth of the king by focage in chiefe, and dieth, his heire of full age, the king shall have livery and *primer seisin* onely of the lands so holden, and not of the lands holden of others. [g] But if the heire of such a tenant in focage in chiefe be within the age of fourteene at the death of his ancestor, he shall neither sue livery, nor pay *primer seisin*, either then or any time after: and the reason thereof is, for that the custodie of his body and lands in that case belong to the *prochein amy*, as gardian in focage. [h] Neither shall the king have *primer seisin* of lands holden in Burgage, (as some have said) for that it is no tenure *in capite*.

Note, there is a generall livery, and a speciall livery: a generall livery hath two properties:

First, it is full of charge to the heire, for he must finde an office in every county where he hath land, or else he cannot sue a generall livery, and he must sue out his writ of *attate probanda*, &c.

[i] The second property is, that it is full of danger: first, it concludeth the heire for ever after to denie any tenure found in the office. Secondly, if livery be not sued of all and of every parcell which the king ought to have, whether it be found in the office or not found (for a generall livery could not be sued by parcels) the livery is void, and the king may reseise the lands, and be answered of the meane profits. So it is if the office be insufficient, or the process whereof the livery was made be insufficient, or the like, the king shall reseise, as is aforesaid. [a] Therefore for the ease of the heire, and for avoyding of such danger, the heire for the most part sueth out a speciall livery, which containeth a beneficiall pardon, and saveth the said charges, and preventeth the said conclusion, and the other dangers, which being of grace, and not of right, as the generall livery is, the king may well and justly take more for a speciall livery, than for a generall, for the causes aforesaid, but ever with such moderation as the heire may cheerfully goe through therewith.

Note that livery is in nature of a restitution, which is to be taken favourably: for if livery be made of a mannor *cum pertinentiis*, the heire shall thereby have the advowson appendant. Otherwise it is in grants by letters patents.

Since the time that Littleton wrote [c] there is a court of wards and liveries erected by authority of parliament concerning the order of the king's wards, &c. to be holden before the master of the wards and the councill of that court appointed by those acts. This hath made

(1) Rot. Parl. 11. H. 6. n. 57. Simile pro ducatu Cornub. Rot. Parl. 18. H. 6. n. 42. *Ryley's escheat* m. 4. and 5 E. 1. Rot. 20. Nota, as to the ancient honor of *Peverel*, the tenure of that is in capite, but some new additions to the honor are not so. P. 7. Jac. Ley 7. *Clarke's case*. Vid. tamen P. 17. Jac. Church's case, Ley 53. for there it was found, that tenure of the honor of *Peverel* is tenure in capite as to the manor of *Woodham Mortimer*. Hal. MSS. By a tenure *in capite* in this note, lord Hale means a tenure of the king *ut de corona* in contradistinction to a tenure of him *ut de honore*. In the time of lord Coke it was the fashion to denominate the former a tenure *ut de persona regis*; and as to the latter, it was not allowed to be a tenure *in capite*.

day, or come before A and B and pay a fine, viz. twenty marks for every fee: So observe, that they were not fines imposed, but voluntary fines. — Hal. MSS.

In reading the preceding annotation by lord Hale, it is very requisite to attend to the distinction between the two subjects of it. The first part of the annotation, which states the progressive changes in the assise of arms between the 27. of Hen. 2. and the 21. of Jam. 1. and refers to the commissions of array during the same period, is applicable to the general military service all the

(2. Ro. Ab. 38.)

[q] So was it holden Tr. 18. El. in Com. Banco per Cur. which my selfe heard and noted, in Sir Thomas Wyat's case.

[r] So was it resolved in Sir Tho. Wyat's case ubi supra.

[a] Glanv. lib. 7. cap. 20. Pract. lib. 2. fo. 85. 86. 87. Brit. l. 3. c. 2. Fleta l. 1. c. 10. 9. H. 3. Prerog. 25. 21. H. 3. ib. 26. Rot. Finium. 6. Johan. Stat. Prerog. Reg. c. 1.

[b] Brañ. ubi supra. Max. carta c. 31. 1. E. 6. ca. 4. 5. E. 3. 5. 47. E. 3. 21. 20. H. 8. B. tit. Livery 58. 28. H. 8. ib. d. 55. (2. Ro. Ab. 503.)

[c] S. Co. 172. Hale's case. 38. H. 8. Br. tit. Livery 60. Vid. Feñ. 154. (F. N. B. 255. E.)

[d] 1. El. Dier 168.

[e] 22. H. 8. tit. Liv. Br. 62.

[f] 38. H. 8. Liver. Br. 66. 45. E. 3. 11. 35. H. 6. 52. Stanf. 13. b.

[g] 20. El. Dy. 362. F. N. B. 259. b.

[h] F. N. B. 263. 7. E. 4. 17. Stanf. Prer. 13. Br. tit. Liv. 64.

[i] 46. E. 3. 33. 47. E. 3. 21. 21. H. 6. 28. b. 33. H. 6. 50. 29. Aff. 8. Pl. Com. Countee of Leic. case 44. E. 1. 1. & 25. 12. R. 2. Liv. 28. 2. H. 7. fol. 12.

[a] 1. H. 4. 6. b. 37. H. 8. E. stop. Br. 1. 218. 7. E. 6. ib. 222. Scurfield's case. Tr. 8. Ja. in cur Ward. 23. El. Dier 377. 28. H. 8. Br. tit. Liv. 56.

41. E. 3. 5. 5. E. 6. 27. Aff. 48. Pl. Com. 251. 20. El. Dyer 360. (10. Co. 64. 2.)

[c] 32. H. 8. 46. 33. H. 8. cap. 21. (4. Inst 188.)

[d] 2. E. 6. ca. 8.

(9. Co. 16.)

[e] 4. E. 4. 23. 33. H. 8. tit. enter congeabl. Br. 125.

[f] 14. Eliz. Dier. fo. 319.

[g] 5. Mar. Dier 156.

[a] 24. E. 3. 31. 38. 9. H. 6. 18. 12. E. 4. 16. 30. Aff. 28. 4. Co. 56. & 60. Sadler's case. Stanf. prerog. 58. b. 52. 5. E. 4. 16. E. 4. 4. 1. H. 7. 14. 2. H. 7. 12. 4. H. 7. 15. 8. H. 7. 11. F. N. B. 262. 12. R. 2. Livery 28. F. N. B. 233. 7. Co. 44. 45. Ken's case.

[b] 4. E. 4. 23. 10. H. 6. 19. 4. Co. 56. &c. Sadler's case. 32. H. 8. entre Cong. Br. 125. 14. E. 3. cap. 14.

[c] Vide 6. Co. 6. Wheeler's case.

[d] 12. Eliz. Dier f. 292. a. 8. Co. 168. Paris Stoughter's case.

13. Eliz. Dier 306. 4. H. 6. 13. 10. H. 4. 2. b.

15. E. 4. 12. 46. E. 3. 12. 21. H. 6. 11. 3. H. 7. 5.

But Mr. Madox very justly animadverts on lord Coke and his cotemporaries, as well for calling any tenure of the king a tenure *ut de persona* by way of distinction, as for not allowing a tenure *ut de honore* to be a tenure *in capite*. He observes, that all tenures of the king are of his person, and that in order to distinguish accurately between lands originally holden immediately of the king and those holden immediately of him in consequence of the escheat of an honor or barony, we should call the tenure of those of the first description a tenure *ut de corona*, and that of the second a tenure *ut de honore*. Further he insists, that tenure *in capite* of the king is holding immediately of him without the interposition of any mesne lord, and consequently that a tenure of the king *ut de honore* is equally *in capite* with a tenure *ut de corona*, though in other respects there certainly are very important differences between the two, such as render it highly necessary to preserve a distinction. See Mad. Baron. Angl. 163.

the king's subjects are liable to for the internal defence of the realm. The remainder relates to the performance of that particular military service, which was due by reason of tenure, and might be required on foreign expeditions. With respect to the latter it may be sufficient to add, that military service by tenure was wholly abolished by the 12. Cha. 2. c. 24. which in express terms discharges all estates from services on *voyages royaux*, and that long before this statute it had fallen into disuse, as appears from there not being any instance of assessing escuage since the reign of Edward the second. As to the former, lord Hale ends his historical deduction about

made such a manifold alteration, as were too long here to be inserted, and doth belong to another treatise mentioned in the epistle of the jurisdiction of courts, where it were necessary, that the true jurisdiction of that court should be set downe, a matter of no great difficulty, seeing it began so late by authority of parliament. And since Littleton's time, [d] there is a right of profitable statute made concerning the finding of offices and other things, not onely concerning the king's wards, or their rights and possessions, but some other provisions very beneficiall for the subject, in all to the number of 12. [e] First, that such persons as hold for tearme of yeares, or by copy of court roll, or have any rent common or profit appender out of any lands found in any office, wherby the king is intituled to the wardship of the lands or tenements, or to the forfeiture of the lands or tenements upon attainder of treason, felony, *pramunire*, or any other offence, yet may they have, hold, enjoy, and perceive their several estates, interests, and profits, although they be not found in the office. And this being a beneficiall law the estates of tenant by statute staple merchant and *elegit*, and executors, that hold lands for payment of debts, are taken to be within the benefit of the clause: [f] and so is a doubt in 14. El. Dier cleared.

2. Where it is found, that the heire is of fewer yeares than in truth he is, he shall not be concluded hereby, [g] but every such heire at his very fullage may prosecute a writ of *attate probanda*, and sue his livery or *ouffier le maine*: in which case he had no remedy by the common law.

[a] 3. Where one person or more be found heire, where another person is heire, the partie grieved had no remedy.

4. Or where one person or more be found heire in one county, and another person or persons found heire in another county, there could have beene no interpleading.

5. Or if any person be untruly found by office lunaticke, or ideot, or dead, the party grieved may traverse the said offices; and you may reade in Ken's case how the office shall be traversed upon this act.

[b] 6. Where it is untruly found by office, that any person attainted of treason, felony, or *pramunire*, is seised of any lands, &c. the party grieved, having just title of freehold, shall have his travers or *monstrans de droit* (without being driven by this double matter of record to his petition of right as he was before this statute) which is much more speedy then the petition, for upon the petition there be foure writs of search, and every one must have 40 dayes before the serving, and now but two writs of search.

7. Where an office is found by these words or the like *quod de quo vel de quibus tenementa predicta tenentur, juratores predicti ignorant*, or holden of the king *per quæ servitia juratores ignorant*, it shall not be taken for any immediate tenure of the king in chiefe, but in such cases a *melius inquirendum* to be awarded as hath beene accustomed of old time. This branch hath beene well [d] expounded; for if the first office finde a tenure of the king *per quæ servitia*, &c. yet if upon the *melius inquirendum* the tenure be found of a subject, the first office hath lost his force *per sensum hujus statuti*, and need not be traversed, and the *melius*, &c. is in nature of the *diem clausit extremum* or *mandamus*, &c. and this was but a declaration of the ancient common law, as by the words of the statute (as hath beene accustomed of old) it appeareth; but if upon the *melius* it be found againe as uncertainly as before is said, then it is in judgement of law a tenure *in capite*, and so it was before the making of this act, and so are the bookes that speake hereof to be intended; but if upon the *melius* a tenure be found of the king *ut de manerio per quæ servitia*, &c. it shall be taken for knights service.

8. Where it is found that lands, &c. are holden of the king immediately, where in truth they are holden of a common person and not of the king immediately, and that the heire is within age, such heire within age shall have his traverse, &c. which he could not have had by the common law.

9. The meane lords of whom the lands are holden, which the king hath by his prerogative during the minority of the heire, shall receive and take such rents as are due unto them by the hands of such of the king's officers as receive the profits of the same lands, where before this act, the lords used to spare the rents due, &c. during the king's possession; and after livery sued charged the heire with all the arrerages.

10. There is a provision for offices found before the statute or before the 20 day of March next after the act.

11. A speciall clause is, that a *scire fac'* shall be awarded upon every travers by force of this act, and where the party was put to his petition, there upon the travers there shall be two writs of search granted.

12. And lastly, if judgement shall be given against the king upon a traverse by vertue of this act, all former rights appearing of record are saved to the king. But albeit these points are most necessary to be knowne, yet let us now returne to Littleton.

Littleton warily and materially (treating of a common person) saith, *tenus de luy* holden of him, for he shall have nothing in ward but that which is holden of him. But the king by his prerogative

prerogative shall not onely have such lands and tenements, which (as hath been said) the heire of his tenant by knights service *in capite* holdeth of others, but such inheritances also as are not holden at all of any, as rent charges, rent secke, fayres, markets, warrens, annuities, and the like; and so is the law cleerely holden at this day, as it hath beene resolved; and so experience teacheth, that the king by his prerogative given to him by the ancient common law shall have those inheritances not holden, and so the *quære* made by [a] Stanford is cleared [a] Stanf. Præf. fo. 8. and made without question.

The law is changed since Littleton wrote in many cases both for the mariage of the body, and for the wardship of the lands, and a farre greater benefit given to the lords then the common law gave them, and some advantage given to the heires, which before they had not, which shall be touched briefly.

If the father had made an estate for life or a gift in taile of lands holden by knights service to his eldest sonne, or other heire apparent within age, the remainder in fee to any other, and dyed, the heire should not have beene in ward; for this was out of the statute of Merlebridge. But at this day the heire shall be in that case in ward for his body, and a third part of his land.

[a] So if the father had infeoffed his eldest sonne within age and a stranger and the heires of the sonne, and died, the sonne should have beene out of ward; but at this day he shall be in ward for his body, and for a third part of his moiety. [b] So if the father had infeoffed any of his younger sonnes or others for the making of his wife a joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoffe and convey the land to his heire and dyed, his heire within age, his heire should not have beene in ward; because he was bound by the law of nature and nations to provide for them; but now in all these cases the heire shall be in ward for his body, and a third part of the land, and all this groweth by construction upon the statutes of 32. and 34. H. 8. [c] But if either the eldest sonne, or any of the younger sonnes purchase lands of his father, which are holden by knights service, *bona fide* for the reasonable value, this is out of those statutes, and the heire shall neither be in ward, nor pay *primer seifon*.

And in all the cases abovesaid, (for example) if a feoffment be made to the use of his wife for life, or to the use of any of his younger sonnes for life, or to the use of some persons for life for payment of debts, and upon all these estates a remainder is limited over, if the wife or tenant for life dye in the life of the father, [d] or if it be conveyed to the use of the wife or younger children in fee, or fee taile, or in fee for payment of debts, and these lands are conveyed away in the life time of the father, after the decease of the father no wardship, &c. accrueth by force of any of the said statutes, for such estates must continue till the title of wardship doe grow.

[e] If the father convey his lands holden by knights service either of the king or of any meane lord to his middle sonne in taile, the remainder to the youngest sonne in fee, and dyeth, the eldest being within age, and the king or lord seize the body and two parts of the land, if the middle brother dye without issue, the king or the lord shall not have any benefit of the statute against him in remainder; for the statute was once satisfied, and the statute extendeth not to him in remainder.

[f] If there be a grandfather, father, and divers sonnes, and the grandfather in the life of the father convey his lands holden by knights service to any of the sonnes, this is out of the statute of 32. H. 8. and if the grandfather die, there is neither wardship nor *primer seifon* due; for the father hath the immediate care of his sons. But if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the sonnes, it is within the said statute: [g] and a conveyance to the use of any of his collateral blood, which is not his heire apparant is out of the said statute. And so are conveyances either by father or mother to or to the use of bastard children out of the statute; for *qui ex damnato coitu nascuntur, inter liberos non computantur*. And the preamble speaketh of lawfull generations. If a man seised of lands holden in socage convey them to the use of his wife, or of his children, or payment of his debts, and after purchase lands holden by knights service *in capite*, and dieth his heire within age, the king shall have no part of the socage land. [h] But if in that case he had by his will in writing devised his socage lands in fee, and after purchased lands holden *in capite*, and dieth, the king shall have so much of the socage lands as will make a full third part of all. The benefits, that grew to the subject by those acts of parliament, were, that tenants in fee simple might devise their lands by their last wills in writing in such manner and forme, as by the said acts appeareth; also that the father might infeoffe his eldest sonne or other heire lineall or collateral of his lands holden by knights service, and two parts of the lands shall be out of ward. And in * Might's case you shall reade excellent matter of estates made upon collusion.

And both the statutes of 32. and 34. H. 8. concerning wills and wardships are many wayes prejudiciall to the heires, as taking one example for many. If tenant by knights service

(1) Vid. Trin. 8. Jac. Ley 21. *Allicock's case*. Hal. MSS.

(2) Grandfather enfeoffe the father and his son in fee, and dies. The father being of full age shall sue livery of the third part of a moiety. Trin. 8. Jac. Ley 21. *Crawley's case*. But if feoffment be to daughter and her husband, they ought to sue livery of the whole, for both are children within the statute. M. 9. Jac. Ley 41. *Bacon's case* et ibid. 43. *Cleer's case*. Hal. MSS.

(3) Lands are given to husband and wife and the heirs of the husband. Husband and wife join in a fine come ceo to the use of the husband

about the assise of arms and commissions of array with the 21. of James; but the reader will find the same subject very accurately continued to the present times, together with some particulars relative to the previous period not adverted to by lord Hale, in an admired

Leon. Lovey's case ubi supra, 22.
Eliz. Dier. 367.

32. E. 3. gard. 61.

2. H. 5. 4.
(6. Co. 20. Ante 73. a. Post.
314. b.)

10. H. 6. 8. 21. E. 3. 33. 2.
27. H. 8. 10. 10.

Vide Britton, fol. 169.

Glanvil. lib. 7. cap. 1. Mirror,
cap. 5. Sect. 2. Britton. fol. 168.
b. 39. H. 6. cap. 2.

35. H. 6. 40. Bracton lib. 2.
cap. 37.
(1. Ro. Ab. 342. 6. Co. 73. b.)

34. E. 1 Stat. 3. Glanvil. lib. 7.
cap. 9. Dier 5 Marie 162. Brac-
ton. lib. 2. cap. 37. F. N. B. 202.
(1. Ro. Ab. 137. 138.)

35. H. 6. 52. tit. Gard. 71. Stan-
ford. 3. b. F. N. B. 256. 253. 35.
H. 6. 40.

Britton. fol. 169. 35. H. 6. 52.

husband and wife and to the heirs of the body of the husband, remainder over. The husband dies. The wife shall not sue livery, because it was originally a purchase to the husband and wife, and she had not a greater estate afterwards. T. 15. Jac. Ley 51. Menfeld's case. Hal. MSS.

admired work, to which we have such frequent occasion to refer. See 1. Blackst. Comment. 5th edit. 411. It is observable, that lord Hale avoids taking the least notice of the great contest between Charles the first and the long parliament about the king's power over the militia, which arose in consequence of some commissions of array issued by him and was the immediate prelude to the civil wars in his reign. Of the arguments used by each party on this occasion, there is a very full account in Rushworth. See 4. Rushw. 655.

service make a feoffment in fee to the use of his wife and her heirs, or to the use of a younger sonne and his heirs, or wholly for the payment of his debts; in these cases, although nothing at all of the lands so holden descend to the heir, but he is disinherited of the same, yet his body shall be in ward. But this for a little taste may suffice. More hereof you may read in my Reports in the severall cases noted in the margin.

Pleine age. Full age regularly is one and twenty yeares.

Entendement del ley. *Entendement .i. intellectus*, the understanding or intelligence of the law. Regularly judges ought to adjudge according to the common intendment of law.

By intendment of law every parson or rector of a church is supposed to be resident on his benefice, unlesse the contrary be proved.

Of common intendment one part of a manor shall not be of another nature then the rest.

Of common intendment a will shall not be supposed to be made by collusion. *In facto quod se habet ad bonum et malum, magis de bono, quam de malo lex intendit. Lex intendit vicinum vicini facta scire. Nulla impossibilia aut inhonesta sunt presumenda, vera autem et honesta, et possibilia. Lex semper intendit, quod convenit rationi.* As in this case, the gardian shall have the custody of the land untill the heir come to his full age of one and twenty yeares; because by intendment of law the heir is not able to doe knights service before that age, which is grounded upon apparant reason. There note that the full age of a man or woman to alien, demise, let, contract, &c. is one and twenty yeares, the civill law five and twenty yeares, for then the Romanes accounted men to have *plenam maturitatem*, and the Lombards at eightene yeares.

Si le heir ne soit marie al temps del mort de tiel auncester, &c. *Aun-*
cester is derived of the Latine word *anteceffor*, and in law there is a difference between *ante-*
ceffor and *prædeceffor*. For *anteceffor* is applyed to a naturall person, as I. S. et *anteceffores sui*;
but *prædeceffor* is applyed to a body politique or corporate, as *episcopus London. et prædeceffores*
sui, rector de D. et prædeceffores sui, &c.

Mes si tiel tenant devie son heir female esteant del age de 14 ans, &c.
And the reason as I finde in antiquity, wherefore the law gave the marriage of the heir fe-
male if she were within the age of fourteene, and that she should not marry herselfe, was, *par*
ceo que les heires females de nostre terre ne se marieront a nous enemies, et dount il nous conviendrait
leur homage prendre, si eux se puissent marier a leur volunt. This is a speciall age for an heir
female to be out of ward, if she attaine unto it in the life time of her ancestor; for at that age
she may have a husband able to doe knights service. A woman hath seven ages for severall
purposes appointed to her by law: as, seven yeares for the lord to have aid *pur file marier*;
nine yeares to deserve dower, twelve yeares to consent to mariage, untill fourteene yeares to
be in ward, fourteene yeares to be out ward if she attained thereunto in the life of her ancestor,
sixteene yeares for to tender her mariage if she were under the age of fourteene at the death of
her ancestor, and one and twenty yeares to alienate her lands goods and chattells.

A man also by the law for severall purposes hath divers ages assigned unto him, viz. twelve
yeares to take the oath of allegiance in the torne or leet, fourteene yeares to consent to ma-
riage, fourteene yeares for the heir in focage to choose his gardian, and fourteene yeares is also
accounted his age of discretion, fifteene yeares for the lord to have aid *pur faire fitz chivalier*,
under one and twenty to be in ward to the lord by knights service, under fourteene to be
in ward to gardian in focage, fourteene to be out of ward of gardian in focage, and one
and twenty to be out of ward of gardian in chivalrie and to alien his lands goods and
chattells.

Mes si tiel heir female soit deins l'age de 14 ans et nient marie, &c.
Le seignior avera la gard del terre. But put case that the lord cannot have the

wardship of the land, as if the lord before the age of fourteene granteth over the wardship of
the body, in this case the grantee of the body cannot enjoy the benefit of the two yeares, be-
cause he cannot hold over the land, and the lord which hath the wardship of the land only
should lose the benefit of the two yeares, because he hath the lands onely and cannot tender any
mariage. Therefore in this case the heir female shall enter into her land at her age of 14
yeares. So if a tenant holdeth of one lord by priority, and of another by posteriority and dieth,
his heir female within the age of 14 yeares, the lord by posteriority shall have the lands but un-
till her age of 14 yeares, because the mariage belongeth not to him. Also if the lord marieth
the heir female within the two yeares, her husband and she shall presently enter into the
lands: for, *cessante causa, cessat effectus; et cessante ratione legis, cessat beneficium legis.*

If

If the lord tender a convenable mariage to the heire within the two yeares, and she mary elsewhere within those two yeares, the lord shall not have the forfeiture of the mariage; for the statute giveth the two yeares onely to make a tender. 35. H. 6. 52. 35. H. 6. tit. Gard. 71. 6. Co. 71. the lord Darcie's case.

Et si le seignior deins les dits 2 ans ne luy tender tiel mariage, &c. donque el al fine del dits 2 ans poet entrer, et ouste le seignior. This is so evident, as it needeth no explication.

Mes si tiel heire female soit marie deins lage de 14 ans en la vie son ancestor, et son ancestor devie el esteant deins age de 14 ans, le seignior naverà la gard forsque de la terre jesque al age de 14 ans, &c. Note, albeit the heire female be married at the age of twelve yeares in the life of her ancestor, (at which age she may consent to matrimony) to a man of full age, that is able to doe knights service, yet if the ancestor die before her age of fourteene, the gardian shall have the land untill her age of fourteene, because (as hath beene said) that is the time appointed by the common law. And so if the heire male be married in the life of the ancestor at his age of fourteene yeares, and the ancestor dieth, the lord shall have the land until the ward commeth to the age of one and twenty. F. N. B. 143.

Car ceo est hors del case del dit statute, intant que le seignior ne poet tender mariage a luy que est marie.

Natura non facit vacuum, nec lex supervacuum. The law doth never enforce a man to doe a vaine thing.

And where the said statute of W. 1. giveth unto the lord the said two yeares, thereby is implied, that if he dyeth within the two yeares, his executors or administrators shall have the same. For when the statute vesteth an interest in the lord, the law giveth the same to his executors or administrators. Then put case, that a lord hath the wardship of the bodie and land of an heire female, and maketh his executor, and dyeth before her age of fourteene yeares, whether the executor shall have the two yeares, because the executor is not lord. But I take it, the executor having the wardship of the body and land, shall in that case have the two yeares, for that they were vested in the lord (1).

It is further provided by the said statute, that if the lord tender a convenable mariage to the heire female within the said two yeares, and the heire female refuseth, then the lord shall hold the land untill her age of one and twenty yeares, and further untill he hath levied the value of her mariage. But if the lord doth not tender a mariage within the two yeares, he shall lose the value of the mariage, and content himselfe with the two yeares value. 27. H. 8. 3. 11. E. 3. Exec. 77. 4. E. 5. 55. 28. Aff. p. 7.

Car devant le dit statute, &c. sicome appiert per le rehearsall et paroles de le dit statute. Nota, the rehearsall or preamble of the statute is a good meane to finde out the meaning of the statute, and as it were a key to open the understanding thereof (2). 31. Aff. p. 26. (Cro. Jam. 151.)

The tender of a mariage to an heire female before the age of fourteene is void, which must be understood where the lord may hold the land for the said two yeares, for then the statute appointeth the time of the tender; but where the lord cannot have the two yeares, he may tender a mariage to the heire female at any time after the age of twelve and before fourteene, for so he might have done at the common law. 6. Co. 71. L. Darcie's case. 35. H. 6. 52. Gard. 71.

Sect. 104.

NOTA, que le pleine age de male et female, selonque le common parlance, est dit lage de 21 ans. Et lage de discretion est dit lage de 14 ans; car a tiel age le enfant que est marie deins tiel age a un feme, puit agreer

NOTE that the full age of male and female, according to common speech, is said the age of 21 yeares. And the age of discretion is called the age of 14 yeares; for at this age, the infant, which is married with in such age to a wo-

OF full age, which is the age of one and twenty, and of the age of discretion, which is the age of fourteene (3), somewhat hath beene spoken before (4). But now to the point of agreement or disagreement in this case. The time of agreement, or disagreement, when they marrie *infra annos nuptiales*, is for the woman at 12 or after, and for the man at fourteene or after, and there need no new mariage, if they so agree; but disagree they can not

5. Mar. Gard. Br. pl. ultimo. 39. E. 3. 32. 33. Praer. Reg. cap. 6. Tr. 24. Eliz. Rot. 842. in bank le roy Banister's case.

(1) See 6. Co. 74. 2.

(2) Lord Coke's manner of expressing himself on the operation of the preamble in the construction of statutes is very observable. Instead of saying generally, that the preamble shall controul the enacting clauses, or of limiting precisely how far it shall have that effect, which would have been attempting to make a line where one cannot be drawn, he cautiously says, that it is a good mean to find out the intention. The authorities referred to in 4. New Abr. 645. will serve to explain by instances, what sort of influence the preamble ought to have in expounding statutes. See also Hatt. on Stat. 53.

(3) It seems more proper to consider twelve as the age of discretion for women; for Lord Coke himself a few lines lower states that to be their time for agreeing or disagreeing to a marriage. See the note as to the age, at which infants may make a will of personalty, Post 89. b.

(4) To lord Coke's account of the several ages of a man and woman, which is given in fol. 78. b. add 1. Hal. Hist. Pl. C. 17.

(1. Ro. Abr. 341. 3. Inst. 89.)

not before the said ages, and then they may disagree and marie againe to others with-

out any divorce: and if they once after give consent, they can never disagree after (1). If a man of the age of fourteen marry a woman of the age of ten, at her age of twelve he may aswell disagree, as she may, though he were of the age of consent; because in contracts of matrimony, either both must be bound, or equal election of disagreement given to both, and so *à converse*, if the woman be of the age of consent, and the man under (2).

a tiel mariage ou man, may agree or disagree to such mariage.

Sect. 105.

13. E. 1. gard. 137. Britton fol. 169. acc.

Glanvil lib. 7. cap. 12.

27. H. 6. gard. 118.

27. H. 6. gard. 118.

27. H. 6. gard. 118.

F. N. B. 243.

7. H. 6. 11.

[a] 30. E. 1. gard. 156. 12. E. 1. gard. 138. 21. E. 3. 19. 20. E. 3. gard. 41. Temps E. 1. ibidem 128. 35. H. 6. 45. 7. H. 6. 11. Vide Præ. Reg. cap. 6. 13. H. 3. gard. 147. Stanf. præ. 26. 27. [b] 27. H. 6. gard. 118. F. N. B. 143. m. 19. E. 3. judgement 123. 45. E. 3. 16. [c] 47. E. 3. tit. Action sur le statute 38. and the bookes above-said.

IT is a maxime in law, *Quod dominus non maritabit minorem in custodia sua nisi semel*. And another faith, *Si semel legitime nupt fuer', &c. postmodum non tenebuntur sub custodia domino- rum esse*. Albeit this mariage is *de facto*, and not *de jure*, and though the disagreement dissolveth it *ab initio*, yet the lord shall never have the mariage of him.

And so if the gardian marieth his ward to a woman, and after the mariage is dissolved by reason of a precontract (4), yet the gardian shall never have the mariage of the ward againe.

But if one ravisheth a ward from the lord and marieth him within the age of consent, in that case if the lord taketh again his ward, and he at the age of consent disagreeeth to the mariage, the lord shall have the mariage of him, for he never had it before.

So likewise, if the ancestor marieth his heire apparent *infra annos nobiles*, and dieth his heire within age, the ward disagreeeth, the gardian shall have the wardship of him. The same law it is in the same case, if the wife dyeth before the age of consent, the lord shall have the mariage of the heire.

And so note a diversity when the ward is married by the ancestor or by a ravisher, and when by the gardian himselfe. [a] For if the ancestor marie his heire apparent *infra annos nobiles* and dyeth, in this case, if the mariage be dissolved by disagreement either of the ward or of his wife, the gardian shall have the mariage of him. [b] And so it is if a ravisher marrie a ward *infra annos nobiles*, and the mariage is dissolved, *ut supra*, the gardian shall have the mariage. If the heire male in ward of the age of tenne yeares be married without the consent of the lord, he may tender unto the heire *infra annos nobiles* a mariage, albeit he be so married, and if he refuse, and agree to the former mariage, the lord shall have the forfeiture of his mariage, as it hath beene holden. But otherwise it is [c] (faith Littleton) where the gardian himselfe marrieth the ward, *ut supra*. And the reason of the diversitie is, because in this case the gardian had once the mariage of him, but so had not he in either of the other cases, and it is a maxime in law, *Quod dominus non maritabit pupillum nisi semel*.

It

(1) But now the agreement after twelve or fourteen would not be binding on the infant, if the marriage was without *banns* or by *licence* and without consent of parent or guardian, and the infant was not a widow or widower; for the 26. Geo. 2. c. 33. makes all such marriages void. In reading this statute, it should be attended to, that the clause for annulling the marriages of infants without the consent of parents or guardians is restricted to marriages by *licence*; so that the marriage of an infant without such consent may still be good, where *banns* are regularly published, unless a dissent is openly declared by the parent or guardian in the church or chapel at the time of publishing, in which latter case the statute makes the *banns* void. As to marriages without either *licence* or *banns*, which are usually termed *clandestine*, they are universally annulled by the statute. Note that Scotland is excepted out of the 26. G. 2. c. 33. In consequence of this, so much of the act, as was calculated to defeat the marriages of minors without the consent of parents or guardians, hath been frequently evaded by going

It appeareth upon consideration of all the bookes aforesaid, that where the ancestor marrieth his heire apparent within the age of consent, and dyeth, the infant still being within the age of consent, the lord may take the infant (if he will) into his possession, in respect the infant may disagree to the marriage; and if the infant be deteyned from him, he shall recover him in a writ of ravishment of ward, and thereupon have the infant delivered to him. [d] But if the ancestor marrieth his heire apparant *infra annos nobiles*, and dieth his heire being *infra annos nobiles*, and after age of consent the heire agreeth to the marriage, neither the king nor the lord shall have the marriage, for now it is a marriage *ab initio*, and there neede no other marriage.

[d] 7. H. 6. 11. adjudged in the booke at large.

Sect. 106.

EN mesme le manner est, si le gardein luy marie, et la feme devie, esteant lenfant deins lage de xiiii ans ou xxi.

IN the same manner it is, if the gardian marry him, and the wife die, the infant being within the age of 14 yeares or 21.

THIS Littleton addeth, because he spake in the case next before of a disagreement by the infant. Here he saith, that if the wife dye, the infant being within the age of consent.

Sect. 107.

ET que tiel enfant poit disagree a tiel marriage, quant il vient al age de xiiii ans, il est prouve per les parolx del statute de Merton cap. 6. que issint dit.

AND that such infant may disagree to such marriage, when he comes to the age of 14 yeares, it is proved by the words of the statute of Merton cap. 6. which saith thus.

L Estatute de Merton. So called because the parliament was holden at Merton.

Et que tiel enfant poit disagree, &c. il est prove, &c. Note the time of disagreement is set downe by act of parliament, and so observed by Littleton, who seekes no other prooffe therein then by the law of England.

Merton ca. 6.

De dominis, qui maritaverint illos, quos habent in custodia sua, villanis, vel aliis, sicut burgenfisibus ubi disparagentur, si talis hæres fuerit infra 14 annos, et talis ætatis quod matrimonio consentire non possit, tunc si parentes illi conquerantur, dominus amittat custodiam illam usque ad ætatem hæredis, et omne commodum, quod inde receptum fuerit, convertatur ad commodum hæredis infra ætatem existentis, secundum dispositionem parentum, propter dedecus ei impositum. Si autem fuerit 14 ans et ultra, quod consentire possit et tali matrimonio consenserit, nulla sequantur pœna.

Ubi disparagentur. Disparagement, *disparagatio*, commeth of the verbe *disparago*, and that of *dispar*, and *ago*.

Now it is necessarie to be understood, what disparagements there be for the which the heire may refuse.

And of such disparagements there be foure kindes.

The first *propter vitium animi*, as an ideot, *non compos mentis*, a lunatique, &c. (1).

The second *propter vitium sanguinis*, as first a villein. 2. Burgenfis. 3. The sonne or daughter of a person attainted of treason or felony, albeit pardoned, for the blood is corrupted. 4. A bastard. 5. An alien or the childe of an alien. *Burgenfis* is a man of trade, as an haberdasher, a draper

Bracton lib. 2. fol. 91. Britton fo. 169. Fleta lib. 1. cap. 12. Mirror ca. 2. Sect. 17. Rot. Parl. 18. E. 1. fo. 9. The daughter of Nevil married to the sonne of Tho. of Weyland after his attainer.

Et issint est prove per mesme le estatute, que nul disparagement est, mes lou ce-luy, que est en garde, est marie deins lage de xiiii ans.

And so it is proved by the same statute, that there is no disparagement, but where he, which is in ward, is married within the age of 14 yeares.

(1) The 15. G. 2. c. 30. annuls the marriages of all persons, who after being found lunaticks on inquisition by commission under the great seal, or after being committed to the care of trustees by act of parliament, shall marry without the chancellor's declaring them of sane mind. Before this act there could be no doubt as to the validity of the marriages of lunaticks, where it could be clearly proved, that they were married in their lucid intervals. One should think, that there could be as little room to doubt their incapacity of contracting marriage whilst in an actual state of insanity, if our books were not remarkably silent on the subject, and it was not also said, that by our law an ideot *anativitate*, in whom the general incapacity of making contracts appears to form as strong an objection as occurs in the case of a madman, may consent to marriage. This doctrine, as to ideots, however strange it may appear, is mentioned as a point adjudged in one case, and seems confirmed by allowing dower to the wife of an ideot, and by questioning the right of an ideot's husband to curtesy merely, where on account of an office finding the wife's ideotcy and the descent of land to her after the marriage it is apprehended, that there is a concurrence of titles between the king and the husband. See 1. Ro. Abr. 357. and ante fol. 30. b. and note 2. there. By the Roman law, persons continually mad, lunaticks except during the intervals of sanity, and ideots were all equally incapable of marriage. See Brouwer. de jur. connubior. lib. 2. cap. 4.

going into Scotland to be married there and returning into England immediately afterwards. Indeed the validity of such mar.

Lib. 2. Cap. 4. Of Knights Service. Sect. 108.

draper or the like, (and this agreeth with the civill law, *Patricii cum plebeis matrimonia ne contrahant*;) whereof Glanvill speaketh thus, *Si vero fuerit filius bargensis, etatem habere tunc intelligitur, quando discrete sciverit denarios numerare, et pannes ulnare et alia paterna negotia similiter exercere.*

The third, *Propter vitium corporis*, as first *de membris*, having but one hand, one foot, one eye, &c. Secondly, deformitie, as to looke a squint, a creeple, halt, lame, decrepit, crooked, &c. Thirdly, privation, as blind, deafe, dumbe, &c. Fourthly, disease horrible, as leprosie, palsie, dropfie, or such like diseases. Fifthly, great and continuall infirmite, as a consumption and such like. Sixthly, impotency to have children in respect either of age past children, or so tender yeares as there is too great disparitie, or for naturall disabilitie or impediment or such like. Seventhly, deflowred of her virginity.

1. E. 6. cap. 12.
[d] Vide Sect. 109. F. N. B.
149.

The fourth kinde of disparagement was *propter jacturam privilegii*, &c. as to marry the heire to a widow, whereby he should by reason of the bigamie have lost the benefit of his cleargie, whereby he might save his life; but now the exception of bigamie in that case is ousted by the statute (1). And Littleton saith, [d] that there be many other disparagements which are not specified in the said statute, for those two mentioned are put but for examples. In a word, it must be *competens maritadium absque disparagatione*.

Si talis heres fuerit infra 14 annos, et talis etatis quod matrimonii consentire non possit, &c. Note albeit the ward, where he is disparaged, may disagree at his age of fourteene yeares, yet the law doth so abhorre the odious dealing of the gardian, to whom the custody of the heire is committed, and his horrible profanation of honourable marriage, the only ligament of mens inheritances, as it inflicteth a great punishment upon the lord in this case, albeit the marriage be not perfect, but avoydable by disagreement.

Tunc si parentes illi conquerantur. Littleton in the next section expoundeth these words in this manner, *viz. Si parentes conquerantur, i. e. Si parentes inter eos lamententur, que est tant a dire, que si les cosens de tiel infant ont cause de faire lamentation ou complaint par le bont fait leur cosent issint disparage, quel est in manner un bont a eux. Parens est nomen generale ad omne genus cognationis.* See more of this in the next section.

Dominus amittat custodiam illam usque ad etatem heredis et omne commodum quod inde receptum fuerit convertatur ad commodum heredis, &c. Here followeth the penaltie.

First, *amittat custodiam*, that is, the whole benefit of the wardship. But in this case if the gardian hath granted the wardship of the land to another *bona fide*, and after, the heire is disparaged, the grantee shall not forfeit his interest, for the statute is (*dominus amittat custodiam*.)

Secondly, *Et omne commodum, quod inde receptum fuerit, convertatur ad commodum heredis secundum dispositionem parentum*. These words are expounded by Littleton which needeth no further explanation. Now where readers upon this statute have put a case, that if the tenant hath issue a daughter, his wife ensint with a sonne and dieth, the lord doth disparage the daughter before the age of twelve yeares, the sonne is borne, the daughter disagrees, the sonne dieth, the daughter within the age of fourteene, she shall be in ward againe. This case is not warranted by this statute, for this statute extends not to the heires female.

Vide the second part of the Institutes. Merton cap. 5. 6. 35. H. 6. 53.
(9. Co. 127.)

If the tenant make a lease to A. for life, the remainder to B. in fee, the tenant for life surrenders upon condition, B. dieth his heire within age, the lord disparages the heire, tenant for life entreth for the condition broken and dieth, the heire shall be out of ward, for that he claimeth as heire to one man. But if after the disparagement lands descend from another ancestor to the ward so disparaged, he shall be in ward for those lands.

If two joyntenants be of a ward, and the one disparageth the heire, both shall lose the wardship, for the words be *et omne commodum*, &c.

Britton, fol. 169. acc.

Si autem fuerit 14 annorum et ultra, &c. nulla sequatur pena. By which it appeareth (as Littleton observeth) that there is no disparagement, but where the ward is married within the age of fourteene.

Sect. 108.

9. H. 3.
(2. Infl. 1.)

L Estatute de magna charta. **N**OTA que il soit loit estre question, coment ceux these words shall be pa-
NOTE, it hath beene a question, how

(1) The word *bigamy* is frequently used to describe the crime of marrying a second wife during the life of the first; but the proper name for this offence in our law is *polygamy*, and with us a *bigamist* is a man who either marries a widow or after the death

marriages was once questioned; and though in general marriages are governed by the law of the country in which they are celebrated, yet it was doubted, whether the *lex loci* ought to be applied to a case accompanied with circumstances so strongly marking the intent to evade the law of England. See Burr. 4. part vol. 2. page 1079. But this point seems now fully settled in favour of the Scotch marriages by a late decision of the court of arches, which was afterwards confirmed in the court of delegates. However it may not be amiss to recollect, that there have been persons of authority, who will not allow such cases of apparent evasion of the law of any country to fall within the principle on which the *lex loci* is indulged. There is a strong passage to this effect in the works of a Dutch author, whose writings on the civil law are much esteemed. *Ego ita existimo*, says Huber, after putting a case in which the law of one Dutch province against the marriages of minors without the consent of guardians was evaded by running away into another province having a different law, *hanc rem manifeste pertinere ad eversionem juris nostri, ac ideo non magistratus heic obligatos e jure gentium ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est*,

parolx ferront entendes, Si parentes conquerantur, &c. Et il semble a ascuns, que considerant lestatute de Magna Charta, que voit, quod hæredes maritentur absque disparagatione, &c. sur quel cel statute de Merton sur tiel point est fount due (1), que nul action poit estre pris sur cel statute (2), entant que il ne fuit unques view ne oye, que ascun action fuit port sur cel statute de Merton pur cel disparagement envers le gardeine pur cest matter avandit, (3) &c. et si ascun action puissoit estre prise sur tiel matter, il serra entendue ascun foits (4) estre mise en ure. Et nota (5) que ceux parolx ferront entendes (6), Si parentes conquerantur, id est, si parentes inter eos lamententur, que (7) est taunt adire, que si les cousins de tiel enfant ont cause de faire lamentation ou complaint enter eux, pur le hont fait a leur cousin issint disparage, quel est en maner un hont a eux, donques puit le prochain cousine, a que

understood, (*Si parentes conquerantur.*) And it seemeth to some, who considering the statute of *Magna Charta*, which willeth, *quod hæredes maritentur absque disparagatione, &c.* upon which this statute of Merton upon this point is founded, that no action can be brought upon this statute, inasmuch as it was never seene or heard, that any action was brought upon the statute of Merton for this disparagement against the gardian for the matter aforesaid, &c. and if any action might have beene brought for this matter, it shall be intended that at some time it would have beene put in ure. And note that these words shall be understood thus, *Si parentes conquerantur, id est, si parentes inter eos lamententur*, which is as much as to say, as if the cousins of such infant have cause to make lamentation or complaint amongst themselves, for the shame done to their cousin so disparaged, which in maner is a shame to them, then may the next cousin to whom the

charter, yet being granted by assent and authority of parliament Littleton here saith it is a statute.

This parliamentary charter hath divers appellations in law. Here it is called *Magna Charta*, not for the length or largeness of it, (for it is but short in respect of the charters granted of private things to private persons now adays being *elephantina charta*;) but it is called the great charter in respect of the great weightiness and weightie greatnesse of the matter contained in it in few words, being the fountaine of all the fundamentall lawes of the realme; and therefore it may truly be said of it, that it is *magnum in parvo*. It is in our bookes called *Charta libertatum*, & *communis libertas Angliæ*, or *Libertates Angliæ*, *Charta de libertatibus*, *Magna Charta*, &c. And well may the lawes of England be called *libertates*, *quia liberos faciunt*. *Magna fuit quondam magnæ reverentia chartæ.*

This statute of *Magna Charta* is but a confirmation or restitution of the common law, as in the statute called *confirmatio chartarum anno 25. E. 1.* it appeareth by the opinion of all the justices; and in 5. H. 3. tit. Mord. 53. *Magna Charta* is there vouch- ed; for there it appeareth, that King John had granted the like charter of renovation of the ancient lawes.

This statute of *Magna Charta* hath beene confirmed above 30 times, and commanded to be put in execution. By the statute of 25. E. 1. cap. 2. judgements given against any points of the charters of *Magna Charta*, or *Charta de Foresta*, are adjudged void. And by the statute of 42. E. 3. c. 1. if any statute be made against either of these charters it shall be void.

Sur lestatute de Magna Charta lestatute de Merton est fount due sur tiel

Vide 8. Co. the Prince's case.

Bracton, 414. & 291. Fleta; lib. 2. cap. 48. & lib. 3. cap. 3. Mirror, cap. 2. § 18. Britton, fol. 177. b.

25. E. 1.

5. H. 3. Mord. 53. Math. Paris, 246, 276, 248.

25. E. 1. ca. 2.

42. E. 3. ca. 1.

death of his first wife marries a second time, in consequence of which he formerly could not claim the benefit of clergy. This denial of the benefit of clergy to bigamists was in consequence of some ancient papal constitutions and canons of councils against admitting bigamists into holy orders; a prohibition, which, however speciously defended by texts of scripture, wholly originated from the injurious policy of the church of Rome in discouraging the marriages of the clergy, and led the way to the complete establishment of celibacy amongst them. See Levit. c. 21. v. 13. 14. 1. Tim. c. 3. v. 12. Summa Concil. per Mirand. fol. 4. a. 119. a. 168. b. 230. b. Bingham. Antiq. Christ. Ch. b. 4. c. 5. Tayl. Elem. Civ. L. 293. and the word *Bigamus* in the index to the Corp. Jur. Canon. ed. Pithæor. However the exclusion of bigamists from the benefit of clergy was not entirely accomplished till the council of Lyons ended the doubts, which before prevailed, by positively declaring bigamists *omni privilegio clericali nudatos*. It appears, that this constitution was immediately received in England; for the statute of 4. E. 1. *de bigamis* takes notice of it, and explains how it should be construed, by directing that it should be understood to comprehend bigamists before, as well as those who became so after. See 4. E. 1. c. 5. 2. Inst. 273. 2. Hal. Hist. Pl. C. 372. 2. Hawk. Pl. C. b. 2. c. 33. f. 5. and Barringt. on Ant. Stat. 2d ed. 73. When the benefit of clergy, by being allowed to all who could read, was extended to laymen as well as persons in orders, the reason for ousting bigamists of clergy in great measure ceased; but notwithstanding this, the exception of bigamy continued till it was taken away by the statute of Edw. 6.—The pointing out exactly the appropriated sense of the word *bigamy* in our law was the more necessary; because very sensible writers have been inattentive to it. We find a remarkable instance of this in the quarto edition of the Statutes, the editor of which, in a note on the 4. E. 1. c. 5. refers to the 1. Jam. 1. c. 11. as making bigamy a felony.

(1) *Que nul action poit estre pris sur cel statute*, not in L. & M.—(2) *Come semble et. L. and M.*—(3) *Pur cest matter avant dit* not in L. & M.—(4) *Per comen presumption devaunt ceux heurez in stead of entendue ascun foits* in L. & M.—(5) *Et nota* not in L. & M.—(6) *En tiel maner* in L. & M.—(7) *Ou in stead of que* in L. & M.

est, eos contra jus gentium facere videri, qui civibus alieni imperii sua facilitate, jus patrii legibus contrarium, scientes volentes impertiuntur. See the digression de consuetudinibus legum diversarum in diversis imperiis in Huber. Prælect. Jur. Rom. page 538. In this digres-

tiel point, viz. *Quod hæredes maritentur ab-que disparagatione* (1).

Foundue. So as *Magna Charta* is the foundation of other acts of parliament. This act extendeth as well to females as to males.

Nul action poet estre prise sur cel statute, in-tant que il ne unques fuit view ou oye, &c. Et si af-cun action pouvoit estre prise sur cest matter, il serra intend a ascun foits estre mise in ure.

Vide Petitiones coram domino rege in Parlamento, fol. 3. 18. E. 1.

39. H. 6. 39. per Ashton. 6. Eliz. Dier, 229. (Ante 11. a.)
23. Eliz. Dier. Nullum breve de errore de iudicio in 5. port. quia nullum breve repetitur. 3. E. 3. 50. 11. H. 4. 7. and 38.

Vide Lestatute de Marlebridge, cap. 17. In custodia parentum.

Hereby it appeareth how safe it is to be guided by judicial presidents, the rule being good, *Periculosum existimo, quod bonorum virorum non comprobatur exemplo.* And as usage is a good interpreter of laws, so non usage where there is no example is a great intendment, that the law will not beare it; for saith Littleton, if any action might have beene grounded upon such matter, it shall be intended, that sometime it should have beene put in ure (2). Not that an act of parliament by non user can be antiquated or lose his force, but that it may be expounded or declared how the act is to be understood.

Si parentes conquerantur. Of this sufficient hath beene said before.

Si les cousins. Here Littleton expoundeth parents to be his cousins, under which name of cousins Littleton includeth uncles and other cousins, who when the father is dead are *in loco parentum*.

Ont cause a faire lamentation, &c. Note if they have cause to make lamentation, it sufficeth though they never complaine.

Pur le hont fait a lour cousin. For when their cousin is disparaged in his marriage, it is not only a shame and infamie to the heire, but in him to all his blood and kindred.

Donques poit le procheine cousin, a que le enheritance ne poit discender, enter et ouster le gardein in chivalrie.

This is worthy the observation, for the words of the statute are generall, *Secundum dispositionem parentum*, and the construction thereof shall be according to the reason of the common law, for the next cousin, to whom the inheritance cannot descend, shall enter and ouste the gardian, and shall be in place of a gardian, as it is in case of a gardian in focage.

Et fil ne voile, un auter cousin del enfant poet ceo faire. Still pursuing the reason of the common law in case of gardian in focage.

Et les issues et profits prender al use del enfant, &c. This is so evident as it needeth no explication.

Ou auterment lenfant deins age poit enter luy mesme et ouste le gardein. If none of the cousins aforesaid will enter, then the heire himself may enter. In all which the reason of the common law is pursued. But what if the heire be disparaged, and the next of kin doth enter, and when the heire commeth to 14 he agreeth to the marriage. Yet shall not this give any advantage to the lord, for that he had lost the wardship before.

Sect.

(1) See 9. Hen. 3. c. 6.

(2) In the famous case of Ashby and White, in which the question was whether an action on the case would lie against a returning officer for refusing a vote at the election of a member of parliament, one objection made to the action was, that it was of the first impression; and the words of Littleton, in explaining why an action could not be maintained on the statute of Merton against a guardian for disparagement, were much relied upon by judge Powys as an authority directly in point. But lord chief justice Holt answered this objection by citing many instances of allowing new actions; and therefore in this particular judge Powell concurred with Holt, though they differed on the principal question. See 2. L. Raym. 944. 946. & 957. It might also have been observed, that Littleton is only stating the opinion of others, and that he concludes with a *quere*; and further, that in the case put by him the question was merely, whether the proper remedy was by *action* or by *entry*. However it must be confessed, that the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against its lying; more particularly, where the *right*, which is the foundation of the action, is admitted, and the *mode of relief* is the only thing controverted, as was the case in Ashby and White.

digression the reader will find a very informing dissertation on the *lex loci*, and the principles, by which the application of it ought to be regulated, expressed clearly and illustrated by a variety of cases, more particularly such as relate to testaments, marriages, and contracts in general. See also the printed argument against Slavery in the Case of Sommerset: the Negro, which was determined in B. R. Trin. 11. G. 3. p. 67. to 75. It is there attempted to prove by principles of reason as well as by authorities, that the *lex loci* is not applicable in the instance of *slavery*, and that though a negro is brought from a country, in which he was *legally* a slave, yet he ceases to be so and gains his freedom to all intents the moment his master carries him into one, where domestic slavery is not permitted.—(2) See acc. Swinb. on Spousals 34. But though the rule, which where one of the parties

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Of this sufficient hath been said before.

ITEM mults auters divers disparagements y sont, que ne sont specifiés en mesme lestatute. Come si le heire, que est en gard, est marry a un, que nad forsque un pee, ou forsque un maine, ou que est deforme, decrepite, ou ayant horrible disease, ou graund et continual infirmitie; et (si soit heire male), si soit marry a feme, que est passe l'age denfanter. Et mults auters causes de disparagements sont; sed de illis quare, car il est bon matter d'ap-prender.

ALso there be many and divers other disparagements, which (Ante 80. a.) are not specified in the same statute. As if the heire which is in ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having some horrible disease, or great and continuall infirmitie. And (if he be an heire male) if he be married to a woman past the age of childe-bearing. And there be other causes of disparagement; but inquire of them, for it is a good matter to understand.

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ET des beires males, que sont deins l'age de 21 ans apres le mort leur ancesster nient marries, en tiel cas le seignior avera le mariage de tiel heire, et avera temps et space de tender a luy convenable mariage sans disparagement deins meme le temps de 21 ans. Et est ascavoir, que l'heire en tiel case poit eslier sil voit estre marry ou non; mes si le seignior, que est appel gardein en chivalry a tiel heire, tender convenable mariage deins l'age de 21 ans sans disparagement, et l'heire ceo refuse, et ne soy marrie deyns le dit age,

AND of heires males, which be within the age of 21 yeares after the decease of their ancestor and not married, in this case the lord shall have the marriage of such heire, and he shall have time and space to tender to him covenable marriage without disparagement within the said time of 21 yeares. And it is to be understood, that the heire in this case may chuse whether he will be married or no; but if the lord which is called guardian in chivalry tenders to such heire covenable marriage within the age of 21 yeares without dispa-

DE tender a luy convenable marriage, &c.

But it is in the election of the lord, whether for the single value the lord will tender a marriage or no, for he shall have the single value without any tender (1).

And of this there needeth no other explication. The value of the marriage of such an heire is according to the valuation by lawfull triall, or as much as another had before offered to give for the same without fraud and covyn.

Le heire en tiel case poit eslier sil voit estre marrie, ou non, &c.

And so on the other side, though there be a tender made of a covenable marriage without disparagement, yet the heire may refuse, for in everie marriage there

6. Co. 70. Lo. Darcie's case
Vid. Britton, fol. 169.
(5. Co. 127.)

Merton, cap. 6. 18. E. 3. 18.

(1) This point, which before lord Coke's time appears to have been doubtful, was adjudged in the case of Palmer and Wilder, and again in lord Darcie's case. See the former case in 5. Co. 126. b. and the latter in 6. Co. 70. b.

parties is under the age of discretion makes the contract of marriage equally voidable by both, is admitted with respect to actual marriages, yet the civilians and canonists are not agreed, that it holds as to contracts of marriage *per verba de presenti* without solemnization. Some think, that such contracts have the full effect of a contract *per verba de presenti* on the person who is of the age of discretion, and that it is only in the power of the younger party to assent or dissent on attaining the age of discretion. But according to others, both parties are in the same situation, and as it can only have the force of a contract *per verba de futuro* as to the younger party unless it is ratified at the age of discretion, so in the mean time it shall not have a greater effect on the elder, and consequently unless the contract is ratified by both when the younger party attains the age of discretion, it will not avoid the subsequent marriage of either. Swinburne adopts this last opinion. See Swinb. on Spoul. 36. But this doctrine

there must be a free consent.

Si tiel heire. That is, if such an heire to whom a tender hath been made by the lord, and by whom a refusall hath beene made. If such an heire afterwards marieth another within age, he shall forfeit double the value; but if he before any tender marieth himselfe within age, he shall pay but the single value of the marriage.

Neither the single value, nor the double value shall be recovered against the heire, but after his full age; but for both these the lord hath a double remedie, viz. an action as is aforesaid, or the lord may retaine the land after full age for his satisfaction of both, with this difference, that in the case of the single value the taking of the profits shall not be accounted parcell of the value, but as a gage or pledge till the heire do satisfie him of the single value; but in case of the double value, the perception of the profits shall be taken in satisfaction of the double value, for the statute of Merton, which giveth the forfeiture, saith, *De minus teneat terram, &c. per tantum tempus quod inde percipere possit duplicem valorem maritagii*: which words (*quod inde, &c.*) proveth that the taking of the profits shall go in satisfaction: but in case of the single value, until the heire doth satisfie the lord of the same.

No forfeiture of marriage is given, by the said statute of Merton, of an heire female, as appeareth by the said act; neither at the common law could the lord have holden the land of the heire female after fourteene yeares for the value.

donques le gardeine a vera le value del mariage del tiel heire male. Mes si tiel heire luy meme marie dems lage de 21 ans encounter la volunt le gardeine en chivalrie, donquez le gardein avera le double value del mariage per force de lestatute de Merton avantdit, come en meme lestatute est comprise plus a pleine.

force of the statute of Merton aforesaid, as in the same statute is more fully at large comprised.

agement, and the heire refuseth this, and doth not marrie himselfe within the said age, then the gardein shall have the value of the marriage of such heire male. But if such heire marieth himself within the age of 21 yeares against the will of the gardein in chivalrie, then the gardein shall have the double value of the marriage by

Sect. III.

4. Co. 88. in Lutterel's case. 6. Co. 20. a. Gregorie's case. 19. R. 2. Gard. 195.

PE R castle gard. wardum castri, seu castle-gardum, seu castri-gardum. He that holdeth by castle-gard, holdeth by knights service, but not by escuage, for escuage is due when the king maketh a voyage royall out of this realme (as hath beene said) and the tenant maketh default, but castle-gard is to be done within the realme, and without any voyage royall.

Also a certaine tearme is appointed for the service of the tenant that holdeth by escuage, but no certaine tearme by law for him that holdeth by castle-gard. Vide in the title of Grand Serjeantie. Sect. Hereof come

ITEM divers tenants teignent de leur seigniors per service de chivaler, et uncore ils ne teignent per escuage, ne pateront escuage; come ceux, que teignent de leur seigniors per castle garde, cestascavoir, a garder un tower del castle leur seignior, ou un huis ou un auter lieu del castle, per reasonable garnishment, quant leur seigni-

ALSO divers tenants hold of their lords by knights service, and yet they hold not by escuage, neither shall they pay escuage; as they which hold of their lords by castle-ward, that is to say, to ward a tower of the castle of their lord, or a doore or some other place of the castle, upon reasonable warning, when their lords heare that the enemies will come,

ors

doctrine of reciprocity where one of the parties is an infant or under the age of discretion, however true it may be in its application to actual marriages or to contracts of marriage *per verba de presenti*, must not be considered as extending to other contracts with an infant, not even contracts of marriage *per verba de futuro*; for in them the person of full age may, it is said, be bound at all events by our law, and yet as to the infant the contract may be voidable. Accordingly in the case of *Holt and Ward* the court held, that if a man of full age enters into a contract of marriage with a woman of 15 *per verba de futuro*, and afterwards marries another woman, an action on the case lies against him for breach of his promise. See 2. Stra. 850. & 937. & S. C. in *Fitz-Gibb*. 175. 275. 1. Barnad. 208. 247. 333. 2. Barnad. 12. 173. 176. As to the effect of the 26. of G. 2. c. 33. on *precontracts* of marriage, see note 4.—(3) In L. and M. the words *quare de hoc* are added.—(4) It seems, that *precontract* is now no longer a cause for dissolving a marriage in England; for it appears impliedly taken away by 26. G. 2. c. 33. which enacts, that there shall be no suit in the ecclesiastical court for compelling the celebration of marriage by reason of any contract, whether *per verba de presenti* or *per verba de futuro*, entered into after the 25th of March 1754. It is observable, that the statute mentions contracts of marriage by *future* as well as those by *present* words; but notwithstanding this, it is far from being clear, that matrimony could ever be compelled in the ecclesiastical court on a contract of the former kind otherwise than by *admonition*, and probably it was included in the statute merely from caution. See 2. Stra. 938.

ors oyont, que enemis voylent vener, ou sont venus en Engleterre. Et en plusors auters cafes home poit tener per service de chevaler, et uncore il ne tient per escuage, ne payera escuage, sicome jerra dit en le tenure per graundserjeantie. Mes en tous cafes ou home tient per service de chivaler, tiel service trait all seignior gard et mariage.

or are come in England. And in many other cafes a man may hold by knights service, and yet he holdeth not by escuage, nor shall pay escuage, as shall be said in the tenure by grand serjeantie. But in all cafes where a man holds by knights service, this service draweth to the lord ward and mariage.

castellani, or constabularii castri, for keepers or constables of a castle.

Vide Mag. Chart. cap. 19. 20. W. 1. cap. 7. Brañt. lib. 5. fol. 363. Fleta lib. 2. cap. 43.

A garder un tower del castle, &c.

A tower, or a doore, or a bridge, or a sconce, or some other certaine part of the castle; for the tenure must be certaine. And this may be done by the tenant himselfe or his deputie.

Magna Chart. cap. 20.

Del seignior. For it cannot be of a castle of another.

Lord and tenant by castle-gard, the lord granteth over his seigniorie to another, [a] the castle-gard is gone because the grantee hath not the castle. [b] For the same reason it is, that if one holdeth of me, as of my manor of D. by fealtie and suit of

(2. Ro. Ab. 513.)

[a] Temps E. 2. tit. Aff. 399.

31. E. 1. tit. Aff. 441.

[b] 17. E. 3. 65. 72. 4. E. 3. 42.

court, if I grant over the services of this tenant, the suit is gone, because the grantee hath not the manor. [c] But if the castle be wholly ruined, *Si castrum sit penitus dirutum*, yet the tenure remaineth by knights service, and it goeth in benefit of the tenant, as to the garding of the castle, untill it be reedified. But ward and mariage belongeth to the lord in the meane time. For Littleton in the end of this section putteth it for a generall rule in all cafes where a man holdeth by knights service, it draweth ward and mariage.

[c] 4. Co. 88. Luttrell's case. 3. H. 8. Bendloes Capel's case. 4. E. 3. 55.

If the tenant make default in garding of the castle, the lord may distreine for it, and recover satisfaction in dammages.

Per reasonable garnishment. This warning must be given by the lord or some other for him, and the tenant need not to stirre untill he have such warning.

Enemies. Which is to be understood of any manner of enemies whatsoever. And though Littleton speakes of enemies, yet it seemeth that to keep a castle in time of insurrection and rebellion (albeit in propriete of speech rebels are no enemies) is a tenure by knights service. Vide Hill. 8. E. 1. Midd. Rott. 86.

Voylent vener. For preparation is to be made upon warning before the enemy be come indeed into England. This appeareth to be in time of hostilitie and warre, or for preparation therefore. But a tenure to keepe a castle in time of peace only is no knights service.

If the tenant by castle-gard doe serve the king in his warre, he shall be discharged against the lord, according to the quantitie of the time that he was in the king's host.

(2. Ro. Ab. 505.)

Fleta speaketh of an old word called *wardswite*, and (saith he) *Significat quietanciam misericordie, in casu quo non invenerit quis hominem ad wardam faciendam in castro.*

Fleta lib. 1. cap. 42.

Sect. 112.

ET si un tenant, que tient de son seignior per service de entier fee de chivaler, morust, son heire donquez esteant de plein age s. de 21 ans,

AND if a tenant, which holdeth of his lord by the service of a whole knight's fee, dieth, his heire then being of full age s. of 21 yeares, then

Reliefe, relevium. Vide Sect. 103.

This word is derived from the originall before (1).

Nota, Reliefe [a] is no service, but an improvement of the service, or an incident to the service (2), for the which the lord may distreine (3), but cannot have an action of debt (4), but

[a] Temps E. 1. Reliefe. 13. 41.

E. 3. 22. 4. E. 2. Avowrie. 210.

7. H. 6. 13. 22. H. 8. Rot. 528.

34. E. 1. Avowrie 233. (3. Co.

66. Ante 47. b.)

(1) See ante 76. a. Lord Coke there cites a passage from Domesday book, in which reliefs are mentioned; and from this early use of the word, and from the terms of a law of Edward the Confessor and of two laws of Canute, some have inferred, that reliefs were known to the Saxons. This circumstance is much relied on by those, who insist, that feudal tenures were established in England before the Conquest; and therefore Sir Henry Spelman, who supports the contrary opinion, is very full in his observation on this part of the subject. The sum of what he advances is, that Domesday book at the utmost only proves the use of reliefs after the Conquest, which is not denied; that the supposed law of Edward the Confessor is either not genuine or belongs to William Rufus; that *heriot*, which is the word used in the original language of the laws of Canute, is improperly translated *relief*; and lastly, that however it might suit with the policy of the Normans to assimilate *reliefs* to *heriots*, there were the most essential differences between the two. According to Sir Henry Spelman, the *heriot* was paid out of the goods of the deceased possessor of the land, the relief by the *heir*, out of his own purse; the *heriots* at all events, the relief only in case of taking up the lands in succession. These two of the differences taken by Spelman are particularly stated here; because they apply

but his executors or administrators may have an action of debt, and cannot distraine (1).

[6] Stat. de r. E. 2 de militibus. Vide 9. Co. 124. Anth. Lowe's case. (2. Inst. 596. Ante 69. b.)

And it [b] is to be understood, that *feodum militis*, a knight's fee, consisteth of twentieth pound land (2), and he payeth for his reliefe for a whole knight's fee the fourth part of his fee, viz. five pound, and so according to the rate.

Baronia, a baronie, or a baron's fee, consisteth of thirteene knights fees and the third part of a knights fee (3), which amounteth to foure hundred markes *per annum*; and the baron for an entire baronie payeth for his reliefe an hundred markes, which is the fourth part of the value of his baronie.

Comitatus, an earledome, or an earle's fee consisteth of a baronie, and the third part of a baronie, which includeth twenty knights fees amounting to foure hundred pound land *per annum*, and he payeth for his reliefe for an entire earledome the fourth part of his revenue, and that is an hundred pound. All which appeareth by the statute of Magna Charta cap. 2. made in the ninth yeare of Henrie the third, at which time there was neither duke, marquesse nor viscount in England, as before is said. But there be presidents in the exchequer, that a dukedome consisting of two earledomes, viz. eight hundred pound land by the yeare, payeth two hundred pound, and a marquesse consisting of two baronies, viz. eight hundred markes land *per annum*, and of an earledome and a halfe, payeth two hundred markes for his reliefe. What the viscount should pay in certaine I have not heard. Before the making of the statute of Magna Charta the king had *rationabile relevium* of noblemen, and it was not reduced to any certaintie (4), yet ought it to have been reasonable and not excessive.

I have seene the record of a charter made in 20. H. 6. to Henrie Beauchampe earle of Warwicke, whereby he was created king of the Ile of Wight, to him and the heires males of his bodie. His reliefe was incertaine, and not limited by the statute of Magna Charta.

It is to be observed, that the words of the statute of Magna Charta be *Haeres comitis de comitatu integro et haeres baronis de baronia integra*, &c. Now what an entire earledome and an entire baronie is, hath bene declared before.

It is also to be observed, that at and before the statute of Magna Charta all earledomes and baronies were derived from the crowne, and were holden of the king *in capite*, and the king would not suffer them to be divided, or severed. And such entire earledomes, and entire baronies are within the statute, but at this day earles and barons are without such earldomes and baronies of the kings gift in chiefe. For at the creation of an earle, he hath sometimes an annuitie granted unto him (5), and sometimes nothing; so as such earles and barons so created are cleere out of the statute of Magna Charta, and are to pay such reliefes as other men that hold of the king *in capite*. For as the heire of a knight shall not pay reliefe, unlesse he hath a knight's fee, &c. so neither the earle nor baron shall pay any reliefe by this statute, unlesse he hath an earledome, &c. or baronie, &c.

Son heire de pleine age f. de 21 ans. And yet in some case the heire shall pay reliefe when he was within age at the time of the death of his ancestor. As if a man holdeth lands of the king by knights service *in capite*, and of a common person other lands by knights service, and dieth, his heire being within age, the king hath all in ward by his prerogative untill the full age of the heire. In this case the heire shall pay reliefe to the other lord, for that the king had the wardship of bodie and lands. And the lord upon everie descent ought to have either wardship or reliefe.

But if there be lord and tenant by knights service, and the tenant dieth, his heire being within age, the lord wayveth his wardship as he may, and taketh himselfe to his feignorie, in this case the lord shall not have reliefe at his full age, because he might have had the wardship of the bodie and land. Lord and tenant of two manors by divers tenures by knights service, the tenant is disseised of the one, and the disseisor dieth seised, and the tenant dieth seised of the other, his heire within age, the lord seised the bodie and lands of that manor, and after the heire at his full age recovereth the other manor against the heire of the disseisor, he shall pay reliefe for that manor, and so one lord of the heire of one tenant shall have both wardship during his minoritie and reliefe at his full age.

(1) S. p. acc. ante 47. b. post 162. b. and 1. Show. 36.

(2) See ante 69. a. and note 3. there.

(3) As to this notion of there being a certain number of knights fees in a barony and earldom, see ante 69. a. note 5.

(4) See 2. Inst. 7. 8. and Wright's Ten. 99.

(5) This annuity is therefore called *creation-money*, and the grant of it usually expressed, that it was assigned in order to enable the grantee the better to sustain his newly-acquired dignity. Mr. Madox gives us various instances of such annuities; and it appears, that they were not confined to earls; for one of the letters patent in his book is a grant of 10 l. a year by Hen. 6. out of the crown-revenues in Cumberland to Sir Thomas Percy on creating him baron of Egremont. See Mad. Baron. Anglic. 143. In Dyer 2. a. notice is taken of an annuity of this kind, and it is there said to be so annexed to the dignity as not to be alienable. See further as to creation-money, Camd. Britann. ed. 1772. p. 125.

ply to heriots and reliefs as they are now distinguishable. See the Treat. on Feuds in Spelm. Polthum. 31. It is observable, that Bracton marks the distinction between reliefs and heriots very strongly, and in terms partly corresponding with the idea of Spelman; for after treating at large on reliefs Bracton adds, *est quidem alia praestatio, quae nominatur herietum, et quae nullam comparationem habeat ad relevium; scilicet ubi tenens, liber vel servus, in morte sua dominum suum, de quo tenuerit, respicit de auctoritate*

Glanvil, lib. 9. cap. 4. 6. Bracton, lib. 2. fol. 83. Britton, fol. 178. Ockam 42. F. N. B. 83. 256. Fleta lib. 3. cap. 17. Magna Charta, cap. 2.

Vide Bracton, fol. 84. 14. H. 4. in recordo longo. 10. H. 7. 19. 20. E. 3. Aff. 122. tit. Avowrie. 126. 18. Ad. pl. ultimo. 22. E. 3. 8.

16. E. 3. Exchange 2. 46. E. 3. Forfeiture 18.

24. E. 3. 24. 26. H. 8. 32. H. 8. ca. 2. in fine.

2. E. 3. 6. Pl. Com. 229. 33. E. 3. tit. Gard. Stathom.

Son heire. [k] And yet the successor of a bishop or abbot may pay reliefe by prescrip-
tion or grant. [l] 3. E. 3. 13. 76. 8 R. 2. Re-
liefe 14. 3. H. 4. 2. a. H. 3.
Avowrie 124.

If the tenant infeoffeth his heire apparent by collusion, and dieth, [l] his heire of full
age, it is a question in our bookes, whether he shall have reliefe either by the common law,
or by the statute of Marlebridge ca. 6. But now the statute [m] of 13. Eliz. ca. 5. hath cleared
that question, and that the lord shall have reliefe where the conveyance is made to any person
by collusion, &c. [n] 39. E. 3. tit. Reliefe 24. E.
3. Reliefe 11. Bracton lib. 2. 85.
[m] 13. Eliz. cap. 5.

Sect. 113.

This is evident, and needeth no explanation.

ITEM home poit tener son terre de son seignior per le service de deux fees de chivaler; et donque l'heire, esteant de pleine age al temps de mort son auncestre, paiera a son seignior x. l. pur reliefe. **A**LSO a man may hold his land of his lord by the service of two knights fees, and then the heire, being of full age at the time of the death of his ancestor, shall pay to his lord x. pound for reliefe (1).

Sect. 114.

NO T A si soit aiel pier et fits, et la mere morust vivant le pier de le fits, et puis laiel, que tient la terre per service de chivaler, morust seisie, et sa terre descendist al fits la mere come heire al aiel, que est deins age, en cest cas le seignior avera le garde de la terre, mes nemy le garde del corps del heire, pur ceo que nul serra en garde de son corps a ascun seignior vivant son pier, pur ceo que le pier durant son vie avera le mariage de son heire apparant, et nemy le seignior. Auterment est, ou le pier est mort vivant la mere, lou le terre tenus en chi-

NO T E, if there be grandfather father and sonne, and the mother dieth living the father of the sonne, and after the grandfather, which holds his land by knights service, dieth seised, and his land descend to the sonne of the mother as heire to the grandfather, who is within age, in this case the lord shall have the wardship of the land, but not of the bodie of the heire, because none shall be in ward of his bodie to any lord, living his father, for the father during his life shall have the marriage of his heire apparent, and not the lord (2). Otherwise it is, where the father dieth living the mother,

FI T Z. Yet the father shall have the marriage of his daughter if she be his heire apparent, and Littleton's reason extendeth to the daughter, for that (saith he) the father shall have the wardship of his heire apparent, within which words the daughter is included, so long as the continueth heire apparent.

Le seignior avera le gard del terre. Note that albeit in this case the law doth give the custodie of the body to the father, and barreth the lord thereof, yet the lord shall have the wardship of the land by force of the tenure at the first creation thereof. And so it is if the father marieth his heire within age and dieth, yet the lord shall have the wardship of the land.

Vivant son pier. This doth not extend to any collaterall heire, but only to the sonne or daughter being heire apparent; for albeit a man shall have an action of trespassse *Quare consanguineum et hæredum caput*, and albeit the words be *Cujus maritagium ad ipsum pertinet*, because the well bestowing of his

Fleta, lib. 1. cap. 5. 16. E. 3. Discein, 6. 31. E. 1. Gard. 164. 8. E. 2. Tresp. 235. F. N. B. 243. Ambrosia Gorge's case. 6. Co. 22.

9. E. 2. 18. E. 3. 25. 29. Aff. 15. 29. E. 3. 37. 31. E. 3. Bar. 237.

(1) See further as to reliefs, Post 85. a. at the end of the note there, 90. b. 91. a. and b. 92. a. 93. a. 106. a. Wright's Ten. 97. and Vin. Abr. Tenures E. a. to O. a.

(2) So in the case of the king, the father shall have the custody of the body and the marriage. 7. Jac. Cur. Ward. Ley. n. 2. Unton's case. Hal. MSS. See Ley 1.

averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem; quæ quidem præstatio magis fit de gratia quam de jure, et quæ hereditatem non contingit. See Bract. lib. 2. cap. 36. fo. 86. a. See further as to heriots, post 185. b.—(2) See acc. Ley on Wards and Liv. fol. ed. 17. W. Jo. 133. The distinction is not merely nominal; for lord Coke in another place assigns it as a reason, why a relief is not within the limitation of 50 years prescribed by the 32. H. 8. c. 2. in the case of avowry or conuface for suit or service. 2. Inst. 95. Note that in the book last cited forty years are mentioned as the limitation in the 32. H. 8. but Mr. Ruffhead in his edition of the Statutes says, that in the record the time is fifty years.—(3) But it is said, that if the relief is claimed, not

Lib. 2. Cap. 4. Of Knights Service. Sect. 115.

32. E. 3. Gard. 32. 30. E. 3. 17.
31. H. 6. 55. 12. H. 4. 16. F.
N. B. 143. 31. E. 3. Br. 357.
9. E. 4. 53.

was heire apparent in mariage
is a great establisment of his
house, yet that is to be under-
stood as against a wrong-
doer, but not against a gardian
in chivalrie, and the mother

valrie descendit al where the land holden
sits de part son pier, in chivalrie descends
to the son on the part
of the father, &c.

shall have the like writ for taking away of her sonne and heire apparent. And yet the mother
shall not barre the lord by knights service of his wardship of the bodie, as Littleton here saith,
Qui tamen ex filia tua nascitur in potestate tua non est, sed patris ejus.

Vide Flet. lib. 1. cap. 6. See
W. 2. c. 35. (2. Ro. Ab. 39.)

A ascun seignior. Put the case there is lord, & *feme* tenant by knights service of a
carve of land, the *feme* maketh a feoffment in fee upon condition, and taketh the lord to
husband, and have issue a sonne, the wife dieth, the issue entreth for the condition broken,
the lord entreth into the land as gardeine by knights service, and maketh his executors, and
dieth, in this case, the executors shall have the wardship of the land during the minority of
the heire, but not the wardship of the body; for albeit the lord seemeth to have a double in-
terest in the wardship of the bodie, one as lord, and another as father, yet as father, and not as
lord in judgement of law, he shall have the wardship of the bodie of his son and heire apparent,
in respect of nature, which was before any wardship of respect of seigniorie by knights ser-
vice began, and that wardship by reason of nature cannot be waived, and claime made in re-
spect of the seigniorie. And the executors of the father shall not have such a wardship, which
the testator had as father, neither can such a wardship be forfeited by outlawrie, because it is
due to the father in respect of privitie of nature.

(3. Co. 39. a. post 88. b.) 33. H.
6. 55. 7. Co. 13. in Calvin's
case. Vide Flet. lib. 1. c. 12. §
cum Patr. de feodo, &c. (Ante 8.
a. 2. Ro. Ab. 39.)

De son heire apparent. And therefore if the father be attainted of felonie, &c. then
cannot the sonne or daughter be an heire apparent, because the blood is corrupted between
them, and consequently in the life of the father his sonne in that case shall be in ward.

A woman seised of lands in fee holden by knights service taketh husband an alien, and
hath issue, and the wife dieth, the issue shall be in ward, and the father shall not have the cus-
todie of him, for that in the eye of the law he is not his heire apparent, as Littleton here
speaketh.

Sect. 115.

This section is an addition to Littleton (1), and therefore I passe it over; and the rather, for
that the said statute of 4. H. 7. is become of no force, for that by the statute of 27. H. 8. cap.
10. all uses are transferred into possession.

NOTA, si home soit seisie de
terre, que est tenuus per
service de chivaler, et fait feoff-
ment en fee a son use, et morust
seisie del use, son heire deins age,
et nul volunt per luy declare, le
seignior avera brieve de droit
de gard de corps et del terre, si-
come tenant ust devie seisie del
demesne. Et si le heire soit de
pleine age al temps del morant
son ancestor, en tiel case il paye-
ra reliefe, sicome il fuisset seisie
del demesne. Et cest per lestatute
de anno 4. H. cap. 17.

NOTE, if a man be seised of land
which is holden by knight's
service, and maketh a feoffment in
fee to his own use, and dieth seised
of the use, his heire within age, and
no will declared by him, the Lord
shall have a writ of right of the
wardship of the bodie and land, as
if the tenant had died seised of the
demesne. And if the heire bee of
full age at the time of the decease
of his ancestor, in this case he shall
pay reliefe, as if he had been seised
of the demesne. And this is by the
statute of 4 H. 7. cap. 17.

Sect.

(1) It was first introduced in Red.

not by reason of tenure, but by *custom*, there must be a prescription for the distress to warrant it. See W. Jo. 133.—(4) Ante
ante 47. b. But there are some opinions to the contrary. See 2. Leon. 179. 2. Ro. Rep. 371.

Sect. 116.

NO T A, il y ad gardein en droit en chivalrie. et gardein en fait en chivalrie. Gardein en droit en chivalrie est, lou le seigniour per cause de son seignorie est seisie de gardi de ternes et del heyre, ut supra. Gardein en fait en chivalrie est, lou en tuel case le seigniour apres son seisin graunt, per fait ou sans fait, le gardi des terras, ou del heire, ou dambideux a un auter, per force de quel grant le grauntee est en possession. Donque est le grauntee appel gardein en fait.

NOTE, there is gardian in right in chivalrie, and gardian in deede in chivalrie. Gardian in right in chivalrie is, where the lord by reason of his seignory is seised of the wardshippe of the lands, and of the heyre, ut supra. Gardian in deede in chivalrie is, where in such case the lord after his seisin grants, by deed or without deed, the wardship of the lands, or of the heire, or of both, to another, by force of which grant the grauntee is in possession. Then is the grauntee called gardian in fait, or gardian in deede.

HERE Littleton divideth gardian in Chivalrie, into gardian in right, a gardian in fait. And this is evident, and needeth no explanation.

Per fait ou sans fait.

Here Littleton affirmeth, that the wardship of the body may be granted over without deed; and herein note a diversity betwene an originall chattell of a thing that properly lyeth in grant, and a chattell deriyed out of a freehold of any thing that lyeth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee assigne it over without deed, because it is deriyed out of a freehold that lyeth in Grant. But the wardship of the body is an originall chattell during the minority deriyed out of no freehold; and therefore as the law createth it without deed, so it may be assigned over without deed.

A corporation aggregate of many, cannot make a lease for years without deed, in respect of the quality of the incorporation; but their lessee may assigne it over without deed.

(2. Ro. Ab. 62.)

12. E. 3. tit. Grant. 59. 7. E. 3. 63. 26. E. 3. 65. 28. E. 3. 96. 14. E. 3. Act. for Left. 17. 25. E. 3. 40. 31. E. 3. Vouch. 5. 46. E. 3. 25. 20. E. 4. 16. 12. H. 4. 19. 5. H. 7. 17. 36. 22. El. Dyer 371. 35. H. 8. Br. tit. Grant. 85.

16. H. 8. tit. Grant. B. 125. 22. H. 6. 34. 19. H. 6. 33. (Post. 325. b.)

24. E. 3. 69. 70. 5. E. 3. 58. 43. E. 3. 15. 5. H. 7. 36. 14. H. 7. 16. 15. H. 8. 8. Bract. 366. 368. 246. 43. E. 3. 1. 6. 5. H. 7. 37. 11. H. 6. 4. 6. H. 7. 3. 18. H. 8. 16. Eli. Dyer 323.

C H A P.

(1) By the 12. Cha. 2. c. 24. tenures by knight's service, whether of the king or of a common person, together with all its oppressive fruits and consequences, as also those of *socage in capite*, is wholly taken away; and every such tenure is converted into free and common socage. The same statute enacts, that all tenures, which should afterwards be created by the king, should be in free and common socage only. Nothing can be more full in expression, than this act; for besides generally abolishing tenure by knight's service, and the consequences peculiar to that tenure and *socage in capite*, it descends into particulars with a redundancy of words, which can only be accounted for by the extreme anxiety to extirpate completely the evils the legislature had under contemplation, for which purpose it might be deemed most safe to attack them in every shape. We have already observed in some former notes, that homage escuage and the aids *pro filio marito* and *pro socore filii* *chivalier* are expressly mentioned. It remains to add, that the statute, after taking away the count of wards and liveries, enumerates wardships, liveries, primer seisin or ousterlemains, values and forfeitures of marriages, and fines seisinures and pardons for alienation, and sweeps away the whole. But the act preserves rents certain, heriots, suits of court, and other services incident to common socage, and fealty; and also fines for alienation due by the customs of particular manors, unless such fines are for lands in *capite*. Reliefs for lands, of which the tenure is converted into common socage, are also saved in some instances; for the clause, which preserves *rents certain*, provides that such relief shall be paid in respect of such rents, as is paid on the death of a tenant in common socage. From this clause it seems, that there can be no relief out of lands which the statute changed into *socage*, unless where a quit-rent is also payable; and the reason of thus expressing the act will appear by considering, that a year's rent is the relief for lands holden by common socage, and consequently is never due out of lands, which are not subject to a rent. See post sect. 126.

It was intended to have continued the notes of fol. 64. a. in this place; but the annotator finds it convenient to postpone them to the end of the chapter of Villenage.

CHAP. 5. Sect. 117.

Socage.

Mirror ca. 1. sect. 3.

4. H. 7. ca. 19. 4. Co. Tiring-
ham's case fo. 39. and 4. H. 7.
ca. 12.**T**ENURE in Socage.(1)

Agriculture or Tillage is of great account in law, as being very profitable for the common wealth, wherein the goodnesse of the habit is best knowne by the privation: for by laying of lands used in tilth to pasture, six maine inconveniences do daily encrease. First idlenesse, which is the ground and beginning of all mischiefs. 2. Depopulation, and decay of townes; for where in some townes 200 persons were occupied, and lived by their lawful labors, by converting of tillage into pasture, there have beene maintained but two or three heardmen; and where men have beene accounted sheepe of God's pasture, now become sheep men of these pastures. 3. Husbandry, which is one of the greatest commodities of the realme, is decayed. 4. Churches are destroyed, and the service of God neglected by diminution of church livings, (as by decay of tythes, &c.) 5. Injury and wrong is done to patrons and God's ministers. And

6. The defence of the land against forraigne enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able, and patient of cold, heat, and hunger, than of any other.

(a) 20. E. 3. Adm. surement 8.
14. Aff. 21. 24. E. 3. 25.
• Mirror.
Bracton fo. 217. Fleta. lib. 2. ca.
41. Regist. orig. 97. Ockam 38.
39. 4. E. 3. 1. a. 18. E. 2. tit.
action sur leitat. 45. Temps E. 1.
Avoury 230. 29. E. 3. 16. 17.

Cic. lib. 1. Offic.

Virgil. lib. 1. Georg.

Seneca in Epist.

The two consequents that follow of these inconveniences, are first the displeasure of Almighty God, and secondly the subversion of the policy and good government of the realm; and all this appeareth in our bookes. And the common law [a] giveth errable land (which anciently is called *hyde and gaine*) the prehemineny and precedency before meadows, pastures, woods, mynes, and all other grounds whatsoever: and *• averia caruca* the beasts of the plough have in some cases more priviledge than other cattell have. And amongst the Romans agriculture or tillage was of high estimation, insomuch as the senators themselves would put their hand to the plough, and it is said, that never prospered tillage better, than when the senators themselves plowed (such force hath the example of superiors) whereof three famous Romanes in their severall kinds spake.

Omnium rerum, ex quibus aliquid exquiritur, nihil agricultura melius, nihil uberius, nihil dulcius, nihil libero homine dignius.

*O fortunatos nimium, sua si bona norunt
Agricolae, quibus ipsa procul discordibus armis
Fundit humo facilem victum iustissima tellus.*

Nullum laborem recusant manus, quæ ab aratro ad arma transferuntur, &c. fortior autem miles ex confragoso venit; sed ille unctus et nitidus in primo pulvere deficit. But now let us peruse our author's words.

Socage.

1) See Wright's Ten. 143. and 1. Blackst. Comment. 5th ed. 79.

Socagium. Littleton in this chapter section 119. fetcheth this word from the original.

Socagium idem est quod servitium focæ, et foca idem est quod caruca. s. un foke ou un carue. (1)

And Bracton agreeth herewith. *Dicitur socagium (saith he) à focco, et inde tenentes dicuntur socmanni, [b] eo quod deputati sunt tantummodo ad culturam.* And Benerth signifieth the service of plough and cart. It is to be observed, that in the booke of [c] Domesday land holden by knight's service was called Tainland, and land holden by Socage was called Reveland; which appeareth in that it is said there, *hæc terra fuit terra regis Edwardi Tainland, sed postea conversa est in Reveland.* (2) And in that booke they that held in Socage were called by severall names, as Sochemanni or Sokemanni, which still continueth; sometime *Coleberti. i. qui tenent in liberum socagium per redditum; and sometime they are called Radchenestres. i. liberi homines, qui tamen arabant, herciabant, falcabant, metebant, &c. And here it appeareth how necessary it is, that words be fetched from their originals, and our author *est verus etimologus* both in this and in many other places in his [d] three bookes. And it is to be observed once for all, that the legall termination of (agium) in composition signifieth service or duty, as *homagium* the service of the man, *escuagium* servitium scuti, [e] *socagium* servitium focæ, *bidagium* the duty to be paid for the hide or plough-land; and so of *cornagium*, *coragium*, *carnagium*, *cariagium*, *burgagium*, *willenagium*, and *guidagium*, (which one describeth thus) *quod datur alicui, ut tuto conducatur per loca alterius*, and the like.

Iffint que les services [f] ne sont pas services de chivaler. And in the next section he saith, and every tenure, that is not a tenant in chivalry, is a tenure in Socage. *Ex donationibus autem, feoda militaria, vel magnam serjantiam non continentibus, oritur nobis quoddam nomen generale, quod est socagium.* Here Littleton speaketh of tenures of common persons; for grand serjantie is not knight's service, and yet it is not a tenure in Socage, as shall be said hereafter. Also here he meaneth temporall services, and not frankalmoigne, as by the examples he put is manifest, and as in his proper place shall appeare more at large. Also here Littleton speaketh of socage largely taken, and so called *ab effectu*; that is, all tenures, that have the like effects and incidents belonging to them as socage hath, are termed tenures in socage, albeit originally service of the plough was not reserved. As if originally a rose, a paire of gilt spurs, a rent, and such like were reserved, or that the tenants in *condemnatos ultroces manus mittant, ut alios suspendio, alios membrorum detractione, &c.* *puniant*, these are said to be tenures in socage *ab effectu*; for that there shall be like gardein in socage, like reliefe, and such other effects and incidents as a tenure in socage hath, and are so termed to distinguish the same from knights service. Nay, the worst tenure that I have read of, of this kind, is to hold lands to be *ultor sceleratorum condemnatorum, ut alios suspendio, alios membrorum detractione vel aliis modis juxta quantitatem perpetrati sceleris puniat*, (that is) to be a hangman or executioner. It seemeth in ancient times such officers were not voluntaries, nor for lucre to be hired, unlesse they were bound thereunto by tenure. And so note that some tenures in socage are named *à causa*, and some and the greater part *ab effectu*.

Car homage de jøy ne fait service de chivaler. But it is a presumption where homage is due, that the land is holden by knights service, as hath beene said.

Bracton lib. 2. fol. 77.

[b] Glanvil. lib. 7. cap. 9. & 11. & lib. 9. ca. 4. Fleta lib. 1. ca. 8. & lib. 3. ca. 14. & 16. Britton fol. 164.

[c] Domesday, Herefordsc. Vid. devant sect. 1. Sudru. Wendesford. Westeserie.

* Mich. 10. E. 3. Coram rege Wiits in Thesaur.

[d] For etimologies vid. sect. 93. 154. 164. 204. 234. 267. 268. &c.

[e] Fleta lib. 3. ca. 14. Bracton lib. 2. cap. 16. Britton. fol. 164

[f] Mirror, ca. 2. sect. 18.

Fleta ubi supra.

Ockam, esp. quæ per solam consuetudinem, &c.

Ockam, fo. 31. a & b.

Sect. 118.

Item home poit tener de son seignior per fealty tantum, et tiel tenure est tenure en socage; car chescun tenure, que n'est pas tenure in chivalry, est tenure en socage.

Of this sufficiently hath beene said before.

ALSO a man may hold of his lord (4 Co. S.) by fealty only, and such tenure is tenure in socage: for every tenure, which is not tenure in chivalrie, is a tenure in socage.

Sect. 119.

ET il est dit, que la cause, pur que tiel tenure est dit et adle nome de tenure en socage,

AND it is said, that the reason, why such tenure is called and hath the name of tenure in socage,

TEMP S
de memory.
Time of memory is when no man alive hath had any prooffe

(1) Mr. Somner disapproves of this etymology, as not large enough to comprehend all the services of the tenure by socage, which may be and sometimes are totally unconnected with the plough. According to him socage is derived from the Saxon word *soc*, which signifies liberty or privilege, and with *agium* added to denote the *agenda* or service imported a free or privileged tenure; and this derivation is preferred by a writer of great judgment. Somn. Gavelk. 133. and 2. Blackst. Comment. 3th ed. 80. However Sir Martin Wright, though he confesses the ingenuity of Mr. Somner's derivation, endeavours to justify Littleton's, and thinks that the objection to it is obviated, when it is considered, that in the case of socage-tenures plough-service was the most ancient and usual reservation; to which observation one may add, that the propriety of a denomination is not always the proper test of etymologies. Wright's Ten. 143. It seems indeed, that both derivations have their share of probability, which is as much as can be expected on a subject so very uncertain.—(2) This explanation of *Thane land* and *Reveland*

Lib. 2.

Cap. 4.

Of Socage.

Sect. 119.

(6 Co. 59.)

Cap. Burgage. sect. 170.

Mirror. cap. 2. sect. 18. Vid.
19. E. 2. Avowrie. 224. 3. E. 2.
action. sur leff. 24. 10. E. 3.
24. 20. E. 3. Avowrie. 124. 39. E.
3. 17. 39. Aff. p. 3. 20. Aff. 1.

Cap. Confirmation. sect. 539.

4. E. 3. 161. 6. E. 3. 283.

prooffe to the contrary, nor hath any conufance to the contrarie, as fhall be hereafter faid in his proper place. And of neceffity this change, hereafter fpoken of, muft be before time of memorie; for within time of memory, the fervices of the plough cannot be changed into money by confent of the tenant and the defire of the lords, .s. into an annuall rent, neither by releafe or confirmation or other conveyance, fo long as the feignior remaineth, as fhall be faid in his due place.

Devoient venger oue leur fokes.

The plough is named *propter excellentiam*; but the ficle, and the fyth, for the reaping in harveft and fuch like, are alfo included. For as *carucata terra*, a ploughland, may contain houfes, milles, paftures, meadow, wood, &c. as pertaining to the plough; fo under the fervice of the plough, all fervices of tillage or husbandry are included.

Uncore le nofme de focage demurt.

Altho' the caufe whereupon the name of focage firft grew be taken away, yet the name remaines the fame it hath beene, and is

ufed to diftinguifh this tenure from a tenure by knights fervice. *Nomina fi nefcis, perit cognitio*

est ceo; quia focagium idem est quod servitium socæ, et soca idem est quod caruca, .s. un foke ouan carue. Et en ancient temps, devant le limitation de temps de memorie, grand part de les tenants, que tyendront de leur seigniors per socage, devoient venger oue leur fokes, chescun de les dits tenant pur certain jours per an pur arer et semer les demefnes le seignior. Et pur ceo que tielx overages fueront fait pur le viver et sustenance de leur seigniors, ils fueront quits envers leur seigniors de tous maners de services, &c. Et pur ceo que tielx services fueront faits oue leur fokes, tiel tenure fuit appel tenure en socage. Et puis apres tielx services fueront changes en denyers, per consent des tenants et per desire des seigniors, .s. en un annuall rent, &c. Mes uncore le nofme de socage demurt, et en divers lyeux les tenants uncore font tielx services oue leur fokes a leur seigniors; issint que tous maners de tenures, que ne sont pas tenures per service de chivaler, sont appels tenures en socage.

is this; becaufe *focagium idem est quod servitium socæ*, and *soca idem est quod caruca*, &c. a foke or a plough. In ancient time, before the limitation of time of memory, a great part of the tenants, which held of their lords by focage, ought to come with their ploughes, every of the faid tenants for certaine daies in the yeare to plow and fow the demefne of the lord. And for that fuch workes were done for the livelihood and sustenance of their lord, they were quit againft their lord of all manner of fervices, &c. And becaufe that fuch fervices were done with their ploughs, this tenure was called tenure in focage. And afterward thefe fervices were changed into money by the confent of the tenants and by the defire of the lords, viz. into an annual rent, &c. But yet the name of focage remaineth, and in divers places the tenants yet doe fuch fervices with their ploughes to their lords; fo that all manner of tenures, which are not tenures by knights fervice, are called tenures in focage.

land is opposed by Sir Henry Spelman, who investigates the subject very minutely. See Spelm. Posthum. 38. 39. In a former note we had occasion to hint at Sir John Dalrymple's opinion on the same subject and on the nature of the difference between *bock land* and *folk land*. See ante 6. a. note 6. Since the writing of that note a tract, intituled *A Discourse on the Bock land and Folk land of the Saxons*, hath been printed, the professed object of which is to examine and confute the notions advanced by Sir John Dalrymple. This tract, being at present only distributed amongst the author's friends, is difficult to be procured, and is mentioned here for the sake of such readers as may be curious to explore this dark and controverted subject. See further Fearn. Legigraphic. Chart. of Landed Property. ante 6. b. 7. a. 58. a. and 2. Whitak. Hist. Manchett. 154.

nitio rerum. Et nomina si perdas, certè distinctio rerum perditur. Therefore the names of things (as Littleton here teacheth) are for avoyding of confusion diligently to be observed.

Sect. 120.

ITEM si home tient de son seignior per escuage certaine, s. en tiel forme quant lescuage curge et est assesse per parliament a griender summe ou meinder summe, que le tenant paiera a son seignior forsque demy marke pur escuage, et nient plus ne meins, a quel graund summe ou a quel petite summe que lescuage curge, &c. tiel tenure est tenure en focage, et nemy service de chivalrie. Mes lou le summe, que le tenant paiera pur lescuage est non certain, s. lou il poit estre que le summe, que le tenant paiera pur lescuage a son seignior, poit estre a un foits le griender et a auter foits le meinder, solonque ceo que est assesse, &c. donques tiel tenure est tenure per service de chivaler.

certa servitia doe ever belong, so as the husbandman may the rather live in quiet.

Secondly, Escuage is to be paid at every time when it is assessed, and here it is not to be paid, but when it amounteth to forty shillings.

Sect. 121.

ITEM si home tient sa terre pur paier certaine rent a son seignior pur castle-garde, tiel tenure est tenure en focage.

ALSO if a man holdeth his land to pay a certaine rent to his lord for castle-gard, this tenure is tenure in focage (1). But

ESCUAGE (6. Co. 6. b.)

ESC certain is not in rei veritate servitium scuti, which is to be done by the body of a man, but it is servitium crumenæ of money, which is to be drawne out of the purse, and that is in effect a tenure in focage; wherein it is to be observed, that the service of payment of money is the more base, and lesse profitable for the commonwealth in this case, and hereof somewhat hath been said before in the chapter of Escuage, Sect. 98, 99.

If a man hold by homage, fealty and escuage, s. by an halfe penny, when escuage runs at fortie shillings, this is a tenure in focage, and no knights service, for two causes.

First, it is focage tenure, because of the certainty, for to the tenure in focage

15. E. 2. tit. Avowrie 215. 37.
E. 1. Aff. 441. 26. Aff. 66. 5.
E. 3. 6.

5. E. 4. 128. Vid. Rot. Parl. 4.
E. 3. nu. 19. Clavering's case
excellently resolved in parliament.
Hill. 3. E. 2. coram Rege Rot.
34. Agnes Frowick's case.

Herein the difference standeth thus. If a rent be paid for castle-garde, it is cleere a focage tenure, as it is agreed

Vide sect. 98. 99.

(1) According to Fitzherbert such a tenure was *knights service*. This he infers from the form of a writ of livery sued out by an heir on attaining his full age, where he held of the king *as of an honor* in the king's hands by the service of rendering the rent of ten shillings a year towards guarding the castle of Dover; and Fitzherbert endeavours to account for the tenure's being knight's service, by suggesting, that the service might *anciently* have been guarding the castle, and that in modern times the king might take a rent in lieu of castle-guard, which taking of a rent, says Fitzherbert, would not alter the nature of the tenure. Fitzherb. Nat. Br. 256. However this opinion of the reverend judge is not delivered absolutely, but is accompanied with a *quære*; and indeed it seems very liable to exception. For—1. The form of the writ relied upon appears quite consistent with *focage in capite*; suing of livery by the heir at full age having been incident to that tenure as well as to *knights service in capite*, unless the heir was under fourteen at the death of the ancestor. See ante 77. a.—2. The propriety of the writ, in the case to which it is applied, may be suspected; for suing of livery by the heir, except in some few special cases distinguished by a kind of prescription of which lord Coke speaks doubtfully, was confined to tenure *in capite*, or to use the phrase preferred by

Lib 2.

Cap. 5.

Of Socage.

Sect. 122, 123.

Vide 4. Co. 88. in Lutterel's case.
19. R. 2. Gard. 195. 26. Aff.
66. F. N. B. 83. 256. 6. Co.
20. Gregorie's case.

ed in Lutterel's case according to Littleton's opinion. But if a summe in grosse, or other thing, be voluntarily paid or given by the tenant, and voluntarily

Mes lou le tenant doit per luy meme ou per un auter faire castle-garde, tiel tenure est tenure per service de chivaler.

received by the lord in lieu of castle-gard, yet the tenure by knights service remaineth. Vide Sect. 98. & 99.

where the tenant ought by himselfe or by another to doe castle-gard, such tenure is tenure by knights service.

Sect. 122.

IT is called rent service, because it is accompanied with some corporal service, as fealty at the least; in respect whereof the lord may distraine for it of common right. See more of this matter in the chapter of Rents.

ITEM en tous cases lou le tenant tient del seignior a paier a luy ascun certeine rent, cel rent est appelle rent service.

ALSO in all cases where the tenant holdeth of his lord to pay unto him any certaine rent, this rent is called rent service.

Sect. 123.

(2. Re. Abr. 40.)

EN tiels tenures en

focage. If a man be seised of a rent charge, rent secke, common of pasture, and such like inheritances, which doe not lie in tenure, and dyeth, his heire within age of 14 yeares; in this case, the heire may chose his gardein: but if he be of such tender yeares as he can make no choice, then (if the father hath made no disposition of the custody of the childe) it were moost fit, that the next of kin, to whom the inheritance cannot descend, should have the custody of him (2). And whosoever taketh the rent, &c. the heire shall charge him in an account. But if he hold any land in focage, in that case the

ITEM en tielx tenures en focage, si le

tenant ad issue et devie, son issue esteant deins lage de 14 ans, donques le prochine amy del heire (1), a que lheritage ne poit descendre, a vera la garde de la terre et del heir jesque al age del heir de 14 ans, et tiel gardein est appelle gardein en focage. Car si la terre descendist al heire de part le pier, donques la mere, ou auter prochine cosen de part le mere, a vera la garde. Et si le terre descendist al heire de part la mere, donques le pier ou le prochein amy de part del pier a vera le garde de tielx terres ou tenements. Et quant lheire vient al age de 14 ans compleat, il poit enter et ouster le gardein en focage, et

ALSO in such tenures

in focage, if the tenant have issue and die, his issue being within the age of 14 yeares, then the next friend of that heire, to whom the inheritance cannot descend, shall have the wardship of the land and of the heire untill the age of 14 yeares, and such gardeine is called gardeine in focage. For if the land descend to the heire of the part of the father, then the mother, or other next cousin of the part of the mother, shall have the wardship. And if land descend to the heire of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such lands or tenements.

Vide le statute de 4. & 5. Ph. & Marie. cap. 8.

(1) Here the word *heir* is significant, for it seems to import, that guardianship in focage can be of *heirs* only. However though it was always clear, that guardian in *chivalry* could only be on a *descent*, yet some have doubted whether wardship in *focage* might not be where the infant was in by *purchase*. This point was agitated so late as the 28th and 29th of Charles the Second, when the court held, that guardianship in focage was equally confined to a descent with guardianship in chivalry. 2. Mod. 176. Vin. Abr. Guardian 1.

(2) See post 88. b.

by Mr. Madox *ut de corona*, whereas the writ in Fitzherbert represents the tenure to have been *ut de honore*. See ante 73. a.—3. Fitzherbert's reason for considering the tenure as knights-service seems unwarranted by the terms of the writ. He supposes the service reserved to be castle-guard, and the rent to be merely taken by the king as a commutation in money; but the writ expressly

*occuper la terre luy
valoir, si luy voit. Et tiel
gardeine en socage
ne prendra ascuns
issues ou profits de
tiels terres ou tene-
ments a son use de-
mesne, mes tant-
selement al use et
profit del heire; et
del ceo il rendra ac-
count al heire, quant
pleast al heire apres
ceo que l'heire accom-
plish lage de xiiii
ans. Mes tiel gar-
dein sur son accompt
avera allowance de
tous ses reasnable
costs et expences en
tous choses, &c. Et
si tiel gardein maria
l'heire deins xiiii
ans, il accomptera
al heire, ou a ses exe-
cutors, de value del
mariage, coment que
il ne prist riens pur
le value del mariage;
pur ceo que il serra
rette sa folly de-
mesne, que il luy
voiloit marier sans
prendre la value del
mariage, sinon que il
luy maria a tiel ma-
riage, que est tant en
value come le ma-
riage del heire, &c.*

And when the heyre cometh to the age of 14 years complete, he may enter and oust the gardian in socage, and occupy the land him- selfe, if he will. And such gardian in socage shal not take any issues or profits of such lands or tenements to his own use, but only to the use and profit of the heire; and of this he shal render an account to the heire, when it pleaseth the heire after he accomplisheth the age of 14 yeares. But such gardian upon his account shal have allowance of all his reasonable costs and expences in all things, &c. And if such gardian marry the heire within age of 14 yeares, he shal account to the heire, or his executors, of the value of the marriage, although that he tooke nothing for the value of the marriage; for it shal be accounted his own folly, that he would marry him without taking the value of the marriage, unles that he marrieth him to such a marriage, that is as much worth in value as the marriage of the heire.

dye their issue within age of 14 yeares, the next of kin of the part of the mother shall have the custody of the body, and not the next of kin of the part of the father albeit he first seised it, because the mother was the cause of the gift. If a man be seised of lands holden in socage of the part of his father, and of other lands holden in socage of the part of his mother, and dyeth, his issue being within the age of 14 yeares, in this case such of the next of

gardian in socage shall take into his custody as well the rent charges, &c. as the land holden in socage, because he hath the custody of the heire.

Si le tenant ad issue et devie.

The same law it is if the tenant hath no issue, but a brother or cousin within age of 14 yeares at the time of his death. [a] Also this doth extend as well to issue female, as to issue male.

Deins lage de 14

ans. Of this sufficient hath been spoken in the next preceding chapter.

Donques le prochain amy del heire, a que le enheritance ne

poit discender. The next friend of the heire, &c. Here *amy* or friend is taken for the next of blood. So the effect of it is, that the next of his blood to whom the inheritance cannot descend, whereby affinity without blood is excluded.

Le prochain. The next.

[b] If there be three brethren, and the youngest holdeth land in socage, and hath issue and dyeth his issue within age of 14 yeares, both the uncles are in equall degree, and yet the eldest shall be gardian; because in equall degree the law preferreth him. [c] And yet if lands holden in socage be given to a man and to the heirs of his body, and he dyeth his heire within age, the next cousin of the part of the father, albeit he be worthier, shall not be preferred before the next cousin of the part of the mother, but such of them as first seised the heire shall have his custody (1). But if lands be given in frankmarriage, and the donees have issue and

Glanvil lib. 7. cap. 11. Britton 163. Fleta lib. 1. cap. 9. Stat. de Hibernia, tit. Partition. (Plowd. 445.)

[b] Vid. 30. Aff. 47.

[c] Pl. Com. Carrel's case.

47. H. 3. Gard. 146. (2. Ro. Abr. 40. Ante 22. a.)

(1) This is according to the rule in *aquali jure melior est conditio possidentis*. Plowd. 296. in Carrel's case. See too Hawk. Abr of Co. Litt.

expressly states the rent to be the service. 4. If Fitzherbert, by saying that the king took the rent for the castle-guard, means that the latter was so changed into the former, that the castle-guard could no longer be demanded, then his idea of the tenure's continuing to be castle-guard and in chivalry is contradicted by Sir William Capell's case cited in Lord Coke's report of Luttrell's case; for in that the court held, that by such a perpetual change of the service the tenure was converted into socage. See 4. Co. 88. a.—5. The authority of Littleton is clearly against Fitzherbert's notion; and according to the opinion of the former, a case, in which the service reserved was a yearly rent in money for guard of the castle of Dover, was adjudged early in the reign of Charles the First. See Litt. Rep. 47. However it should not be concealed, that in this last case the court seemed inclined to think, that under special circumstances there might be a change of the castle-guard into rent by consent of the king and his tenant without altering the tenure, where evidence could be given of the manner in which the change was effected.

of kinne of either side, as first happeth the body of the heire, shall have him (1), but the next of blood of the part of the father shall enter into the lands of the part of the mother, and the next of kinne of the part of the mother, shall enter into the lands of the part of the father (2).

[d] F. N. B. 139. b. Regist.

[e] 7. E. 3. 46. 16. E. 3. ac. 52.

21. E. 3. 8. 31. E. 3. Enfant 9.

17. E. 2. Account 121. 26. E.

3. 63. 10. H. 6. 14. F. N. B.

118.

[f] Braet. li. 2. fo. 88.

[b] Flet. l. 1. ca. 10.

[d] If A be gardian in socage, of the body and lands of B within the age of fourteen years, A shall be gardian in socage *per cause de Gard* (3). But an infant within age, that [e] is not in the custody of another, cannot be gardian in socage; because no writ of account lyeth against an infant. And herewith agreeth Braet. [f] and yeeldeth this reason, *alium regere non potest, qui seipsum regere non novit*. And Fleta saith, [b] that *minor minorem custodire non debet; alios enim presumitur male regere, qui seipsum regere nescit*. And by like reason an ideot, a man *non compos mentis*, a lunaticke, a man *cæcus & mutus*, or *surdus & mutus*, or a leper removed by a writ *de leproso amovendo*, cannot be gardian in socage. But in the case of gard *per cause de Gard*, there lyeth an action of account against A in the case abovesaid.

[i] Lib. Rub. cap. 70.

[k] Glanv. lib. 7. ca. 11.

[l] Pl. Com. Carrel's case.

(2. Ro. Abr. 40. Cro. Eliz. 825.

Mo. 635.)

[m] Lit. lib. 1. fo. 2; 3.

A que le heritage ne poet descend. [i] *Nullus hæredipeta suo propinquo vel extraneo periculosa sane* (4) *custodia committatur*. Note [k] this word (*poet*) may or can. [l] And therefore this doth not onely exclude an immediate discent, but all possibility of discent. As if a man hath issue two sons by several venters, and having lands holden in socage of the nature of burgh English dyeth, the younger brother within age of 14 years, [m] the elder brother of the halfe blood shall not have the custody of the land (5); because by possibility the elder may inherit the land, for if the youngest dye without issue, and the land discent to an uncle, the elder brother of the halfe blood may be heire unto him: and herewith doth agree our ancient authors. [n] *Hæres sokmanni sub custodia capitalium dominorum non erit, sed sub custodia consanguineorum suorum propinquorum, hoc est, eorum qui conjuncti sunt jure sanguinis, & non jure successionis, ex parte quorum non descendit hæreditas; & regulariter verum est, quod nunquam remanebit aliquis in custodia alicujus, de quo haberi possit suspitio, quod velit jus clamare in ipsa hæreditate, & unde si plures sint filia & hæredes & tenere debeant in socagio, nulla debet esse in custodia alterius*. [o] And this is contrary to the civil law; for *leges civiles impuberum tutelam proximis de eorum sanguine committunt, siue agnati fuerint, cognati, unicuique, videlicet, secundum gradum & ordinem, qui in hæreditate pupilli successurus est*. But this the law of England saith, *est quasi agnum lupo committere ad devorandum* (6).

[n] Braet. lib. 2. fol. 87.

Erit. fol. 163. b. Flet. li. 1. c. 9.

28. E. 1. Stat. 1. Fortesc. c. 40.

[o] Fortesc. ubi supra. Statut. de

Homagio capiendo, temp. E. 1.

Donques la mere. Note, albeit land cannot discent to the mother from her sonne, (as hath beene said) because inheritance cannot ascend, yet here it appeareth by Littleton, that she is next of blood (7), for none (as hath beene said) can be gardian in socage, but the next of blood; and the like is to be said of the father, as hereafter next appeareth.

Donques le pier. By this it appeareth, that the father in case of a tenure in socage shall be gardian in socage, and shall not have the custody of his eldest sonne, in respect of his paternall naturall custody, (as he shall have in case of a tenure by knights service, as before appeareth) (8) but as gardian in socage. And the reason of the diversity is, for that in the case of a tenure in socage, the father must by law be accountable to the sonne both for his marriage, and also for the profits of his lands, which he should not be if he had the custody of his eldest sonne in this case as his father in respect of nature (9), and the act of law never doth any man wrong.

But no lord or other person, in respect of any tenure by knights service or otherwise, shall have the custody of any childe that is heire apparant to his father, but the father only during his life, as hath beene said before (10).

It is to be observed, that in the lawes of England, there are three manner of gardianships, *viz.* by the common law, by statute law, and by custome. By the common law there are foure manner of gardians, *viz.* gardian in chivalry (whom Littleton hath described before Sect. 103, &c.) (11) gardian by nature, as the father of the eldest son, of whom Littleton hath spoken Sect. 114, (12) gardian in socage treated of by Littleton in this Section, and gardian *per cause de nurture*; (13) all frequent in [a] our books. By statute, *viz.* the statute in 4 & 5 *Phil. & Mar.* of women children, and that is in two manners, either of the father or mother (14) without assignation, or of any other to whom the father shall appoint the custody, either by his last will, or by any act in his life-time, whereof you shall reade at large [b] in Ratcliffe's case in my Reports (15). [c] Lastly, by custome, as of orphans by the custome of the city of London, and of other cities and boroughes (16).

[a] 3 E. 3. 43. S. E. 4. 5.

(5. Co. 37.)

[b] 3. Co. 57. Ratcliffe's

case.

[c] 32. E. 3. Gard. 31. S. R. 2.

Gard. 166.

(Cro. Jam. 99.)

Tantsolement al use et profit del heire. And therefore gardian in socage shall not forfeit his interest by outlawrie or attainder of felony or treason; because he hath nothing to his owne use, but to the use of the heire.

Also

(1) See ante 83. a. note 1.—(2) Mr. Serjeant Hawkins supposes an elder brother to purchase land and the land to descend to his younger brother being under 14; in which case the infant's paternal and maternal relations are equally of the blood of the first purchaser, and therefore equally capable of inheriting to them; and then Mr. Serjeant asks, who shall be guardian in socage. Hawk. Abr. of Co. Litt. Perhaps there may be some difficulty in solving this question. If Littleton's rule be understood *strictly*, there cannot be any guardian in socage in such a case unless the next friend is a father or mother or other lineal ancestor, or of the half blood; for all of the other relations may by possibility succeed as immediate heirs to the son. But if the next of blood on either side may be guardian, the mother's blood must be preferred, because they are the *most remote* from the succession.—(3) Guardian *per cause de ward* is, where one infant in wardship is guardian of another infant, in which case the wardship of the first infant intitles his guardian to the wardship of the second. But it seems, that only guardian in chivalry and in socage could be guardian *per cause de ward*. See 2. Ro. Abr. 35. 40. and Vaugh. 184.—(4) *Sine* instead of *sane* seems necessary to the sense of this passage.—(5) This point appears to have been adjudged *contra* in lord Coke's time, though it is not taken notice of by him. See Swan's case 2. Ro. Abr. 40. Ow. 128. Mo. 635. Cro. Eliz. 825. and 2. And. 171. However as lord Coke here decides against the half blood, the question was revived after the Restoration; but the case did not produce any opinion of the court. T. Jo. 17. The rule as expressed by lord Coke certainly excludes the half blood; because he extends it to *all* possibility of descent. But if the judgment in Swan's case was right, the rule should be confined to all possibility of *immediate* descent.—(6) Lord Chancellor Macclesfield very much disapproved of the rule of our law, which gives the guardianship in socage to the next of kin to whom the land cannot descend. He would not allow the exclusion of the heir to the land to be founded on reason, but deemed it the offspring of barbarous times and the effect of a cruel presumption. Therefore, when he was applied to on a like principle, for an order to remove a lunatick from the custody of Mr. Justice Dormer, who was the lunatick's uncle and next in remainder to him, but had with the consent of the *nominal* committee of the lunatick's person taken care of him for many years and treated him with the greatest tenderness, under these circumstances his lordship refused

Also if the mother be gardian in socage, and taketh husband, and dyeth, the husband shall Pl. Com. not have this custody by survivour; because the wife had it *en auter droit*, in the right of the (3. Co. 39.) heire.

A guardian in socage shall not [d] present to a benefice in the right of the heire; because he [d] 8. E. 2. Presentment 10. cannot be accomptable therefore, for that he can make no benefit thereof, for the law doth ab- 7. H. 27. 39. F. 3. 89. 29. E. horre simony or any corrupt contract for benefices; and therefore in that case the heire shall 3. 5. F. N. B. 33. 31. E. 3. E. present himselfe (1). And Britton speaking of these gardians said well, *Les queux gardeins sont itoppel, 340. Britton 163. 164.* plus serjants que gardeins, (that is) which gardians are rather servants then gardians. Fleta lib. 1. cap. 10.

Il rendra account, &c. apres que l'heire ad accomplishe l'age de 14 ans.

This point hath beene much controverted in our bookes, and the causes of the doubts have beene, first upon the words of the statute of [e] Merlebridge ca. 17. 2. Upon the originall writ of account against the gardian in socage. The words of the statute be *cum ad legitimam etatem pervenerit sibi respondeat, &c. and legitima etas*, [f] lawfull age is xxi yeares. Also the writ of account reciteth the said statute, *quare cum de communi consilio regni nostri provisum sit, quod custodes terrarum & tenementorum, que tenentur in socagio, heredibus terrarum & tenementorum illorum, cum ad plenam etatem pervenerint, reddant rationabilem computum.* [g] Whereupon it is gathered that no action of account did lye against the gardian in socage at the common law, untill the heire be of his lawfull age of 21 yeares. But as to the first (*legitima etas*) as the statute [h] speaketh, or *plena etas* (as the writ doth render it) are to be understood secundum subjectam materiam, that is of the heire of socage land, whose lawfull and full age as to the custody or guardianship is 14. And as to the recitall of the statute, [i] it is evident that an action of account did lye against gardian in socage at the common law. And that the statute was made in affirmance or declaration of the common law; for the statute speaketh onely *de custodia parentum*, that is of a gardian in right, but yet an action of account lyeth against him that occupieth the land as gardian, albeit he be not of the blood (as hereafter shall be said). And upon consideration had of the said statute and of all the bookes, it was adjudged in the court of Common Pleas, Pasch. 16. Eliz. Rot. 436. according to the opinion of Littleton, that the heire after the age of 14 yeares shall have an action of account against the gardian in socage, when he will at his pleasure; and so is an ancient question well resolved (2).

Britton was of opinion, that the statute of Merlebridge, which gave the *capias* in account, extended to gardian in socage, for he wrote before the statute of W. 2. c. 11. But later bookes have over-ruled this point, that no *capias* lyeth against gardian in socage, for the statute extendeth to bailifes only. Neither doth the statute of W. 2. extend to gardian in socage, for that speaketh onely *de servientibus, balivis, camerariis, & receptoribus*. Pasch. 16. Eliz. Rot. 436. in communi banco. Mirror ca. 2. Sect. 17. Britton fol. 163. b. Fleta lib. 2. cap. 64. 18. E. 2. Avowry 220. 17. E. 3. 59. Merlbr. ca. 29. W. 2. ca. 11.

Mes tiel gardien sur son account avera allowance de tous ses raisonable costs et expences en tous choses. (3) And this is due to all accountants by the common law (4); and so it is declared by the said statute of Merlebridge, *salvis ipsis custodibus rationabilibus missis suis*. The statute of Merlbr. intended by Littl. is ca. 17.

Allowance. What other allowances shall the gardian have? If the gardian receive the rents and profits of the lands, and be robbed of the same, whether shall he be discharged thereof upon his account? And it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof (5). As if a bailife of a manor, or a receiver, or a factor of a merchant, or the like accountant, be robbed, he shall be discharged thereof upon his account. And seeing the gardian shall be charged as bailife after the heires age of 14 and be discharged upon his account, if he be robbed, *pari ratione* if he be robbed before the age of 14. But otherwise it is of a carier, for he hath his hire (6), and thereby implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them (7). Note the diversity, and so it was resolved in the King's Bench.

So it is if goods be delivered to a man to be safely kept, and after those goods are stolen from him, this shall not excuse him; because by the acceptance he undertooke to keepe them safely, and therefore he must keepe them at his perill.

So it is if goods be delivered to one to be kept, for to be kept and to be safely kept is all one in law (9). But if the goods be delivered to be kept as he would keepe his owne, there if they be stolen from him without his default or negligence, he shall be discharged. So if goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged; because he hath a property in them (10), and therefore he ought to keepe them no otherwise then his owne; but if he that gaged them, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged.

If A leave a chest locked with B to be kept, and taketh away the key with him, and acquainteth (8. Co. 32. 5. Co. 13. b.)

(1) S. p. acc. ante 17. b. post 120. a. S. p. acc. as to guardian by nurture. Cro. Jam. 99. In another work lord Coke extends the doctrine so far, as to say that the infant shall present *whatsoever his age may be*. 3. Inst. 156. But some suppose the guardian to have the right of presenting in the name of the infant. Others again admit the right of the infant in general, but add, that if the infant be of such tender years as not to have any discretion, then the guardian should present for him. See Vin. Abr. Guardian Q. pl. 2. But the law seems now settled in the full extent of lord Coke's opinion by a determination of lord chancellor King. In a cause before him an advowson had been conveyed to trustees on trust to present such person as the grantor his heirs or assigns should by deed appoint; and on the principle that an infant of any age may present, his lordship confirmed an appointment by an infant-heir, though it appeared, that the child was not a year old, and that the guardian guided the child's pen in making his mark and putting his seal. 2. Eq. Caf. Abr. Infant B. pl. 3. Vin. Abr. Collation A. pl. 10. Watf. Clergy. L. ed. 1740. p. 140. See also 3. Atk. 710. — However, though this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to controul the exercise, where a presentation is obtained from an infant without the concurrence of the guardian. — (2) But against a testamentary or other guardian, whose authority doth not determine till the infant is twenty-one, or being a female attains that age or marries, the infant cannot have action of account before; for the rule of the common law is, that account shall not lie whilst the guardianship continues. However in equity the infant may by *prochein amy* sue his guardian for an account during the minority. 2. Vern. 342. 2. P. Wms. 119. 1. Vef. 91. 3. Atk. 625. — (3) Therefore a guardian cannot be charged in account as a receiver; because then he would lose his costs and expences; these it is said being in general allowed only to guardians and bailiffs, and not to receivers. Post 172. a. — (4) The rule seems expressed too generally; lord Coke elsewhere telling us, that a receiver, who is one of the three denominations of accountants known to our law, cannot charge for costs and expences, except in some special cases in favour of trade and merchandise. Post 172. 1. Freem. 378. — (5) The rule is the same as to trustees, though for their greater security it is usual to insert special provisions in the instrument creating the trust. 2. Cha. Caf. 2. — (6) But the hire is not the only or principal ground, on which the carier is liable; for factors, though they also receive a reward, are not so, except for negligence or by reason of a special undertaking. The great cause of the law's charging the carier is the public employment he exercises. 1. Ld. Raym. 917. 1. Salk. 143. 12. Mod. 487. — (7) This is by the common law or general custom of the realm; and to recite it in the declaration, as is sometimes the practice both with respect to inn-keepers and carriers, seems not only unnecessary but even rather improper; because it tends to confound the distinction between special customs, which ought to be pleaded, and the general custom of the realm, of which the courts are bound to take notice without pleading. Accordingly it seems admitted in several books, that describing the defendant to be a common carrier, without anything more, is sufficient. Hob. 18. 1. Sid. 245. Hardr. 485. 3. Mod. 227. Wilf. v. 1. part 1. page 281. — (8) S. C. Mo. 462. Ow. 57. 1. Ro. Abr. 2. — (9) This doctrine was denied by the court in the great case of Coggs and Barnard; and it is now understood, that acceptance of goods to be kept generally is merely an undertaking to keep them as the party receiving receiving keeps his own. 2. L. Raym. 911. — In Coggs and Barnard the action was for so negligently carrying some hogheads of brandy that one of them was staved; and on motion in arrest of judgment, the court held that a sufficient consideration appeared in the declaration, though it was wholly grounded on a special undertaking to carry safely, without stating, either that the defendant was to have hire, or that he was a common carrier. — (10) Lord ch j. Holt thought this reason insufficient,

to make such an order, 1. P. Wms. 260. See also 9. Mod. 142. and Cary's Rep. 137. 138. But notwithstanding this censure by one most

(Doct. & Stud. 129. b.)

* Pasch. 43. Eliz. inter Southcote & Benne in Detinue. (4. Co. 83. b.)

quainteth not B what is in the chest, and the chest together with the goods of B are stolen away, B shall not be charged therewith, because A did not trust B with them as this case is (1). And that, which hath been said before of stealing, is to be understood also of other like accidents, as shipwracke by sea, fire by lightning, and other like inevitable accidents (2). And all these cases were resolved, and adjudged in the King's Bench. • And by these diversities are all the bookes concerning this point reconciled (3).

Note, reader it is necessary for any, that receiveth goods to be kept, to receive them in this speciall manner, viz. to be kept as his owne, or to keepe them at the perill of the owner (4). But now is Littleton to be further heard.

Et si tiel gardein maria le heire deins 14 ans, &c. For if he marry the heire after 14, he is out of his custody, and no account shall be made therefore.

Il accountera a luy. He shall account for the mariage of the heire, viz. for so much as any man *bona fide* had offered for the mariage; or would give in mariage unto him.

(1. Ro. Abr. 908. 910. Cro. Cha. 79.)

7. E. 3. 62. 19. E. 3. Account 56. 38. E. 3. 7. 31. E. 3. tit. Account 57.

3. E. 3. 10. 46. E. 3. Account 40. 2. R. 2. ibid. 45. 6. R. 2. Account 47.

Hill. 3. E. 2. Coram Rege, Rot. 34. Agnes Frowick's case. F. N. B. 139. l. & 140. 26. E. 3. 65. 1. E. 3. 19. 20.

Trin. 1. H. 5. Coram Rege, Rot. 1. Midd.

Ou a ses executors. Not (5) that an infant of the age of 14 may make his will (as some hereupon have collected); but the meaning of Littleton is, that if after his mariage he accomplish his age of 18 years, at what time he may make his testament (6), and constitute executors for his goods and chattells, and the words are so to be understood, as may stand with law and reason. Note, executors could not have an action of account at the common law, in respect of the privity of the account; but the statute of W. 2. ca. 23. hath given the action of account to executors, the statute of 25. E. 3. ca. 5. to executors of executors, and the statute of 31. E. 3. c. 11. to administrators.

Que il voile luy marier sans prendre le value. So as the gardian shall not account only for that which he shall receive in this case, but for that also which he might receive.

Si non que il luy marier a tiel mariage que est tant en value, &c.

This needeth no explanation.

If the heire in socage be ravished out of the custody of the gardian, and the ravisher marieth the heire, the gardian shall have a writ of ravishment of ward, and recover the value of the mariage, &c. and shall account to the heire for the same.

And the gardian in socage is bounden by law, that the heire be well brought up, and that his evidences be safely kept.

The grandmother of the sonne and heire of John Bernevill, who held the manor of Tootington in the county of Midd. in socage, recovered the heire in a ravishment of ward against Simon Chevin, which had married the stepmother of the heire; and by the rule of the court, the plaintife *pro nutritura heredis et pro custodia evidentiarii invenit plegios.*

Sect. 124.

ET si ascun auter home, que nest pas procheine amy, &c.

19. E. 2. Avowry 221. 39. E. 3. 16. 41. E. 3. Account 35. 49. E. 3. 10. 18. E. 3. 77. 28. Aff. p. 11. Pl. Com. 542. 6. E. 3. 38. F. N. B. 118.

If a stranger entreteth into the lands of the infant within age of 14, and taketh the profits of the same, the infant may charge him as gardian in socage. And this doth well agree with the writ of account against a gardian in socage, for the words be, *Idem B prefato A rationabilem compotum suum de exitibus*

ET si ascun auter home, que nest procheine amy, occupee les terres ou tenements del heire come gardeine en socage, il serra compell de render accompt al heire, auxi bien si come il fuisset prochein amy; car il nest pas plee pur luy en briefe dacompt adire, que il nest procheine amie, &c. mes il respondra le quel

AND if any other man, who is not the next friend, occupies the lands or tenements of the heire as gardian in socage, he shall be compelled to yeeld an account to the heire, as wel as if he had beene next friend; for it is no plea for him in the writ of account to say, that he is not the next friend, &c. but he shall answer

sufficient, and justly as it seems. Other bailees have a property, that is, a special and limited one; and what hath the pawnee more? The only difference is in the degree; the pawnee's property, though not absolute, being rather more enlarged, and for some purposes a beneficial one. 2. L. Raym. 916. Com. Dig. tit. Mortgage and Vin. Abr. tit. Pawn. But whatever the difference may be in point of property, it is become immaterial so far as regards the use made of it by lord Coke; because now general bailees of goods are not deemed any farther chargeable for the loss of them than pawnees.

(1) In the case here stated, the not informing B what was in the chest is relied on as the material circumstance; but the modern doctrine would make it unnecessary to resort for aid from it, as according to that B would not be chargeable, though he had known the contents of the chest. However there are cases, which turn upon the giving of such information. All. 93. 1. Vent. 258. Carth. 486. 1. Stra. 145. Law of Nisi Prius ed. 1775. p. 71.—(2) Here lord Coke joins losses by shipwreck and lightning and other like inevitable accidents with those by stealing; but other authorities make a distinction, and according to them, neither carriers nor masters of ships are responsible for losses by *acts of God* or of the *king's enemies*. 2. Bulstr. 280. 2. L. Raym. 918. Vin. Abr. tit. Master of a Ship B. pl. 12.—(3) The old doctrine about bailment will be found at large in Southcote's case, which is cited by lord Coke in the margin. For the modern doctrine, the student should consult the famous case of Coggs and Barnard already cited. Lord chief justice Holt's argument in that case, as reported by Lord Raymond, particularly merits attention; it being a most masterly view of the whole subject of bailment. Another important case connected with the same subject is that of Lane and Cotton, in which three judges against Holt held, that action on the case will not lie against the Master of the General Post Office for the loss of a letter with Exchequer bills in it. 12. Mod. 472. See further the following books, which are citations from a note by the editor of the 11th edition.—21. E. 4. 55. 4. E. 3. 6. 2. H. 7. 11. Palm. 548. W. Jo. 179. Grot. de jur. bell. l. 2. c. 12. f. 13. Puffend. de jur. nat. l. 5. c. 4. f. 6. 7. and Dom. Loix Civ. l. 1. t. 5. f. 2. t. 6. f. 3. t. 7. f. 3.—(4) We have already observed, that in general this distinction is now exploded. Ante 89. a. note 9. See further tit. Bailment and Carrier in New Abr. tit. Bailment and Action for Negligence in Vin. tit. Action on the case for misfeasance in Com. Dig. Law of Nisi Prius ed. 1775. p. 69.—(5) It is note in all the former editions, but not is apparently the true reading.—(6) There is a great abundance of irreconcilable opinions in our books about the earliest age, at which a will

most deservedly of high authority, the rule of our law in respect to guardianship in socage, considered as one settling the right by nearness of blood without regard to personal qualifications, which was the point of view in which lord Coke and those he follows extolled it, is surely very defensible; for it gives the custody of the infant's person to those, who in point of nearness of blood have equal

il ad occupie les terres ou tenements come gardeine en socage ou nemy. Sed quære, si apres ceo que le heire ad accomplisb lage de 14 ans, et gardeine en socage continualment occupia la terre tanque l'heire vient a plein age, f. 21 ans, si le heire a son plein age avera action dacompt envers le gardein de temps que il occupia apres les dits 14 ans, come envers gardeine en socage, ou envers luy come son baylife.

when the heire will, either before his age of 21 yeares, or after (2).

whether he hath occupied the lands or tenements as gardian in socage or no. But *quære*, if after the heire hath accomplished the age of 14 yeares, and the gardian in socage continually occupieth the land until the heire comes to full age, f. of 21 yeares, if the heire at his full age shall have an action of account against the gardian, from the time that he occupied after the said 14 yeares, as gardian in socage, or against him as his bailife.

*provenientibus de terris et tenementis suis in N. quæ tenentur in socagio, et quorum custodiam idem B habuit dum præd. A infra ætatem fuit, ut dicitur. And true it is, that in judgement of law he had the custody of the lands: and he is called tutor alienus, and the right gardian in socage tutor proprius, and it is no plea for him to denie that he is *prochein amy*, but he must answer to the taking of the profits (1), as Littleton here saith.*

Sed quære, &c.

This *quære* came not out of Littleton's quiver; for it is evident, that after the age of 14 yeares he shall be charged as bailife at any time

13. E. 3. Account 77. 22. E. 3. 11. 41. E. 3. Account 35. 10. H. 7. 7. 4. H. 7. 6. b. 7. H. 7. 9. a.

6. E. 3. 38. 32. E. 3. Account 60. 7. E. 4. F. N. B. 118.

Sect. 125.

ITEM si gardein en chivalry face ses executors et devy, le heire esteant deins age, &c. les executors averoient le garde durant le nonage, &c. Mes si gardein en socage face ses executors et devy, le heire esteant deins lage de 14 ans, ses executors naveront pas le garde; mes un auter prochein amy, a que le heritage ne poyt my descend, avera la garde &c. Et la cause de diversity est, pur ceo que gardein en

ALSO if gardian in chivalrie makes his executors and die, the heire being within age, &c. the executors shall have the wardship during the nonage, &c. But if the gardian in socage make his executors and die, the heire being within the age of 14 yeares, his executors shall not have the wardship; but another next friend, to whom the inheritance cannot descend, shall have the wardship, &c. And the reason of this diversitie is be-

A Son proper use.

A tenant holdeth land of a bishop by knights service, which seigniorie the bishop hath in the right of his bishoprick, the tenant dieth his heire within age, the bishop either before or after seisure dyeth; neither the King, nor the successor of the bishop shall have the wardship, but his executors. For albeit the bishop hath the seigniorie, *in auter droit*, yet the wardship being but a chattell he hath in his owne right, and a chattell cannot goe in the succession of a sole corporation, unless it be in the case of the king (3).

And yet if a bishop have an advowson, and the church become void, and the bishop die, neither the successor nor the executors shall present, but the king; because it is but a chose in action (4). And so it is in case where the king hath wardship, but that

7. R. 2. Bre. 634. 40. E. 3. 14. 2. H. 4. 19. 10. Eliz. Dier 277. (Post 117. 4. Co. 64. b.)

7. H. 4. 41. 44. E. 3. 42.

24. E. 3. 26. 44. E. 3. F. N. B. 33. See more of this in the chapter of Warranty, sect. 740. (Cro. Jam. 248.)

a will may be made of *personal* estate. Here lord Coke states 18 to be the age; though the reasons and authorities in favour of that time do not appear.—Others mention 17, that being the age at which an administration during the minority of an executor determines. 1. Vern. 255. 2. Vern. 558. But this opinion was probably founded on an idea, that our spiritual courts make no difference between the time for acting as an executor and the time for making a will, which is clearly a mistaken notion. However it receives some countenance from the decisive manner in which a late chancellor of the first authority mentions 17, and the ambiguous terms in which he speaks of an earlier age. 1. Vef. 303. 3. Atk. 709.—According to others 15 is the age for *males*, if the party can be proved of sufficient discretion; but we are not informed why, and therefore little respect is due to this opinion, if that can be deemed one, which in fact was nothing more than a loose *dictum*. 2. Vern. 469.—Others doubt, whether any time before 21 is not too early; because none can be administrators till they have attained that age. 1. Vern. 326. The reasons usually assigned for not granting administration to any person under 21 are, that an administrator being created by statute his age should be according to the common law, and that the statute of distribution requires the security of a bond from an administrator, which an infant cannot give. See the books cited in Vin. Abr. *Executors* L. 3. pl. 6. This latter reason against an infant's being administrator is the most forcible; but both seem equally inapplicable to the other point; the power of making a will of personal estate not being derived from or regulated by any statute, and the giving of a bond being foreign to the case of a testator.—In Perkins *four* is said to be the age for making a will of personalty; but though this is the time mentioned in the old as well as the new editions of his book, yet, as Swinburne well observes, it appears to be an error of the press by omission of the figure x, and most probably xiii was the age intended. Perk. sect. 503. Swinb. Testam. part 2. sect. 2. Off. of Ex. cap. 18.—The last opinion on the subject, and that most to be relied upon, distinguishes between *males* and *females*, making the *testamentary* power to commence in the former at 14, and in the latter at 12. At these ages the Roman law allowed of testaments, and the civilians agree that our ecclesiastical courts follow the same rule: and to them we ought principally to resort for information on testamentary subjects; because these being so peculiarly of spiritual consueance, they speak more *ex tripode juridico*, to use the phrase of a great author, than our common lawyers. Swinb. on Testam. part 2. sect. 2. Godolph. Orph. Leg. 276. 2. Strah. Dom. 11. Harr. Justin. Instit. l. 2. t. 12. f. 1. But the doctrine is not sustained by the authority of civilians only. Some respectable books, written by common lawyers, mention 12 and 14 for the same purpose; prohibitions have been refused by the King's Bench, when applied for to restrain the ecclesiastical courts from allowing wills made at such early ages; and there are instances, in which the doctrine hath been recognized and adopted by the court of Chancery. Off. of Ex. cap. 18. Sheph. Touchst. 403. T. Jo. 210. 2. Show. 204. Comb. 50. Prec. in Cha. 316. Gilb. Eq. Rep. 74. Mos. 5. To conclude this point, it may be added, that as on the one hand the rule of the ecclesiastical courts, in holding 12 and 14 to be ages at which males and females according to the difference of sex first have the power of making wills of personalty, seems now well established; so on the other hand it is in some degree consonant to the doctrine of our common law; for though that is silent as to the age for wills of personalty, these being the subjects of a different law, yet it adopts the same standard of 12 and 14 for other purposes, and so far deems them the ages of discretion, as to give infants of those ages the power of choosing guardians, and to presume that they are *doli capaces* in respect to crimes. 1. Hal. H. P. C. 22.

(1) That is, whether he took the profits as guardian; for if he assumed to take them in that character, he shall answer for them accordingly, though he was not guardian *de jure*.—(2) Notwithstanding lord Coke's observation on the *quære*, it is in L. and M. Roh. P. and both of the MSS.—(3) Acc. ante 9. a. 46. b. post 388. a.—(4) This reason requires some explanation. It

equal pretensions to the trust, without the same temptation in point of interest to abuse it. However in justification of the Roman

that is a prerogative that belongeth to the king to provide for the church being void; for where the tenure by knights service is of a common person, the executors of the tenant shall present where the avoidance fell in the life of the tenant.

Le heire est sauns remede, &c. For albeit

in an action of account against a gardian in socage, &c. the defendant cannot wage his law, yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lyeth against the executors of the accountant, nor at the common law for the executors of him to whom the account is to be made as is aforesaid (3); but that is holpen by statute (4). (*) It hath been attempted in parliament to give an action of account against the executors of a gardian in socage, but never could be effected (5).

Si non pur le roy solement.

[a] The reason of this is because the king's treasure is the finewes of warre, and the honour and safety of the king in time of peace, *firmamentum belli, et ornamentum pacis*; and therefore the death of the party shall not barre the king of his treasure due unto him upon the account, because it is intended, that the king was busied about the publike for the good of the common-wealth, and had not leisure to call his accountant to make his account, and *nullum tempus occurrit regi* (6). Littleton speakech of the king's prerogative but twice in all his bookes, *viz.* here, and Sect. 178. and in both places, as part of the lawes of England. *Prærogativa* is [b] derived of *præ* .i. ante, and *rogare*, that is, to aske or demand before-hand, whereof commeth *prærogativa*, and is denominated of the most excellent part, because though an act hath passed both the houses of the lords and commons in parliament, yet, before it be a law, the royall assent must be asked or demanded and obtained, and this is the proper sense of the word. But legally (*) it extends to all powers, preeminences, and privileges, which the law giveth to the crowne, whereof Littleton here speaketh of one. Bract. lib. 1. in one place calleth it *libertatem*, in another *privilegium regis*; [c] Britton [d] (following W. 1.) *droit le roy*; [e] *registr. jus regium*, and *jus regium coronæ*, &c.

Sect. 126.

CERTEINE rent.

A tenant holdeth of his lord certaine lands in socage, to pay yearely a paire of gilt spurs or five shillings in money at the feast of Easter. In this case the rent is uncertaine, and the tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for reliefe; but if he pay it not when he ought, then may the

ITEM le seignior,

de que la terre est tenu en socage, apres le mort son tenant avera reliefe en tiel forme. Si le tenant, tient per fealtie et certain rent a paier annualment, &c. si les termes de paiment

ALSO the lord, of whom the land is holden in socage, after the decease of his tenant shall have reliefe in this manner. If the tenant holdeth by fealty and certaine rent to pay yeerely, &c. if the tearmes of

31. E. 3. Account 57. 19. E. 3. ibid. 156. 48. E. 3. 2. 2. H. 4. 13. F. N. B. 117. 19. H. 6. 5. 4. E. 4. 25. 43. E. 3. 21. 11. Co. 89. (2. Inst. 404.)

* Rot. Parl. 50. E. 3. nu. 123.

[a] Pl. Com. 321. Keyleway 131. 11. Co. 89.

Vid. Sect. 178. Stanf. Præ. 32.

[b] Fortescue fo. 45. Rot. Parl. 1. H. 4. nu. 188. Pl. Com. 236. Stanf. Pl. Cor. 162. b. Stanf. Præ. 1. a. & 10. b.

[*] Stanf. Præ. 5. 10.

[c] Westm. 1. cap. 50.

[d] Britton fol. 27.

[e] Regist. fol. 61. &c.

41. E. 3. Barre 294. 9. E. 4. 36. Bract. lib. 2. fol. 35. Glanvil lib. 9. cap. 4. (2. Ro. Abr. 519. Post 145. a.)

It is not, that *choses in action* are in their nature incapable of transmission to executors; for the contrary is known to be law, and some instances of it are here given: but it is, because in the case of a *chose in action*, so peculiar as a right of presentation, the law favours the king more than the bishop's executors, and therefore gives the king, as having in his custody the temporalities of the vacant bishoprick, that presentation, which executors in general are entitled to when they are opposed to an heir. See post 388. Bro. Abr. *Presentation* 34. Watf. Clergym. L. ed. 1747. p. 71. But then it may be asked, why the king should not have a like preference, in the case of the bishop's being intitled to a wardship by knight's service in right of his fee and dying before reducing it into possession by seisure. The answer may be, that the law distinguishes between an *interest both of profit and trust*, as wardship by knight's service is, and one *merely of trust*, such as a presentation. The law gives the former to the bishop's executors, for the benefit of his personal estate. It gives the latter to the king; because the presentation to a vacant church cannot lawfully be sold; and as the bishop's personal estate cannot derive any *profit* from the presentation, the law deems it more proper to follow the temporalities of the fee to which the advowson belongs. In a subsequent part of the commentary, where it is said, that the bishop's executors shall not present, because nothing can be taken for a presentation, lord Coke seems to hint at something of this kind. Post 388. a. However as a like reason might be urged against executors in favour of an heir, it is most safe to rely on the right of the king as settled by *authorities* and *long practice*.—This preference of the king's title by prerogative is carried so far, that even *presentation* and *institution* in the life-time of the bishop will not prevail, unless there hath been also an *induction*. Vin. Abr. *Presentation* C. a. E. a. Watf. Clergym. L. ed. 1747. p. 73.

(1) Fitzherbert cites two authorities, which make guardianship in socage grantable. F. N. B. 143. P. But Littleton's opinion militates strongly to the contrary; for if such a trust is so *personal* as not to be transmissible to executors, why should it be so to grantees? Accordingly in the arguing of a modern case it seems to have been taken for granted, that guardianship in socage cannot be assigned. Gilb. Eq. Rep. 177.—(2) Littleton must be understood to mean, that at *common law* account did not lie against executors; for in his time it did lie under several statutes against an executor *in general*, though they were deemed not to extend to the executor of guardian in socage. See the next note.—(3) This rule of the common law, which did not allow of actions of account *against* or *for* executors, had some exceptions. The *latter* part of the rule did not extend to the executors of *merchants*; and the king was not within *either* part. F. N. B. 117. 11. Co. 90. a. It should also be remarked, that though at the common law executors in general were not compellable to account, yet if they consented to settle an account, they were liable to an action of *debt* for the ballance. F. N. B. page 167. of 4to ed. in lord Hale's notes.—(4) The 13. E. 1. c. 23. gave account to executors; but this being construed to describe *immediate* executors only, other statutes were made to extend the remedy to the executors of executors and to administrators. 25. E. 3. ft. 5. c. 5. 31. E. 3. c. 11. 2. Inst. 404. Antc 98. b.—(5) Acc. Cott. Abr. Rec. 131. But now by 4. An. c. 18. s. 27. actions of account lie against the executors and administrators of every *guardian* bailiff and receiver.—(6) See post 119. a. and the note there.

Roman law it should be remembered, that their order of succession made it impossible to adopt a distinction like that of our law in the case of guardianship in socage; for by the Roman law, the relations both of the *father's* and *mother's* blood, being

font a payer per deux termes del an, ou per quater termes del an, le seignior avera del heire son tenant tant, come le rent amount, que il paya per an. Sicome le tenant tient de son seignior per fealtie, et x. s. de rent payable a certaine termes del an, donques l'heire paiera al seignior x. s. pur reliefe, ouster les x. s. que il paiera pur le rent.

payment be to pay at two termes of the yeare, or at 4 termes in the yeare, the lord shal have of the heire of his tenant as much, as the rent amounts unto, which he payeth yearly. As if the tenant holds of his lord by fealty, and tenne shillings rent payable at certaine termes of the yeare, then the heire shall pay to the lord ten shillings for relief, beside the tenne shillings which he payeth for the rent.

lord distraine for which of (2. Co. 37. 2. Ro. Abr. 519) them he will. But if the tenure be to attend on his lord at the feast of Christmasse, or to pay ten shillings, there the reliefe must be ten shillings, because the other cannot be doubled; *et sic de similibus.*

A paier annuelment.

If the tenant holdeth of his lord by fealty, and to pay every two or three year ten shillings, albeit this be no annuall rent, yet shall he pay ten shillings for reliefe; *et sic de similibus.*

But it is to be noted, that beside reliefe, whereof Littleton here speaketh, there belongeth to a tenure in socage of common right aid for the making of his eldest son a knight at the age of fifteene years, and to marry his daughter at the age of 7 yeares (1).

Vid. Sect. 103. F. N. B. 82.
West. 1. cap. 35. 25. E. 3. stat.
5. cap. 11.

En mesme le manner est, si home soit seisie de certaine terre que est tenu en socage, et fait feoffement en fee a son use, et mourust seisie del use, (son heire del age de 14 ans, ou plus, et nul volunt per luy declare) le seignior avera reliefe del heire, sicome avant est dit. Et cest per le statute de Ann. 19. Hen. 7. cap. 15. (2)

In the same manner it is, if a man be seised of certaine land, which is holden in socage, and maketh a feoffement in fee to his owne use, and dieth seised of the use, (his heire of the age of 14 yeares or more, and no will by him declared) the lord shall have reliefe of the heire, as afore is said. And this by the statute of 19. H. 7. cap. 15.

This is an addition to Littleton, whereof I omit it the rather for that the statute of 19. H. 7. is for the cause above mentioned become of none effect.

Sect. 127.

ET en tiel cas apres la mort le tenant, tiel reliefe est due al seignior maintenant, de quel age que le heire soit; pur ceo que tiel seignior ne poit aver le garde de corps ne de terre

AND in this case, after the death of the tenant, such reliefe is due to the lord presently, of what age soever the heire be; because such lord cannot have the wardship of the body, nor of the land of the heire.

MAintenant, and as Littleton saith, he ought not to attend the payment of his reliefe according to the daies of payment of his rent; but he ought to have his reliefe presently, and for the same he may incontinently distraine after the death of the tenant.

And therefore in the case aforesaid, where the tenant holdeth by the rent of five shillings, or a paire of gilt spurres,

16. H. 7. 4. 18. E. 3. 26. p. 18.
Bracton lib. 2. fol. 85. dabit hæres una vice redditum suum unius anni duplicatum. Britton fo. 178. acc. Fleta lib. 1. cap. 8.
(2. Ro. Abr. 519)

(1) We have already had occasion to observe, that these aids are taken away by the 12. Cha. 1. c. 24. Ante 76. a. note 1.—
(2) This part about relief from the heir of *cestuique use*, as lord Coke truly observes, is an addition to Littleton; and it first appears in Redman. See post 117. a.

in equal degree, were equally capable of inheriting; and the Emperor Justinian having wholly destroyed the distinction between the *agnati* and *cognati*, there could not be *proximity of blood* without *proximity to the succession*. Novell. 18. c. 4. 5. Such being the difference of the two laws in point of succession, it is rather unfair to make a comparison between them in point of guardianship. Besides *nearness of blood alone* is at best a very exceptionable rule for settling the right of guardianship. It must frequently give a title to those, who are in every respect the least qualified for a trust so delicate and important. Nearness of blood ought to be greatly regarded; particularly in the case of parents, whose title by nature is so strong, that to wrest from them the custody and education of their children, except when there is any gross misconduct or the most apparent incapacity, would be very inhuman indeed. But personal qualities, situation of life, interest in the succession, and other circumstances, whether operating for or against, should also be attended to; and hence arises the necessity of a *discretionary* power in the choice of guardians. On this principle in many countries in Europe the father is now intrusted with the power of assigning guardians

(Ante 47. b. 2. Ro. Abr. 519.)

45. E. 3. 19. 35. H. 6. 52.
20. Eliz. Dier 361. Stanf. Præf.
13. b. F. N. B. 256. 259.

spurres, if the heire be not presently (that is, as presently and as conveniently as he may, all due circumstances considered) after the death of his ancestor ready upon the land to pay reliefe, the lord may distrain for which of them he will; and if the tenant tendred either of them according to the law, and none for the lord was ready there to receive it, yet the lord may distraine for that, which was tendred, at his pleasure (2).

De quel age que le heire soit.

And yet it appeareth in our bookes, that in this case the king in case of a tenure in socage in chiefe shall not have primer seisin unlessse the heire be of the age of 14 yeares at the death of his ancestor; for if he be under that age, he is in the gard and custody of his *prochein amy*.

But otherwise it is in case of a common person, as here it appeareth. And where in some impressions these words be added (*issint que il passa lage de 14 ans*), those words so added are against the law, and no part of Littleton's worke (3).

Sect. 128.

UN lib. de pepper ou cumyn.

Here it is to be observed, that the lord may reserve pepper, or any other things that be *ex-actica*, foreign of the growth of outlandish countreyes or beyond sea, as well as of the growth of England, where-by navigation (the life of every island) is employed. And where Littleton here putteth his case in the disjunctive, if the tenant doth hold by fealty and one pound of pepper or a pound of cummin, he shall pay for reliefe a pound of pepper or a pound of cummin, over and besides the rent. But if the tenant holdeth of his lord by doing of certaine worke dayes in harvest, or to attend at Christmasse, or such like, he shall not double the same; for of corporall service or labour or worke of the tenant,

no reliefe is due, but where the tenant holdeth by such yearly rents or profits, which may be paid or delivered, whereof Littleton hath put his examples; and by them is manifestly proved, that corporall service, worke, or labour, shall not be doubled in this case (4).

Ou certaine bushels de frument. Here it appeareth, that the reliefe of bushels of corne is to be paid presently, though the tenant die in winter before corne be ripe.

(1) But here we must understand Littleton to be speaking of a relief due on the descent of a fee simple in fee tail *in possession*; for if only a remainder on reversion expectant on an estate for life descends on the heir, the relief is not leviable till the death of the tenant for life. Keilw. 83. b. Kitch. ed. 1592. fo. 146. b. As to the descent of a remainder or reversion expectant on an estate tail, it seems doubtful whether a relief is payable at any time in respect of such a descent. Keilw. 84. a.

(2) See ante 83. b. note 4.

(3) Accordingly the words objected to by lord Coke are neither in L. and M. or Rob. — They were first inserted in P.

(4) But Rolle tells us, that Master Herbert of the Inner Temple in his autumn reading 11 Cha. 1. held the contrary. 2. Ro. Abr. 515.

dians for his children by testament, and for want of a testamentary guardian some great magistrate or judicial officer is authorized to nominate; and in other countries guardians are wholly dative by a magistrate. Groenweg. de Leg. Abrogat. lib. 1. tit. 15. Voet Comment. ad Indect. l. 26. §. 3. 1. Strah. Dom. 264. Stair's Inst. of Law of Scotl. 3. ed. 46. In effect our law, as changed by statutes and regulated by the modern practice of the court of chancery, conforms very much to these modes of prescribing who shall have the guardianship. But this subject will be more fully opened in the succeeding notes. — (7) As to the construction of the words *next of blood* in other cases, see ante 10. b. and note 2. there. — (8) Ante 84. b. — (9) Lord Coke should

le heire. Et le seignior en tiel case ne doit attendre a le payment de son reliefe, solonques les termes et jours de payment de rent; mes il doit aver son reliefe main-tenant, et pur ceo il doit incontinent (1) distraine apres le mort son tenant pur reliefe.

And the lord in such case ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent; but he is to have his reliefe presently, and therefore he may forthwith distreine after the death of his tenant for reliefe.

EN mesme le maner est, lou le tenant tient de son seignior per fealtie et un li. de peper ou cummin, et le tenant morust, le seignior avera pur relief un lib. de cummin, ou un lib. de peper, ouster le common rent. En mesme le maner est, lou le tenant tient a payer per an certaine number de capons, ou de gallines, ou un paire de gaunts, ou certaine bushels de frument; et hujusmodi.

IN the same manner it is, where the tenant holdeth of his lord by fealtie and a pound of pepper or cummin, and the tenant dyeth, the lord shall have for reliefe a pound of cummin, or a pound of pepper, besides the common rent. In the same manner it is, where the tenant holdeth to pay yearly a number of capons or hennies, or a paire of gloves, or certaine bushels of corne, or such like.

(Post 142. a.)

(2. Ro. Abr. 515.)

Note, here are examples put of five natures. 1. *Aromatorum exoticum*, of spices or drugs of outlandish growth. 2. *Granorum*, of corne of English growth. 3. *Avium villaticarum*, of poultry, as capons, hens, &c. 4. *Artificiorum*, of handicrafts, as a paire of gloves generally either of outlandish or English. 5. *Aut similia*, or such like, (that is) of like outlandish growth or of English growth, or of poultry, or of artifices outlandish or English, and like herein also, that they may be paid or delivered to the lord every year, or every second or third year, &c.

Sect. 129.

MES en ascun case le seignior doit demurrer a distreiner pur son reliefe jesque a certaine temps. Sicome le tenant tient de son seignior per un rose, ou per un bushel de roses, a paier al feast de Nativite de Saint John Baptist, si tiel tenant devie en yuer, donque le seignior ne poit distreiner pur son reliefe, tanque al temps que roses per le course del an poient aver leur creffer, &c. et sic de similibus.

BUT in some case the lord ought to stay to distreine for his reliefe untill a certaine time. As if the tenant holds of his lord by a rose, or by a bushell of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter, then the lord cannot distreine for his reliefe, untill the time that roses by the course of the yeare may have their growth, &c. and so of the like.

PER le course del an. (Post 197. b.)

Lex spectat naturæ ordinem, the law respecteth the order and course of nature. *Lex non cogit ad impossibilia*, the law compells no man to impossible things. The argument *ab impossibili* is forcible in law. *Impossibile est, quod naturæ rei repugnat*. And here it is to be observed, that Littleton puts a diversity betwene corne and roses; for corne will last. And therefore the tenant must deliver the corne presently before the time of growth, (as before is said), and so of saffron, and the like. But roses, or other flowers, that are *fructus fugaces*, cannot be kept, and therefore are not to be delivered till the time of growing. Neither is the tenant driven by law artificially to preserve roses; for the law in these cases respecteth nature, and the course of the

yeare, as Littleton here saith, *et ars naturam imitatur, et sic de similibus*.

Sect. 130.

ITEM si ascun voile demand, pur que home poit tener de son seignior per fealty tantselement pur tous maners des services, entant que quant le tenant ferra fealtie, il jurera a son seignior que il ferra a son seignior tous maners des services dues, et quant il ad

ALSO if any will aske, why a man may hold of his lord by fealty only for all manner of services, insomuch as when the tenant shall doe his fealty, he shal sweare to his lord that he will doe to his lord all manner of services due, and when he hath done fealty in

QUANT le tenant ferra fealty, il jurera a son seignior, &c.

Here it appeareth, that the doing of the fealty is both a performance of his service, and of his oath also when it is done, for that no other service is due; and that one oath of fealty is taken of all that hold, and is not to be changed for any noveltie or nicety of invention; for judges anciently and continually have suppressed innovations, and would in no case change the ancient common law.

31. E. 3. tit. Gager deliverance 5.
38. E. 3. 1. 42. Aff. p. 12. 4. E.
3. ca. 5. 18. E. 3. ca. 4. & 6.
4. H. 4. ca. 2. 2. H. 4. fo. 18.

II

should not be understood to assert that a guardian by nature is not accountable for the profits of the infant's estate; that being a doctrine, which seems inconsistent with the nature of every other kind of guardianship except guardianship in chivalry. It is therefore presumed, that lord Coke's meaning was, that the father shall be deemed guardian in socage, because in that character the law makes him accountable to the son for the value of his marriage as well as for the profits of his lands, whereas in

Il covient que il doit faire a son seignior ascun service. For there can be no tenure without some service; because the service maketh the tenure.

See of this in the chapter of Fee simple, sect. 4.
(1. Ro. Abr. 316. F. N. B. 144.
Ante 13. a.)

Son escheat de la terre. Eschaeta is derived of this word *eschier*, quod est accidere; for an escheat is a casuall profit, quod accidit domino ex eventu et ex insperato, which hapneth to the lord by chance and unlooked for. And of this word eschaeta commeth escheator, an escheator, so called, because his office is to inquire of all casuall profits, and them to seise into the king's hands, that the same may be answered to the king (1).

See more of this in the chapter of Warrantie, sect.

Lands may escheat to the lord two manner of wayes: one by attainder, the other without attainder. By attainder in three sorts. First, *Quia suspensus est per collum.* Secondly, *Quia abjuravit regnum* (2). Thirdly, *Quia utlegatus est.* Without attainder, as if the tenant dies without heire.

Ou per case auter forfeiture. As if the land be aliened in mortmaine, or when Littleton wrote, if the tenants had erected crosses upon their houses or tenements, in prejudice of the lords, that the tenants might claim the privilege of the Hospitlers to defend themselves against their lords, they had forfeited their tenancies. But since Littleton wrote, the Hospitlers are dissolved, and consequently that forfeiture is gone.

W. 2. ca. 33. Flet. li. 2. ca. 43.
& li. 5. ca. 34. 32. H. 3. ca. 24.
(F. N. B. 144.)

Ou profit. As relieve, aid pur file marrier, aid pur faire fitz chevalier, and the like.

fait fealtie en tiel case nul auter service est due: a ceo il poyt estre dit, que lou un tenant tient sa terre de son seignior, il covient, que il doit faire a son seignior ascun service; car si le tenant ne ses heires devoyent faire nul manner de service al seignior ne a ses heires, donque per long temps continue il serroit hors de memorie et de remembrance, le quel la terre fuit tenu de le seignior, ou de ses heires, ou nemy, et donques pluis tost et pluis rediment voilont homes dire, que la terre nest pas tenu del seignior ou de ses heires, que auterment; et sur ceo il seignior perdra son escheat de la terre, ou per case auter forfeiture ou profit que il poet aver de le terre. Issint il est reason, que le seignior et ses heires ont ascun service fayt a eux, pur prover et testifier, que la terre est tenu de eux.

this case no other service is due: to this it may be said, that where a tenant holds his land of his lord, it behooveth that he ought to do some service to his lord; for if the tenant nor his heires ought to do no manner of service to his lord nor his heires, then by long continuance of time it would grow out of memorie, whether the land were holden of the lord, or of his heires, or not, and then will men more often and more readily say, that the land is not holden of the lord, nor of his heires, than otherwise; and hereupon the lord shall lose his escheat of the land, or perchance some other forfeiture or profit which he might have of the land. So it is reason, that the lord and his heires have some service done unto them, to prove and testifie, that the land is holden of them.

Sect.

(1) See further as to escheat and escheator ante 13. and b. 18. b. and note 2. there. 4. Inst. 225. Mad. Excheq. chap. 10. f. 2.
(2) Abjuration, according to the ancient use of the word, had the effect of an attainder; because it was necessarily accompanied with the confession of a felony. But this kind of abjuration is not now in force; the privilege of sanctuary, of which it was consequential, having been taken away by a statute of James the First. See 21. Jam. c. 28. f. 7. 2. Inst. 629. and 2. Hawk. Pl. C. b. 2. c. 32. However the word abjuration is still in use in our law for some purposes. For—1. some statutes, in order to secure the established religion, require persons convicted of certain kinds of recusancy to abjure the realm, on pain of being adjudged guilty of a capital felony; and the word in this sense is similar to the ancient abjuration, and is attended with a like effect. 35. Eliz. c. 1. and 2. 13.—2. In order to secure the succession of the crown as settled at and since the revolution, other statutes make all persons, who refuse to take the oath prescribed for abjuring the pretender and his descendants, liable to various penalties and forfeitures; but this kind of abjuration differs both in object and effect from the ancient one. 13. W. 3. c. 6. 1. An. st. 1. c. 22. 1. G. 1. st. 2. c. 13. 6. G. 3. c. 53.

in the character of guardian by nature he is only accountable for the latter.—(10) Ante 84. a.—(11) Ante 74. b. Though guardian.

Sect. 131.

ET pur ceo que *fealtie est incident a tous manners de tenures, forspris le tenure in frankalmoigne, (scome ferra dit en le tenure de frankalmoign) et pur ceo que le Seignior ne voiloit al commencement del tenure aver ascun auter service, forsque fealtie, il est reason, que home poet tener de son seignior per fealtie tant-solement; et quaut il ad fait son fealtie, il ad fait tous ses services.*

AND for that fealtie is incident to all manner of tenures, but to the tenure in frankalmoigne (1), (as shall be said in the tenure of frankalmoigne) and for that the lord would not at the beginning of the tenure have any other service but fealty, it is reason, that a man may hold of his lord by fealty onely; and when he hath done his fealty, he hath done all his services.

Fealtie est incident.

(4. Co. 8. Post 143. 2.)

Of incidents there be two sorts, viz. separable, and inseparable.

Separable, as rents incident to reversions, &c. which may be severed; inseparable, as fealty to a reversion or tenure which cannot be severed: for as all lands and tenements within England are holden of some lord or other, and either mediately or immediately of the king; so to every tenure, at the least fealty is an inseparable incident, so long as the tenure remains; and all other services, except fealty, are severable. But where the tenure is by fealty only, there is no relieve due for the cause above said (2).

Sect. 132.

ITEM si un home lessé a un auter pur terme de vie certaine terres ou tenements, jauns parler de ascun rent render a le lessor, uncore il ferra fealtie a le lessor, pur ceo que il tient de luy. Auxy si un lease soit fait a un home pur terme de ans, il est dit, que le lessé ferra fealtie a le lessor, pur ceo que il tient de luy. Et ceo est prove bien per les parols del brief de wast, quaut le lessour ad cause de porter brieve de wast envers luy; le quel brieve dira, que le lessé tient les tenements de le lessor pur terme de ans.

ALSO if a man letteth to another lands or tenements for terme of life, without naming any rent to be reserved to the lessor, yet he shall do fealty to the lessor, because he holdeth of him. Also if a lease be made to a man for terme of yeares, it is said, that the lessee shall do fealty to the lessor, because he holdeth of him. And this is well proved by the words of the writ of wast, when the lessor hath cause to bring a writ of wast against him; which writ shall say, that the lessee holds his tenements of the lessor for terme of yeares. So the

SI un home lessé pur terme de vie jauns parler de rent, &c. il fera fealtie, &c.

And (Ante 67. a. 68. 2.) the reason is; because there is a tenure, and fealty (as hath been said) is incident to all manner of tenures; and it is to be noted, that the law, for the suretie of

(1) Tenure at will should be also excepted. See the next section and ante 67. b. note 2. 68. b. n. 5. However even to tenure at will fealty may be incident by the custom of a manor; and so generally, if not universally, it is to copyhold tenures. 10. H. 6. 13. 20. H. 6. 3. Kitch. on Co. ed. 1592 fol. 132.

(2) The reason is plain. Socage relief, being a year's rent, cannot be calculated, if an annual rent is not payable. See ante 85. a. note 1. But as by custom, or by express reservation on creating the tenure, a payment wholly different from and unconnected with the yearly rent may be due for relief; so it may be presumed, that by the same means a relief may be payable, where there is no yearly rent; because the relief is ascertained, without reference to a yearly rent, in both cases equally. See Kitch. on Co. ed. 1592. fo. 103. Here it may not be amiss to advert to some other differences between the several kinds of relief payable by socage-tenants. 1. The proper socage relief, that is, the relief incident to the tenure by socage by the general custom of the realm, is a year's rent, and consequently can never be payable, except where there is an annual rent; but the improper socage-relief, that is, the relief due either by special custom or by express reservation, may be more or less than the annual rent, or may be payable, where there is no annual rent. 2. The socage-relief by common law is only payable on a descent and by a natural person; but the two other reliefs may be due, where the tenant comes in by purchase, or where he takes as a sole corporation by succession. Ante 84. a. 2. Ro. Abr. 517. 518. 3. If the relief claimed is one at common law, it is presumed to be due, till the contrary appears; that is, unless it can be proved, that the relief hath been released, or that the tenure was reserved

guardianship in chivalry is now taken away by act of parliament, it may be useful to recollect some general things concerning it;

of the lord, that his tenant shall be faithfull and loyall to him, doth create such a service as the tenant shall be bound thereunto by oath.

40. E. 3. 34. 9. H. 6. 41. 10. H. 6. 13. 9. E. 4. 1. 21. E. 4. 29. 5. H. 5. 12. 5. H. 7. 11.

Auxi si lease soit fait pur ans, &c. le lessee ferra fealty. For there also is a tenure between them. And *Littleton's* opinion in this case is holden for good law at this day (1).

Vid. Sect. 84.

Et ceo est prove bien per les parols de brieve, &c. *Nota*, the original writs are (as it were) the foundations and grounds of the law, and, as it appears here by *Littleton*, are of great authority for the proove of the law in particular cases (2).

(Ante 63. a. 5. Co. 10.)

Pur ceo que nil nad fuer estate. Therefore tenant at will shall not do fealty (as hath been said before); because the matter of an oath must be certaine. The rest of this section needs no explanation (3).

Issint le brieve prova un tenure enter eux. Mes celuy, que est tenant a volunt solonque le cours del common ley ne ferra fealtie; pur ceo que il nad ascun sure estate. Mes autrement est de tenant a volunt solonque le custome del manor; pur ceo que il est oblige pur faire fealtie a son seignior pur deux causes. L'un est per cause del custome; et l'auter est, pur ceo que il prist son estate en tiel forme pur faire a son seignior fealty.

Writ proves a tenure betweene them. But he, which is tenant at will according to the course of the common law, shal not do fealty; because he hath not any sure estate. But otherwise it is of tenant at will according to the custom of the manor; for that he is bound to do fealty to his lord for two causes. The one is, by reason of the custome, and the other is, for that he taketh his estate in such form to do his lord fealty.

CHAP. 6. Sect. 133.

Frankalmoigne.

Brañ. lib. 2. cap. 5. and lib. 4. ca. 2. Britton fo. 164. 165. Mirror ca. 2. Sect. 18. Glanvil. lib. 7. ca. 1. & lib. 12. ca. 3. & 25 Fleta lib. 3. ca. 5.

21. H. 7. 39. 29. E. 3. 14.

40. E. 3. 20. 8 H. 6. 23. 7. E. 4. 12. 12. H. 8. 8.

UN abbe, prior, auter home de religion, ou de saint eglise. It is to be observed, that of ecclesiasticall persons some be regular, and some be secular. They be called regular, because they live under certain rules, and have vowed three things; true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of religion, he is said to be *home dereligion*, a man of religion, or religious. Of this sort be all abbots, priors, and others of any of the said orders regular. Secular are persons ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are votaries

Tenant en frankalmoigne est, lou un abbe, ou prior, ou un auter home de religion ou de saint eglise, tient de son seignior en frankalmoigne; que est a dire en Latin en liberam eleamofynam. Et tiel tenure commençoit adeprimes en auncient temps en tiel forme; quant un home en auncient temps fuit seise de certain terres ou tenements en son demesne come de fee,

Tenant in frankalmoigne is, where an abbot, or prior, or another man of religion or of holy church, holdeth of his lord in frankalmoigne; that is to say in Latine in liberam eleamofynam, that is, in free almes. And such tenure beganne first in old time, when a man in old time was seised of the lands or tenements in his demesne as of fee, and of the same land infeoffed

et served with an *express exemption* from relief. 3. Lev. 145. Vin. Abr. Evidence A. b. 28. pl. 5. But if the relief be claimed by *special custom* or *special reservation*, the *onus probandi* must necessarily fall upon the lord. 4. If the relief is by the *common law*, it is merely a fruit *incident to the service*; but if the relief is by *express reservation*, it is a *part of the service*. This distinction, however nice it may appear, may be deemed an *essential* one. Relief, when only an *incident to the service*, is not within the limitation of 50 years prescribed for seisin of it by the 32. H. 8. c. 2. as hath been observed in a former note; nor will acceptance of rent stop the lord afterwards from claiming such a relief. Ante 83. a. note 2. Cro. Eliz. 885. But the law seems to be to the contrary in both these particulars, where the relief is *part of the service*. 5. If the relief is by the *common law*, or by *special reservation*, the remedy by distress follows of course; but it is said, that for relief by *special custom*, distress is not warranted without a prescription. W. Jo. 133.—These differences between the three kinds of socage-reliefs lie scattered in the books; and thus bringing them into one point of view may be useful. The learned reader will judge of their propriety. The diligent student may add to their number. See further Co. Copyhold. chap. 2. Survey. Dial. 4th edit. 95. and the case of Hungerford and Havyland in W. Jo. 132. 2. Bulstr. 323. Latch 37. 94. 129. 2. Ro. Rep. 370. O. Bendl. 180.

(1) See ante 67. b. note 2.—(2) See ante 73. b.—(3) It may be proper to conclude this chapter of socage, by pointing out the

it; and for the ease of the student in that respect, the following particulars, selected principally from the chapter of knights-service.

et de mesmes les terres ou tenements enfeoffa un abbe et son covent, ou un pryor, &c. a aver et tener a eux et leur successeurs a tous jours en pure et perpetual almoigne ou en frankalmoigne; [ou pertielx parols, a tener de le grantor, ou de le feoffor, et de ses heires en frankalmoigne:] (1) en tiels cases les tenements sont tenus en frankalmoigne.

an abbot and his covent, or prior and his covent, to have and to hold to them and their successors in pure and perpetuall almes, or in frankalmoigne; or by such words, to hold of the grantor or of the lessor and his heires in free almes: in such case the tenements were holden in frankalmoigne.

they are for distinction sake called secular, as bishops, (4. Co. 104.) deanes and chapters, archdeacons, prebends, parsons, vicars, and such like. All which *Littleton* here includeth under these general words, *de saint eglise*, of holy church; and none of these are in law said to be *homes de religion*, or religious.

Where *Littleton* saith (*infeoffa un abbe et son covent*) his meaning is, that the abbot only is infeoffed; for he is only a person capable, and the covent are dead persons in law, and have power of assent only, and that they thereunto assent. But since *Littleton* wrote, all abbeyes, priories, monasteries, and other religious houses of

See the statutes of 27. H. 8. not printed, but in the abridgement, 31. H. 8. cap. 13, and 32. H. 8. ca. 24. &c. Vide sect. 530.

monkes canons friers and nuns &c. have been dissolved, and their possessions given to the crowne (2).

The ecclesiasticall state of England, as it standeth at this day, (which is necessary for our student to know) is divided into two provinces, or archbishopricks, (*viz.*) of Canterbury, and of Yorke. The archbishop of Canterbury is styled *Metropolitanus et Primas totius Angliæ*, and the archbishop of Yorke *Primas Angliæ*. Each archbishop hath within his province suffragan bishops of severall diocesses (3). The archbishop of Canterbury hath under him within his province, of ancient foundations, *viz.* Rochester his principall chaplaine, London his deane, Winchester his chancellor, Norwich, Lincolne, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Litchfield, Hereford, Landaffe, St. David, Bangor, and St. Asaph, and four founded by king Henry 8. erected out of the ruins of dissolved monasteries (that is to say) Gloucester, Bristow, Peterborow, and Oxford. The archbishop of Yorke hath under him four, (*viz.*) the bishop of the county palatine of Chester newly erected by king H. 8. and annexed by him to the archbishopricke of Yorke, the county palatine of Durham, Carlisle, and the tle of Man annexed to the province of Yorke by H. 8. but a greater number this archbishop anciently had, which time hath taken from him. The extent of every diocesse you may elsewhere read, the which for brevity I here omit. All the said archbishopricks, and bishopricks of England were founded by the kings of England, to hold by barony, as hereafter shall be said (4). And every archbishop and bishop hath his deane and chapter, whereof more shall be said hereafter. The archbishop of Canterbury hath the pre-dencie, next to him the archbishop of Yorke, next to him the bishop of London, and next to him the bishop of Winchester (5), and then all other bishops of both provinces after their ancientnesse.

(4. Inst. 321.)

Math. Parker de vitis archiepiscoporum. Linwood. Camden Britannia. Vid. Rot. parliam. anno 36. H. 8. 1. E. 6. 5. E. 6. &c. Westminster also was newly erected a bishopricke by H. 8. but by queene Mary it was restored to be an abbey, and by queene Eliz. created a deanry collegiate. Chester had been anciently a bishop's see, and long since translated to Coventry. 33. H. 8. ca. 31. Camden ubi supra. 26. H. 8. first fruits and tenths. Vid. Sect. 137.

3. Co. 73. deane and chap. of Norwich case. Vide Sect. 134. 201. 31. H. 8. cap. 10.

Every diocesse is divided into archdeaconries, whereof there be 60; and the archdeacon is called *oculus episcopi*; and every archdeaconry is parted into deanries; and deanries again into parishes, townes and hamlets. And thus much, for the better understanding of our author, and how the state ecclesiasticall standeth at this day, shall suffice.

Vide more hereof, sect. 180. 528. 648. &c.

Frankalmoigne, que est a dire en Latine, in liberam eleemosinam.

In English in free almes. There is an officer in the king's house called *eleemosinarius*, vulgarly called the king's almoner (whose office and duty is excellently described in ancient authors), *viz.* *Fragmenta diligenter colligere, et diligenter distribuere singulis diebus egenis; agrotos et leprosos, incarceratos, pauperesque viduas, et alios egenos vagosque in patria commorantes charitative visitare: item equos relictos, robas, pecuniam, et alia ad eleemosinam largita recipere, et fideliter distribuere. Debet etiam regem super eleemosinæ largitione crebris summotionibus stimulare, præcipue diebus sanctorum, et rogare ne robas suas, quæ magni sunt pretii, histrionibus, blanditoribus, accusatoribus, seu menistrallis, sed ad eleemosinæ suæ incrementum, jubeat largiri* (6).

Fleta lib. 2. cap. 23.

All ecclesiasticall persons may hold in frankalmoigne be they secular or regular; and no lay person can hold in frankalmoigne. This adjective (*liber*) doth distinguish many things in law from others; as here *libera eleemosina* are words appropriated to this case, and doth distinguish it from a tenure by divine service; *liberum tenementum* from a tenure in villenage or by copyhold or base tenure; *liberum feudum* franke fee from a tenure in ancient demeané; *liberum*

Vide Sect 1. Bract. lib. 4. c. 37. 38. Britton cap. 32.

the several changes made in the tenure of socage by the statute of the 12. Cha. 2. c. 24. so often mentioned. 1. It takes away the aids *pur fide marier* and *pur faire fize chevalier*, which were incident to all socage-tenures. 2. It relieves socage *in capite* from the burthen of the king's *primer seisin* and of *fines of alienation to the king*; to both of which *socage in capite* was equally liable with tenure by *knights service in capite*, though not so to *wardship*. It extends the father's power of appointing guardians by deed or will, which by the 4. and 5. Phil. and Mar. the first statute conferring such a power was restricted to *female* children, to children of *both* sexes, and thus supplied the means of still further preventing guardianship in socage. In all other respects the tenure in socage seems to be under the same circumstances, and attended with the same consequences, as it was before the Restoration. But the statute of Charles the Second goes further than the mere alteration of socage; and having thus reformed and improved this favourite tenure, in the next place provides for the extension of it throughout the kingdom. This the statute effectually secures, by converting into socage all tenures by knights service, and by taking from the crown the power of creating any other tenure than socage in future.

(1) The words between brackets are in L. and M. but not in Roh.—(2) The student will find a good history of the dissolution of monasteries in England in the excellent preface to that most valuable work the *Notitia Monastica*, by bishop Tanner.—(3) Here bishops are styled suffragans in respect of their relation to the archbishop of their province; but formerly each archbishop and bishop had also his suffragan, to assist him in conferring orders and in other spiritual parts of his office within his diocese. These in our ecclesiasticall law are called suffragan-bishops, and resemble the *chorepiscopi* or *bishops of the country* in the early times of the christian church. How this inferior order of bishops may be elected and consecrated is regulated by the 26. H. 8. c. 14. but notwithstanding this statute, it is not usual to appoint them.—They should not be confounded with the *co-adjutors* of a bishop; the latter being appointed in case of the bishop's infirmity to superintend his jurisdiction and temporalities; neither of which was within the interference of the former. See fully on this subject in Gibb. Cod. 1st ed. v. 1. p. 155.—(4) See ante 70. b. note 2. post 164. a.—(5) This is a mistake; for the statute, by which precedency is principally regulated, gives the bishop of Durham place between the bishop of London and the bishop of Winchester. See 31. H. 8. c. 10. f. 3.—(6) The office of king's almoner is usually given to the archbishop of York, with the title of lord high almoner.

service, are brought into one point of view.—Guardianship in chivalry could only be where the estate vested in the infant by descent.

Britton cap. 66. Bract. lib. 4. f. 288. 247. 292. Britton fol. 245. Fleta lib. 5. cap. 11. Fortescue c. 26. 24. E. 3. 34. 43. E. 3. Conspir. 11. 27. Ail. 59. Stanf. 175. Vide Sect. 199. Fleta lib. 1. cap. 47.

Glanvil. lib. 7. ca. 1. fo. 44. 45. acc.

Britton ca. 66. fol. 164. Bract. lib. 2. cap. 5. & 10. F. N. B. 211.

Fleta lib. 1. cap. 42.

7. E. 4. 12. 33. H. 6. 6. 7.

39. H. 6. 29.

[a] Mortmaine.

Britton fol. 32. & 90. Bracton

lib. 2. cap. 5. Fleta lib. 3. cap.

5. 11. H. 7. 12.

(2. Ro. Abr. 61.)

39. H. 6. 30. b.

(1. Ro. Abr. 832.)

Vid. Litt. in the chapter of Fee simple. Sect. 1. 2.

39. H. 6. 30.

35. H. 6. 56. 7. E. 4. 11. Vid. Bracton lib. 2. ca. 10.

35. H. 6. 56. 7. E. 4. 11. Bract. ubi. supr. 44. E. 3. 24.

20. H. 6. fol. 36.

38. E. 3. 4. 3. 14. H. 6. 12. 10. H. 7. 13. 16. H. 7. 9. 18. E. 3. Consilans 39. 33. H. 6. 22. 17. E. 3. 51. 6. E. 3. 54. & c. Tr. 5. H. 3. Rot. 4. in Scaccario. The prior of Donstable's case.

(1) See Wright's Ten. 167.

(2) See post sect. 140.

(3) In general a corporation aggregate cannot take or pass away an interest in land, or even do any acts of importance, without deed; but there are several exceptions to the rule. See ante 66. b. Vin. Abr. Grants D. a. Corporation K. Com. Dig. Franchises F. 12. 13. 14. New Abr. Corporation E. 3.

(4) Contra 1. Ro. Abr. 832.—Also in the following annotation by lord Hale, which he gives at the bottom of fol. 8. b. several authorities are cited to the contrary. Vid. 7. E. 3. 41. 11. H. 4. 84. Gift to abbot and monks passeth fee simple. If an abbot makes lease reddendo rent nobis, it enures to the successor. 20. H. 6. 8. Land granted to the abbot of S and his heirs is only for life. 9. H. 5. 9. Hal. MSS. See further the authorities cited in Vin. Abr. Estate L. pl. 1.

(5) Acc. ante 8. b. But some take a distinction between describing a sole corporation both by his natural and politick name, and describing him by his politick name only; and it hath been resolved, that a visitatorial power, granted to the bishop of Ely over Trinity College Cambridge in the latter way, ought to be construed as a grant to the bishop of Ely for the time being, and therefore extended to successors. This point was adjudged in Dr. Bentley's case. See 2. Stra. 913. Fitz-Gibb. 308. 312. 1. Barnard. 453.

descent.—All males under 21 at the ancestor's death were liable to it; but not females, unless they were then under 14.—It extended not only to the person of the infant, but also to all such of the infant's lands or tenements as were within the guardian's feignory; and if the king was guardian in respect of a tenure in capite, then to the whole of the infant's estate, of whomsoever holden, what.

berum maritagium from other estates taile; *libera firma* frank ferme, when an estate is changed from knights service to socage; *liberum socagium* from a tenure by service in chivalrie; *francus bancus* to distinguish it from other dowers, for that it cometh freely without any act of the husband's or assignement of the heire; *libera lex* to distinguish men, who enjoy it, and whose best and freest birthright it is, from them, that by their offences have lost it, as men attainted in an attain, in a conspiracie upon an indictment, or in a premunire, &c. And so of *libera capella*, *francus plagius* frankpledge, *libera chasea* free chase, *liber burgus*, *liber aper*, *liber taurus*, and the like. But in a matter (some will say) of curiosity, this shall suffice; and yet seeing it tends to the better understanding (others say) it is tolerable.

By the ancient common law of England, a man could not alien such lands as he had by descent, without the consent of his heire; (1) yet he might give a part to God in free almoigne, or with his daughter in free marriage, or to his servant in remuneratione servitii. Our old bookes described frankalmoign thus; when lands or tenements were bestowed upon God, (that is) given to such people as are consecrated to the service of God. In our ancient bookes these gifts of devotion were called churchfett, or churchseed, *quasi semen ecclesie*; but in a more particular sense it is described thus. *Certam mensuram bladi tritici significat, quam quilibet olim sancte ecclesie die sancti Martini, tempore tam Britonum quam Anglorum, contribuerunt. Plures tamen Magnates, post Romanorum adventum, illum contributionem secundum veterem legem Moysi nomine primitiarum dabant, prout in brevi regis Knuti ad summum pontificem transmissa continetur, in quo illam contributionem Churchsed appellant quasi semen ecclesie.*

Et tiel tenure. For albeit neither fealty, nor any other temporall service, is due, yet it is a tenure.

En ancient temps. [a] That is to say before the statutes of mortmaine, viz. magna charta, cap. 36. and 7. E. 1. de religiosis, &c. and before the statute of quia emptores terrarum, as shall be hereafter in his proper place said in this chapter (2).

Enfeoffa un abbe et son covent, &c. Albeit the covent be dead persons in law, and the abbot only capable (as before is said) yet if the feoffment be made to an abbot and covent, the feoffment is good, and the state vesteth only in the abbot. And note a man may infeoffe an abbot, a bishop, a parson, &c. or any other sole body politique, by deed or without deed, in free almes; and so may a gift in frankmarriage be made without deed also; but if lands be given to a deane and chapter, or any other corporation aggregate of many, there the gift must be by deed (3).

A ver et tener a eux et a leur successors. For in case an abbot or prior and covent regularly a fee simple doth not passe without these words (successors); (4) for the diversity standeth thus betwene a corporation aggregate of many capable persons, and a sole corporation. As if lands be given to a deane and chapter, they have a fee simple without these words (successors) for that the body never dies; but if lands be given to a bishop, parson, or any other sole corporation, who after their deceases have a succession, there without these words (successors) nothing passeth unto them but for life (5). But of corporations aggregate of many, there is a diversity when the head and body both are capable, as in the case of deane and chapter, and when one (as hath been said) is onely capable, as in case of abbot or prior and covent; but yet out of the generall rules, the case of frankalmoign is excepted, as hereafter shall be said. Also lands must be given to a corporation aggregate of many by deed; but to a sole corporation it may be granted without deed.

Bracton lib. 2. cap. 10. *Potest donatio fieri in liberam elemosinam ecclesiis cathedralibus, conventualibus, parochialibus, et viris religiosis.*

En pure et perpetuall almoigne. Here it appeareth, that a tenure in frankalmoigne may be created without the word (*libera*) for *pura* implyeth as much.

Ou en frankalmoigne. But one of these words, either *pura* or *libera*, must be used, or else it is no tenure in frankalmoigne.

Ou per ceux parolx a tener de le grantor ou feoffor et ses heires en frankalmoigne. Here it appeareth, that by these words a fee simple passeth without these words (successors), albeit it be in case of a sole corporation. For as in case of a gift in frankmarriage, an estate taile passeth to the donees without words of heires of their two bodies, as hath been said in the chapter of Fee taile; so in case of a gift in frankalmoigne (which may be resembled to a divine marriage), a fee simple passeth, as hath bin said, though it be in case of a sole corporation, without this word (successors). And besides, grants in frankalmoigne are ancient grants as hath been said, and therefore shall be allowed, as the law was taken, when such grants were made.

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Sect. 134.

EN mesme le man- **IN** the same manner
ner est, lout terres it is, where lands or
ou tenements fueront tenements were grant-
grant en ancient ed in ancient time to
temps a un deane et a deane and chapter
chapter et a leur suc- and to their succes-
cessors, ou a un par- sors, or to a parson of
son dun esglis et a ses a church and his suc-
successeurs, ou a ascun cessors, or to any other
auter home de saint man of holy church
esglis et a ses succes- and to his successors,
sors, en frankal- in frankalmoigne, if
moigne, si il avoit he had capacite to
capacity dapprender take such graunts or
tiels grants ou feoff- feoffments, &c.
ments, &c.

clericorum congregatio sub uno decano in ecclesia cathedrali (2). And chapters be twofold, viz. the ancient, and the later. And the later be also of two sorts. First, those which were translated or founded by king Henry the Eight, in place of abbots and convents, or priors and convents, which were chapters whiles they stood; and these are new chapters to old bishopricks. Secondly, where the bishopricke was newly founded by Henry the Eight (as Chester, Bristol, &c.) there the chapters are also new (3). There is a great diversitie betweene the commings in of the ancient deane, and of the new. For the ancient come in, in much like sort as bishops doe; for they are chosen by the chapter, by a *conge de eslier*, as bishops be, and the king giving his royall assent they are confirmed by the bishop. But they, which are either newly translated or founded, are donative, and by the king's letters patents are installed, which are matters necessarie to be knowne (4).

Sil avoit capacite a prender. For ecclesiasticall persons have not capacite to take in succession, unless they be bodies politique, as bishops, archdeacons, deanes, parsons, vicars, &c. or lawfully incorporate by the king's letters patents, or prescription, as deanes and chapters, colledges, &c. But a colledge of religious persons, chauntry priests, and such like, that are not lawfully incorporated, but onely consist in vulgar reputation, have no capacity to take in succession. Therefore Littleton added materially (*sil ad capacite a prender.*)

Sect. 135.

ET tiels, que teig- **AND** they, which
nont en franke- hold in frankal-
almoigne, sont oblige moigne, are bound of
de droit devant Dieu right before God, to
de faire orisons, prai- make orisons, pray-
ers, mess. et autres di- ers, masses, and other
vine services, pur les divine services, for the
almes de leur grantor soules of their grantor
ou feoffor et pur les or feoffor, and for the
almes de leur heires soules of their heires

EN mesme le man- **IN** this section there ap-
ner, &c. Here Lit- peareth a division of te-
tleton, having put an exam- nures, that is to say, some
ple of bodies incorporate ag- be spirituall, and some be
gregate of many, whereof temporall. And of spirituall
the head is only capable, some be incertain, as tenures
now putteth examples both in frankalmoign; and some
of bodies incorporate, aggre- be certain, as tenures by
gate of many (all being capa- divine service. Again, divine
ble) and of sole corporations service certaine is two fold,
of secular persons.

Deane. *Decanus* is derived of the Greek word *δεκα* that signifieth Ten; for that he is an ecclesiasticall secular governour, and was anciently over ten prebends, or canons at the least in a cathedral church, and is head of his chapter (1).

Chapter. *Capitulum est* (3. Co. 73.)

IN this section there ap-
peareth a division of te-
nures, that is to say, some
be spirituall, and some be
temporall. And of spirituall
some be incertain, as tenures
in frankalmoign; and some
be certain, as tenures by di-
vine service. Again, divine
service certaine is two fold,
either spirituall, as prayers
to God, or temporall, as dis-
tribution of almes to poore
people.

Oblige

(1) Various kinds of deans, besides deans of chapters, are known to our law; and it requires more divisions than one to distinguish them properly. Considered in respect of the difference of office, deans are of six kinds. 1. Deans of chapters, who are either of cathedral or collegiate churches; though the members of churches of the latter sort may more properly be denominated colleges than chapters. 2. Deans of peculiars, who have sometimes both jurisdiction and cure of souls, as the dean of Batel in Sussex, and sometimes jurisdiction only, as the dean of the Arches in London, and the deans of Bocking in Essex and of Croydon in Surrey. 3. Rural deans. 4. Deans in the colleges of our universities, who are officers appointed to superintend the behaviour of the members and to enforce discipline. 5. Honorary deans, as the dean of the Chapel Royal at St. James's, who is so styled on account of the dignity of the person over whose chapel he presides. As to the chapel of St. George Windsor, there being canons as well a dean, it is something more than a mere chapel, and, except in name, resembles a collegiate church. 6. Deans of provinces, or, as they are sometimes called, deans of bishops. Thus the bishop of London is dean of the province of Canterbury, and to him as such the archbishop sends his mandate for summoning the bishops of his province, when a convocation is to be assembled; which perhaps may account for calling the dean of the province dean of the bishops. What the other parts of his office are, the books we have been able to consult do not explain; nor do they mention whether there is a dean for the province of York. See Lyndw. Oxf. ed. 317. Gibf. Synod. Anglican. 17. Ante 94. a.—Another division of deans arises from the nature of the office, and is into deans of spiritual promotions and deans of lay promotions. Of the former kind are deans of peculiars with cure of souls, deans of the royal chapels, and deans of chapters; though as to these last a contrary opinion formerly prevailed. Perhaps too rural deans may be added to the number. Of the latter kind are deans of peculiars without cure of souls, who therefore may be and frequently are persons not in holy orders.—In respect of the manner of appointment,

whatever the tenure, and whether lying in tenure or not.—If the infant heir held lands by knights service of several lords, each

Oblige de droit. That is they are compellable by the ecclesiasticall law to doe it; and therefore it is said that they are bound of right, (for want of remedy, and want of right is all one) and the common law (as here it appeareth) taketh knowledge of the ecclesiasticall law in that behalfe.

De faire orisons, prayers, messes, et autres divine services.

Since Littleton wrote, the lyturgie or booke of Common Praier and of celebrating divine service is altered. This alteration notwithstanding, yet the tenure in frankalmoigne remaineth; and such prayers and divine service shall be said and celebrated, as now is authorised; yea, though the tenure be in particular, as Littleton

[a] hereafter saith, viz. *A chaunter un messe, &c. ou a chaunter un placebo et dirige,*

yet if the tenant saith the praier now authorised, it sufficeth. And as Littleton [b] hath said before in the case of socage, the changing of one kinde of temporall services into other temporall services altereth neither the name nor the effect of the tenure; so the changing of spirituall services into other spirituall services altereth neither the name nor effect of the tenure. And albeit the tenure in frankalmoigne is now reduced to a certaintie contained in the booke of Common Prayer, yet seeing the originall tenure was in frankalmoigne, and the change is by generall consent by authority of parliament, [c] whereunto every man is party, the tenure remaines as it was before.

Ne ferront ascun fealtie. Herein tenant in frankalmoigne differeth from a tenant in frankmariage; for tenant in frankmariage shall doe fealty, as hath beene said in the chapter of Fee taile, but tenant in frankalmoigne shall not doe any, or any other thing, but *devota animarum suffragia.*

Tiel divine service est melieur pur eux. And it is also said in our bookes, [d] *que frankalmoigne est le plus haute service,* and this was confessed by the heathen poet.

— fuit hac sapientia quondam

Publica privatis discernere, sacra profanis.

And certaine it is, that *nunquam res humana prosperè succedunt, ubi negliguntur divinae.*

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LE seigniour ne **E**T si tiels, que **A**ND if they, which
poet eux disfrei- teignent leur hold their tene-
ner pur cest non fea- tenements en frank- ments in frankalmoign,
sant, &c. almoigne, ne voilont will not or faile to do
Disfreine. The ou failont de faire tiel such divine service (as
di-

pointment, deans are, 1. *Elective*, as deans of chapters of the old foundation; though they are only so nominally and in form, the king being the real patron, which will appear from the next note but one. 2. *Donative*, as those deans of chapters of the new foundation, who are appointed by the king's letters patent, and are installed under his command to the chapter, without resorting to the bishop either for admission or for a mandate of installment; if that mode of promoting still prevails in respect to any of the new deaneries. See the next note but one. Deans of the royal chapels are also *donative*, the king appointing to them in the same way. So too may deans of peculiars without cure of souls be called, as the dean of the *Arches*, who is appointed by commission from the archbishop of Canterbury; but this must be understood in a large sense of the word *donative*, it being most usually restrained to *spiritual* promotions. 3. *Presentative*, as some deans of peculiars with cure of souls, and the deans of some chapters of the new foundation if not of all. Thus the dean of Battel is presented by the patron to the bishop of Chichester, and from him receives institution. Thus too the dean of Gloucester is presented by the king to the bishop with a mandate to admit him and to give orders for his installment. See the next note but one. 4. *By virtue of another office*, as the bishop of London is dean of the province of Canterbury, and the bishop of St. David is dean of his own chapter.—Again in respect of the manner of holding, deans are so *absolutely*, or in *commendam*. But this division applies only to *spiritual* deaneries.—In thus pointing out the several denominations of deans, we have attempted a more comprehensive as well as a nicer general discrimination and arrangement, than the books usually resorted to furnish; though to them we are indebted for most of the materials, and to them we refer the student for a competent idea of the nature of each kind of deanery. See *Decanus* and *Deanery* in Spelm. Gloss. Cow. Dict. Ayl. Parerg. Nelf. Rights of the Clerg. Burn. Eccles. L. and the Index to Gibb. Cod.—(1) But the name of chapter is not confined to

each lord had the wardship of the land within his feignory; and as to the body, the wardship of it belonged to that lord, of whom

divine service (come est dit) le seignior ne poit eux distraire pur cel non fesant, &c. pur ceo que nest mis en certaine, quelx services ils doivent faire. Mes le seignior de ceo poit complaine a lour ordinary ou visiteur, luy preyant, que il voiloit mitter punishment et correction de ceo, et auxy de provider que tiel negligence ne soit plus avant fait, &c. Et lordinary ou visiteur de droit ceo doit faire, &c.

is said) the lord may not distraine them for not doing this, &c. because it is not put in certainty what services they ought to do. But the lord may complaine of this to their ordinary or visiteur, praying him, that he will lay some punishment and correction for this, and also provide that such negligence be no more done, &c. And the ordinary or visiteur of right ought to doe this, &c.

word distresse is a French word. In Latine it is called *distressio*, sive *angustia*; because the cattell distrained are put into a strait, which we call a pown.

Pur ceo que nest mise en certaine quelx services ils doivent faire.

It is a maxim in law, that no distresse can be taken for any services, that are not put into certainty [e] nor can be reduced to any certainty; for, *id certum est, quod certum reddi potest*; for [f] *oportet quod certa res deducatur in iudicium*; and upon the avowry, damages cannot be recovered for that, which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor; and this is certaine

[e] 35. H. 6. 37. Br. tit. Off. fic. 4. 8 E. 3. 3. 66. 20. E. 3. Avowry 131. (Cro. Cha. 383. Cro. Jam. 585. 1. Sid. 263.) [f] Bracton fol. 230. & 328. (Post 142.)

7. E. 3. 38.

enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this incertainty, being referred to the manor which is certaine, the lord may distrain for this uncertainty. *Et sic de similibus.*

Poit complayner. That is, to complaine in course of justice, according to the ecclesiasticall law. (5. Co. 73. a.)

A lour ordinarie. *Ordinarius*, and so he is called [g] in the ecclesiasticall law, *quia habet ordinariam jurisdictionem in jure proprio, et non per deputationem.* The name we have anciently taken from the canonists, and doe apply it onely to a bishop, or any other that hath ordinary jurisdiction in causes ecclesiasticall. In this case of Littleton it is to be observed, that the law doth appoint every thing to be done by those, unto whose office it properly appertaineth; and forasmuch as it belongeth to the office of the ordinary in this case to see divine service said, and to compell them to doe it by ecclesiasticall censures, therefore complaint is to be made unto him. Here and in the next section it appeareth, that for deciding of controversies, and for distribution of justice within this realme, there be two distinct jurisdictions. The one ecclesiasticall, limited to certaine spirituall and particular cases (of the one whereof our author here speaketh) and the court wherein these causes are handled, is called *forum ecclesiasticum*. The other jurisdiction is secular and generall; for that it is guided by the common and generall law of the realme. *Quæ pertinet ad coronam et dignitatem regis, et ad regnum in causis et placitis rerum temporalium, in foro seculari.* So as in this case put by our author, the lord hath remedy for his divine service (albeit they issue out of temporall lands) in *foro ecclesiastico*, by the ecclesiasticall law; otherwise the lord should be without remedy. Yet the common law, to the intent that ecclesiasticall persons might the better discharge their duty in celebration of divine service, and not to be intangled with temporall businesse, hath provided, that if any of them be chosen to any temporall office, he may have his writ de clerico infra sacros ordines constituto non eligendo in officium, &c. and thereof be discharged.

[g] Mirror ca. 5. sect. Bracton lib. 5. fo. 405. &c. Fleta lib. 2. ca. 50. & 55. & lib. 6. ca. 38. Britton fo. 69. 70. W. 2. ca. 19. 17. E. 2. Bre. 822. Regist. 141. Lindwood, tit. de Constit. cap. ext. Bract. lib. 5. ca. 2. fo. 400. & 401. and the other Authors above aid. (Post 344. 9. Co. 37. 2. Inst. 398.)

Regist. Orig. 187.

Ou visiteur. That is, where the king or any of his progenitors is founder of the house, there the ordinary regularly shall not visit them, but the chancelour of England is appointed by law to be visiteur of them; or where a speciall visiteur is appointed upon the foundation, the complaint must be made to that visiteur.

27. E. 3. 84. 85. Regist. 40. F. N. B. 42. 10. Eliz. Dier 273. 16. E. 3. Bre. 660. 21. E. 3. 60. 6. H. 7. 13. 8. Ass. 29. Brooke tit. Premunire 21.

De droit doit ceo faire. *De droit*, of right, (that is to say) he ought to doe it by the ecclesiasticall law in the right of his office.

And here is implied a maxime of the common law, that where the right (as our author here speaketh) is spirituall, and the remedy therefore onely by the ecclesiasticall law, the consue- (5. Co. 66. b. 2. Co. 43. Plowd. 277.)

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to cathedrals, the prebendaries and canons of *collegiate* churches being also styled chapters; though rather improperly, as we have before hinted.—(3) The new deaneries and chapters to old bishopricks are eight; namely, Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle. The new deaneries and chapters to new bishopricks are five; namely, Peterborough, Chester, Gloucester, Bristol, and Oxford. See Will. Cathedr.—(4) In this account of the old and new deaneries, many particulars, relative to the manner of coming to the possession of them, are omitted; and therefore we shall add some general things historically in respect to both.

As to the old deaneries, it will be very difficult to trace the subject, with any tolerable degree of precision, higher than the reign of king John, or to ascertain what was the legal mode of constituting deans of chapters before. If our ancient chronicles are to be depended upon, nothing could be more variable than the practice for several reigns after the Conquest. Thus in the church of York, we find sometimes the archbishop collating to the deanery, sometimes the king conferring, and sometimes the chapter electing; and it is probable, that a like uncertainty prevailed in other cathedrals. See Drake's Antiq. York 557. to 565. 1 Will. Surv. Cathedr. 64. At length however after many struggles the elective mode of constituting deans, as well as bishops, abbots, and priors, was established throughout the kingdom; for king John by a charter of the 16th of his reign grants, *ut de cetero, in universis et singulis ecclesiis et monasteriis cathedralibus et conventualibus totius regni nostri Anglia, libera sint in perpetuum electiones quorumcunque praelatorum majorum et minorum*; and deans of chapters clearly fall within the description of *minor prelates*. See king John's charter in 1. Coll. Eccles. Hist. Append. No. 33. and as to the word *praelatus*, consult Lyndw. Oxf. Ed. 41. and

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whom the tenure was most ancient, he being styled the lord by *priority*, and the others lords by *posterority*. But this must be under-

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2. E. 3. 27. 28.

(5. Co. 72. b. F. N. B. 209. L.)

33. H. 6. 26. 27.

2. E. 6. ca. 13. *versus finem*.
 13. E. 3. ca. 5. 11. H. 7. c. 8.
 1. El. ca. 2. 13. El. ca. 1. 23.
 El. ca. 1. 1. Ja. c. 11. & 12.

(4. Co. 20.)

PER certaine divine service destre fait, sicome a chaunter un messe, &c. ou de distributer en almoign,

&c. Here be the two parts above mentioned, of divine service; and for this divine service certaine, the lord hath his remedy, as here it appeares by our author *in foro seculari*: for here it appears, that if the lord distreine for not doing of divine service, which is certaine, he shall upon his avowry recover damages at the common law, that is, in the king's temporal court, for the not doing of it. And if issue be taken upon the performance of the divine service, it shall be tried by a jury of twelve men; because albeit the service be spirituall, yet the damages are temporall, and so is the feignory also.

And here is implied another maxime of the law, that where the common or statute law giveth remedy *in foro seculari*, (whether the matter be temporall or spiritual) the confusions of that cause belongeth to the king's temporall courts only; unlesse the jurisdiction of the ecclesiastical court be saved or allowed by the same statute, to proceed according to the ecclesiastical lawes.

Ou de distributer en almoigne al cent poves homes. Here note, that the almes and reliefe of poore people, being a worke of charity, is accounted in law divine service; for what herein is done to the poore for God's sake, is done to God himselfe.

Poet distrein, &c.
 Here (&c.) includeth many

MES si un abbe, ou prior, tient de son seignior per certaine divine service, en certaine destre fait, sicome a chaunter un messe chescun vendredie en le semaine pur les almes, ut supra, ou chescun an a tiel jour a chaunter placebo et dirige, &c. ou de trover un chapleine de chanter messe, &c. ou de distributer en almoigne al cent poves homes cent deniers a tiel jour; en tiel case, si tiel divine service ne soit fait, le seignior poet distreiner, &c. pur ceo que le divine service est mise en certaine per lour tenure, que le abbe ou prior devoit faire. Et en tiel case le seignior avera fealtie, &c. come il semble. Et tiel tenure nest passe dit tenure en frankalmoigne; eins est dit tenure per divine service; car en tenure en frankalmoigne nul mention est fait d'aucun manner de service; car nul poet tener en frankal-

BUT if an abbot, or prior, holds of his lord by a certaine divine service, in certaine to be done, as to sing a masse everie Friday in the weeke, for the soules, ut supra, or every yeare at such a day to sing a placebo et dirige, &c. or to finde a chaplain to sing a masse, &c. or to distribute in almes to an hundred poore men an hundred pence, at such a day; in this case if such divine service be not done, the lord may distreine, &c. because the divine service is put in certaine by their tenure, which the abbot or prior ought to doe. And in this case the lord shall have fealtie, &c. as it seemeth. And such tenure shall not be said to be tenure in frankalmoigne, but is called tenure by divine service; for in tenure in frankalmoigne no mention is made of any manner of service; for none can hold in frankalmoigne, if there be expressed any manner

moigne

217. But notwithstanding the strong terms, in which the freedom of canonical election is provided for by this charter, and the repeated confirmation of it by various statutes, the election of a dean by the chapter is by long practice converted into a mere form, and the king is in reality as much the patron of the *old*, as he is both in name and substance of the *new* deaneries. For two centuries past at least, the king's *congè d'élire*, which by the charter of John must precede every election of a prelate and was in use long before, hath been invariably accompanied with the king's *letter missive*, as it is styled, recommending a particular person, whom the chapter of course elect their dean. In the case of the *old bishopricks*, which are filled in the same form, the election of the person named by the crown is secured by a statute of the 25th of Henry the Eighth, which compels the chapter to yield to the recommendation by the pains of a *premunire*, and if they refuse authorizes the king to appoint a bishop by letters patent. See Post 134. a. But no such statute hath been yet made in respect to the *old* deaneries; and therefore the right of the crown over them rests wholly on the charter of king John and the subsequent practice. Here then it may be asked, how the crown, without the aid of a statute, can enforce its claim of patronage; and what are the means, by which the nomination would be made effectual if the chapter should disregard the royal recommendation, and persevere in a *free* exercise of the right of electing? This question may be resolved, by considering, that even the charter of king John requires the king's confirmation of the choice made by the chapter; and therefore by refusing to confirm he may always prevent the effect of their election. Nay it hath been said, that the election is so wholly a ceremony as not even to be essential, and that even before any act of parliament to dispense with it the king might nominate to the *old* bishopricks by letters patent, without resorting to the chapter for the form of their concurrence; and the *old* deaneries are within the same reason. See the case of Revan O'Brian in Cro. Jam. 552. Palm. 22. and 2. Ro. Rep. 101. 130. and f. c. cited in F. N. B. 4to ed. 396. note (a). This doctrine, it must be owned, notwithstanding the positive terms in which it was asserted, and the reverence due to the judges by whom it was recognised, seems as repugnant to the *letter* of king John's charter, as the mode of electing in conformity to the *letter missive* certainly

understood with an exception of the king; for if any lands of the infant were holden of the king by knights service *in capite*, he

*moigne, si soit ex- of certaine service that
presse ascun manner he ought to doe, &c.
de certain service que
il doit faire, &c.*

excellent things, as when,
where, and what may be di-
streynd, of all which there
is a taste given in their pro-
per places.

En tiel case le seignior avera fealtie, &c. come semble. For, as it hath
beene said, fealty is incident to every tenure, saving the tenure in frankalmoigne; and where
the lord may distreine, there is fealty due. And Britton calleth this tenure (by divine service) *Brit. fo. 164.*
aumone, and not *libera elemosina*. And, saith he, *tenure en aumone est terre ou tenement que est
dene a aumone, douant ascun service est retenue al seoffor.*

&c. And here (*&c.*) implyeth distresse, escheat, and the like.

*Et tiel tenure nest passe dit tenure en frankalmoigne, eins est dit te-
nure per divine service, &c.* And therefore our old bookes divided spirituall service
into free almes, (which was free from any limitation of certainty) and almes, because the
tenants were bound to certaine divine services.

Sil soit expresse ascun manner de certaine service. This holdeth where the
certainty is reserved upon the original grant. If lands were given to hold in *libera elemosina*,
reddendo a rent, it seemeth the reservation of the rent to be void; * because it is repugnant
and contrary to the former grant in *libera elemosina*.

Vide Trin. 4. E. 3. and F. N. B. 231. f. That an abbot or prior that hold in frankalmoigne,
shall not be charged with a corody. Also lands holden in frankalmoigne cannot [1] be ancient
demesne, in respect of charges incident thereunto.

Que il doit faire, &c. Here by (*&c.*) is understood temporall or spirituall service
also, which he ought to doe corporally, or render, or pay.

There were within this realme of Englande one hundred and eightene monasteries,
founded by the kings of Englande; whereof such abbots and priors, as were founded to hold
of the king *per baroniam*, and were called to the parliament by writ, were lords of parliament,
and had places and voices there. * And of them there were twenty-seven abbots and two priors,
as by the rolles of parliament appeares. But since our author wrote, all these (as hath beene
said) (1) are dissolved. King Stephen did found the abbey of Feversham in Kent, *et dedit abbati
& monachis, et successoribus suis, manerium de Feversham in com. Kancie, simul cum hundredo, &c.*
tenendum per baroniam, &c. who albeit he held by a barony, yet because he was never (that I
[m] finde) called by writ, he never sat in parliament.

All the archbishops and bishops of England have beene founded by the kings of England,
and doe hold of the king by barony (as before hath beene said) (2) and have beene all called by
writ to the court of parliament, and are lords of parliament. As (amongst many) taking one
notable record, [a] *mandatum est omnibus episcopis, qui conventuri sunt apud Gloucestriam, die
Sabbathi in crastina. sancte Katherina, firmiter inhibendo, quod sicut baronias suas, quas de rege
tenent, diligunt, nullo modo presumant consilium tenere de aliquibus, quæ ad coronam regis pertinent,
vel quæ personam regis, vel statum suum, vel statum consilii sui contingunt, scituri pro certo, quod
si fecerint, rex inde se capiet ad baronias suas. Feste rege apud Hereford, 23 Novemb. &c.* And
the bishopricks in Wales were founded by the princes of Wales; and the principality of
Wales was holden of the king of England, as of his crowne; and when the prince of Wales
committed treason, rebellion, &c. the principality was forfeited, and the patronages of the
bishops annexed to the crowne of England, so as the king is to have pensions for his chaplaines,
and corodies for his vadelets, of them, as of bishops founded by himselfe (3). And *vide Mich.*
10. H. 4. Rot. 60. Wallia coram rege, that the judgment was given accordingly against the
bishop of St. David's in Wales, *per iusticiarios de utroque banco & alios de perito concilio domini
regis.* And the bishops of Wales are also called by writ to parliament, and are lords of parlia-
ment, as bishops of England be.

33. H. 6. fol. 6.
Brit. ca. 66.

(2. Inst. 460.)
13. E. 1. Count de Vouch. 118.
* 13. H. 4. tit. Meine 74.
30. E. 3. 30. 19. E. 2. Avowrie
224. 32. E. 1. Taille 31.
26. Aff. 66. 4 H. 6. 17.
Trin. 4. E. 3. F. N. B. 252. f.
15. E. 3. Corody 4.
11. Aff. 22. 50. Aff. Pl. 6.
[1] 32. E. 1. Ant. Dem. 39.
8. E. 3. 5.

(F. N. B. 232. a.
* For example, Rot. Parl.
5. H. 8. & 21. H. 8. &c.

[m] Cant. Pas. 30. E. 1.
cor. rege this foundation is so
pleaded.
(Post 134. a. 344. a.)

[a] Ex rot. pat. de anno 18. H. 3.
M. 17.

10. H. 4. fo. 6. b.

V. scil. 87. 136. 201. 265. 440.
478. 665. 722.

Sect. 138.

*Item si soit demande, si tenant en frank-
mariage ferra fealtie in frankmariage shall
a le donor ou a do fealtie to the do-*

*LE quel ferra in-
convenient, &c.*

An argument, drawne from
an inconvenience, is forcible
in law, as hath beene obser-
ved

tainly is to the genuine spirit and intention. But the latter having the sanction of a practice too ancient to be now drawn into
question, it can be of little use to deny the former; and accordingly in the reign of Charles the First we find some instances,
in which the king actually appointed to some of the old deaneries by letters patent without the least appearance of opposition on
the part of the chapter. See Kym. Fæd. vol. 8. part 3. page 166. vol. 9. part 1. page 82. To fix the time when the *letter missive*,
in respect either to the old deaneries or the old bishopricks first came into use; to explain how from a mere recommendation
it grew into a royal mandate; and more particularly to determine, whether it operated as such before the Reformation, or
whether that, in consequence of the assertion of the king's supremacy, was the æra of implicit obedience to it; might be both
curious and useful. Probably the *letter missive* was not generally used, to controul the freedom of election, till after the time
of Edward the First. At least Mr. Prynne, hostile as he was to canonical election, he deeming it an usurpation to the prejudice
of the royal prerogative, gives us a *congè d'lire* of Edward the First for the election of a bishop, which concludes, with a re-
commendation to the chapter in general terms to chuse a person duly qualified; but he takes no notice of its being accom-
panied with a *letter missive*; a circumstance, which had it occurred, would scarce have escaped his observation. See 3. Pryn.
Rec. 1255. The earliest precedent of such a letter, we have hitherto met with since the charter of king John, is of the year
1347, when Philip de Weston is said to have been elected to the deanery of York on exhibiting a letter from Edward the
Third. Drak. Antiq. York, 563. Another instance of a *letter missive* relative to the same deanery occurs in 1344, Henry the
Eighth signifying it to be his pleasure that Dr. Wootton should be elected, and the chapter electing him accordingly. Drak.
Antiq. York, 565. and Append. 81. These few facts may give some idea of the gradation, by which the crown hath possessed
itself of the complete patronage of the old deaneries. We are not prepared for a more ample discussion; and if we were, this
would not be the proper place for a subject so extensive.—The remainder of this note is necessarily postponed to 97. b.

(1) See ante 94. a.—(2) See ante 70. b. and note 2. there.—(3) It seems however, that it is not now the practice of the
crown

he was intituled to the wardship both of the infant's body and all his lands held of the crown *in capite*, or of others by
knights-

40. Aff. 27.

Littleton fo. 50. b. 42. E. 3. 5.
28. E. 3. 395. 20. H. 6. 28.

(Ante 23. a.)

ved before, and shall be often hereafter. *Nilil, quod est inconveniens, est licitum.* And the law, that is the perfection of reason, cannot suffer any thing that is inconvenient.

It is better, saith the law, to suffer a mischief that is peculiar to one, then an inconvenience that may prejudice many. See more of this after in this chapter.

Note, the reason of this diversity, between frankalmoigne and frankmariage, standeth upon a maine maxime of law, that there is no land, that is not holden by some service spirituall or temporall; and therefore the donee in frankmariage shall do fealty, for otherwise he should doe to his lord no service at all; and yet it is frankmariage, because the law createth the service of fealty for necessity of reason, and avoiding of an inconvenience. But tenant in frankalmoigne doth spirituall and divine service, which is within the said maxime, and therefore the law will not cohort him to do any temporall service. See the next section.

Et encounter reason.

And this is another strong argument in law, *nilil quod est contra rationem est licitum.* for reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *nemo nascitur artifex.* This legall reason *est summa ratio.* And therefore if all the reason, that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law of England is; because by many succession of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *neminem oportet esse sapientiores legibus:* no man (out of his own private reason) ought to be wiser than the law, which is the perfection of reason.

ses heires devant le quart degree passe, &c. il semble que cy. Car il nest pas sem- ble quant a cel entent a tenant en frankalmoigne; pur ceo que tenant en frankalmoigne ferra, per cause de sa tenure, divine service pur son seignior, come devant est dit, et ceo il est charge a faite per la ley del saint esglise, et pur ceo il est excuse et dischARGE de fealtie: mes tenant en frankemariage ne ferra pur son tenure tiel service, et sil ne ferra fealtie, dunque il ne ferra a son seignior aucun manner de service, ne spirituall ne temporal, le quel seroit inconvenient et encountre reason, que home ferra tenant de state denheritance a un auter, et encore le seignior avera nul manner de service de luy. (1) Et issint il semble, que il ferra fealtie a son seignior devant le quart degree passe. Et quant il ad fait fealty, il ad fait tous ses services.

nor or his heires before the fourth degree be past, &c. it seemeth that he shall. For he is not like as to this purpose to tenant in frankalmoign; for tenant in frankalmoign by reason of his tenure shall do divine service for his lord, as is said before, and this he is charged to do by the law of holy church, and therefore he his excused and discharged of fealty: but tenant in frankmariage shall not no for his tenure such service, and if he doth not fealty, he shall not do any manner of service to his lord, neither spiritual nor temporall, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance to another, and yet the lord shall have no manner of service of him. And so it seemes he shall do fealty to his lord before the fourth degree be past. And when he hath done fealty he hath done all his services.

Sect.

crown to exert this right of incumbering bishops with pensions and corodies. Should the student wish for any particular information concerning either, whether belonging to the king or to a common person, they not being peculiar to the former, the more ancient books must be referred to; as those of modern date, except bishop Gibson's *Codex*, either wholly pass over the subject, or treat of it very slightly. See Fitz. N. B. 230. to 232. and title *Corody* in Fitzh. Abr. Bro. Abr. Ash. Prompt. and the Index to Gibf. Cod.

(1) *Come il semble.* L and M.

Continuation of the note left unfinished in 97. a.

As to the deans of the new foundation, though the king nominates by letters patent, yet some, if not all, of the new deans of cathedral churches are now deemed *presentative* and not *donative*, the practice being to present the letters patent to the bishop for institution and a mandate of installment. It hath indeed been a question, whether they are *donative* or *presentative*; for the understanding of which we shall shortly state the principal facts, on which the case, so far as relates to the deanery of Gloucester, depends. The new deaneries were erected by Henry the Eighth under powers given by act of parliament, which also authorized him to make statutes for their regulation by *letters patent* or *writing under the great seal*. In the charter for founding the deanery of Gloucester, being one of the new foundation, the king reserved the nomination of the deans to himself, and directed, that the deans and chapters should be governed according to such rules and statutes as the king should appoint by *indenture*. The king afterwards by commissioners named for the purpose formed a body of statutes, amongst which one required, that the king should upon every vacancy nominate a dean by letters patent, and that he should be presented to the bishop, and being instituted by him should be admitted by the chapter. The commissioners signed these statutes; but they were neither

knights-service.—It continued over males till twenty-one, over females till sixteen or marriage.—When it determined, if the tenure

Sect. 139.

ET si un abbe tient de son seignior en frankalmoigne, et labbe et le covent south lour common seale alien mesmes les tenements a un seculer home en fee simple, en ceo cas le seculer home ferra fealtie a le seignior; pour ceo que il ne poit tener de son seignior en frankalmoigne. Car si le seignior ne doit aver de luy fealtie, donque il avera nul manner de service, que serroit inconvenient, ou il est seignior, et le tenement est tenu de luy.

AND if an abbot holdeth of his lord in frankalmoign, and the abbot and convent under their common seale alien the same tenements to a secular man in fee simple, in this case the secular man shall do fealty to the lord; because he cannot hold of his lord in frankalmoigne. For if the lord should not have fealty of him, he should have no manner of service, which should be inconvenient, where he is lord, and the tenements be holden of him.

THIS case is worthy of great observation; for hereby it appeareth, that albeit the alienors held not by fealty nor any other terrene service, but onely by spirituall services and those incertaine, yet the alienee shall hold by the certaine service of fealty, (and of this opinion is Littleton, agreeable with our bookes in former authorities) for the law createth a new temporall service out of the land to be done by the alienee, wherewith the abbot was not formerly charged, for the avoyding of an inconvenience, viz. that the feoffee should doe no manner of service, and consequently that the land should be holden of no man. Wherein it is to be remembered, that (as hath bin said before) all the lands and tenements in England, in the hands of any subject, are holden of some lord or other, and that every tenant must do some kinde of service; and that all lands and tenements are holden either mediately

31. E. 3. Cessavit 22. 33. H. 6. 67. 21. E. 4. 11. 9. Co. 123. Anth. Lowe's case. (2. Inst. 502. 3. Co. 3. b.)

(Ante 1. 2. Inst. 501.)

9. Co. 123. in Anth. Lowe's case.

42. Aff. Pl. 6. Britton 164. b.

or immediately of the king, for originally all lands and tenements were derived from the crowne. And it is to be observed that when the law createth any new tenure, it is the lowest, (viz. tenure in socage) and with the least service that can be done, and neereſt to the freedome of the former service; as in this case a tenure in socage by fealty only is created by the law, which is the lowest and least service the law can create, because fealty is incident to every tenure except tenure in frankalmoigne, for if it should create any other service, it must create fealty also. And the law, according to equity and justice, giveth this fealty to the lord, of whom the land was before holden in frankalmoigne. And lastly, the law so abhorreth an inconvenience, as that it createth out of the land a new service for avoyding thereof. It appeareth by our bookes, that a seignior in frankalmoigne may be granted over, and consequently the tenant shall hold of the grantee by fealty only; and therefore Britton said well, that no service could be demanded of a tenant in frankalmoigne, *tant come les terres remaine en les maines les feoffees.*

Sect. 140.

ITEM si home graunta a cel jour a un abbe, ou a un prior, terres ou tenements en frankalmoigne, ceux parolx (frankalmoigne) sont

ALSO if a man grant at this day to an abbot, or to a prior, lands or tenements in frankalmoigne, these words (frankalmoign) are void; for it is or-

Ordeine per lestatute. Here it appeareth by the authority of Littleton, that this is a statute, and yet the king alone speaketh, viz. *dominus rex in parlamento suo, &c. ad instantiam magnatum regni sui concessit, providit & statuit.*

But

under the great seal nor indented; and on account of this deviation both from the act of parliament and the commission, they were considered as invalid, and powers were given by other acts to Mary and Elizabeth successively to form other statutes. However nothing final being done under these powers, some of the statutes framed by Henry the Eighth's commissioners, for want of others more regularly made, were adopted; but the particular statute, which made the deanery *presentative*, was never practised after the Restoration, and only in one instance before, the deans being constituted by mere grants from the crown. In this state of things came the 6. Ann. c. 21. which established such of the statutes of the cathedral and collegiate churches founded by Henry the Eighth, as had been usually received and practised in the government of the same respectively since the Restoration, and were not inconsistent with the constitution of the church of England or the laws of the land. But this act, made to remove doubts, created a very important one; which was, whether the act confirmed the whole body of statutes where any of them had been practised since the Restoration, or only such statutes or parts of statutes as had been individually received. Amongst other cases, which depended on the solution of this doubt, one was the mode of constituting the dean of Gloucester; for if receiving a part of Henry the Eighth's statutes necessarily was followed with a confirmation of the whole, then the cathedral church of Gloucester being under this predicament, it was become essential to conform to the particular statute, which required a presentation of the dean to the bishop, though that form had hitherto been disregarded. It being of importance to have this point settled, the crown in 1720 referred it to Sir Philip Yorke and Sir Robert Raymond the then attorney and solicitor-general, who were of opinion, that it was intended by the act of queen Anne to confirm the whole body of statutes where any part had been received, and therefore that in the case of the particular deanery of Gloucester a presentation was become necessary; though they

tenure was of a subject, the heir might enter on the lord immediately; but if the king had the wardship, then the heir was not

Vid. 8. Co. the Prince's case.

But because it is *dominus rex in parlamento, &c. concessit*, it is as much in this case (being an ancient statute) as *dominus rex autoritate parliamenti concessit*. Secondly, it is (amongst other acts of parliament) entred into the parliament roll, and therefore shall be intended to be ordained by the king, by the consent of the lords and commons in that parliament assembled. Thirdly, it is a generall law, whereof the judges may take knowledge, and therefore it is to be determined by them, whether it be a statute or no. (1) Now for the divers formes of acts of parliament, you may read them in the Prince's case, *ubi supra*.

(Fol. 143. 2. Inst. 500.)

Appel quia emptores terrarum. This statute is called so; because the statute beginneth with these words, *Quia emptores terrarum*.

Nul poet aliener, &c. terres in fee simple de tener de luy mesme.

This is justly inferred upon the statute; but the letter of the statute is, that *seoffatus teneat terram illam de capitali domino, &c.* So as by the authority of Littleton, he, that citeth a statute, is not bound to recite the very words thereof, so long as he misseeth not of the substance and necessary consequence thereupon; and yet the safer way is to vouch the words of a law, as they be.

Granta per licence mesme les tenements, &c. Here Littleton speaketh of a licence, or a dispensation within the said statute of *quia emptores terrarum* (and mentioneth no other statute) which may be done by the king and all the lords immediate and mediate, for it is a rule in law, *alienatio, licet prohibeatur, consensu tamen omnium, in*

voides; pur ceo que il est ordeine per lestatute, que est appelle quia emptores terrarum (que lestatut fuit fait anno 18 Ed. 1.) que nul poet aliener ne graunter terres ou tenements en fee simple, a tener de luy mesme. Issint si home seisie de certaine tenements, queux il tient de son seignior per service de chivaler, et a cel jour il, &c. granta per licence mesmes les tenements a un abbe, &c. en frankalmoigne, labbe tiendra immediatment mesmes les tenements per service de chivaler de mesme le seignior, de que son graunter tenoit, et ne tiendra my de son grantor en frankalmoigne, per cause de mesme lestatute. Issint que nul poet tener en frankalmoigne, si non que soit per title de prescription, ou per force de graunt fait a ascun de ses predecessors devant que mesme lestatute fuit fait. Mes le roy poet doner terres ou tenements en fee simple, a tener en frankalmoigne, ou per autres services; car il est hors de cas del estatute.

dained by the statute which is called *quia emptores terrarum*, (which was made anno 18. E. 1.) that none may alien nor grant lands or tenements in fee simple to hold of himselfe. So that if a man seised of certain tenements, which he holdeth of his lord by knights service, and at this day he, &c. granteth by licence the same tenements to an abbot, &c. in frankalmoigne, the abbot shall hold immediately the tenements by knights service of the same lord of whom his grantor held, and shall not hold of his grantor in frankalmoigne, by reason of the same statute. So that none can hold in frankalmoigne, unless it be by title of prescription, or by force of a grant made to any of his predecessors before the same statute was made: but the king may give lands or tenements in fee simple to hold in frankalmoigne, or by other services; for he is out of the case of that statute.

13. E. 3. tit. Release 33. 27. H. S. F. N. B. 211. 1.

they allowed the question to be one of great doubt and difficulty. See Burn. Ecclef. L. tit. Deans and Chapters. To this opinion was added the form of a presentation; and it is presumed, that the deanery of Gloucester hath ever since been treated by the crown as *presentative*. Probably too under the same sanction the example may have been followed in respect to such other of the new deaneries, as at the time of the act of queen Anne were in the same circumstances; that is, had statutes of doubtful authority from Henry the Eighth or any of his successors, some of which between the Restoration and the act of Anne had been usually practised, though not the particular one directing a presentation of their deans. But whether this construction of the act of Anne hath ever been judicially recognized, we cannot inform the reader. As to those new deaneries, which had statutes requiring a presentation and usually complied with after the Restoration, there cannot be the least doubt of their being legally *presentative*. But if there are any of the new deaneries, the rules and statutes of whose churches are wholly silent as to presentation, it is most likely that they always have been donative, and still continue so; and we guess, that the church of Westminster may fall under this description, it being collegiate and not for any other purpose subject to the jurisdiction of any bishop.—From this detail about appointing to deaneries of the new foundations, it seems that lord Coke was fully justified in styling all of them *donative*; for it is said, that none of the charters for founding the new deaneries mention presentation, and that the subsequent statutes prescribing it were equally liable to the objection of *informality* as those of the church of Gloucester, and there was no act for establishing them in lord Coke's time. On the other hand, bishop Gibson might be equally warranted in calling all the new deaneries *presentative*, if we except the collegiate church of Westminster; because in 1713, when the first edition of his book on Ecclesiastical Law was published, they were become so by the operation of the act of queen Anne. This distinction of time did not strike the bishop, though a writer in general well informed and much to be relied on, when he animadverted on those, who like lord Coke denominated the new deaneries *donative*. 1. Gibb. Cod. 197.—The continuation of this note on the old and new deaneries will be found in fol. 100. b.

(1) This observation on general or publick statutes points at two important rules distinguishing between them and particular

not intitled to take possession of the land without suing to the crown for livery, which was a process both nice and expensive.

quorum favorem prohibita est, potest fieri, and quilibet potest renunciare juri pro se introducto: and the licence of lords immediate and mediate in this case shall enure to two intents, viz. to a dispensation both of the statute of *Quia emptore terrarum*, and of the statutes of mortmain, as Littleton here implyeth; because their deedes shall be taken most strongly against themselves (1). But it is a safe and good policy in the king's licence to have a *non obstante* also of the statutes of mortmain, and not only a *non obstante* of the statute of *Quia emptores terrarum*. But it appeareth by Littleton (which is a secret of law,) that there needeth not any *non obstante* by the king of the statutes of mortmain, for the king shall not be intended to be misconusant of the law, and when he licenseth expressly to alien an abbot, &c. which is in mortmain, he needs not make any *non obstante* of the statutes of mortmain, for it is apparent to be granted in mortmain, and the king is the head of the law, and therefore *presumitur rex habere omnia jura in scrinio pectoris sui*, for the maintenance of his grant to be good according to the law, for which cause of purpose Littleton maketh no mention of any licence in mortmain. *Dispensatio est mali prohibiti provida relaxatio, utilitate seu necessitate pensata.*

Labbe tiendra, &c. per service chivaler. For although by the death of (Ante 70. b.) Lit. fol. 20. a. the abbot there is neither ward, marriage, nor reliefe due, yet he holdeth by knight's service, albeit the lord cannot have the fruit of it; and if the abbot, with the consent of the covent, alien the land over to a man and his heires, there is the ward, marriage, and reliefe revived. But by prescription (as it hath been said) the successor of an abbot may pay reliefe. An abbot or prior, &c. that holdeth lands by knights service, albeit he ought not in respect of his profession to serve in warre in proper person, yet must he find a sufficient man, conveniently arrayed for the warre, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession doth not privilege him, but that the king's service in his warre must be done, that belongeth to his tenure.

Nota (reader) since Littleton wrote, a man might either in his life time, or by his last will in writing [m] give lands, tenements, &c. to any spirituall body politick, or corporate, to be holden of himselfe in frankalmoigne, or by divine service, as by the statute of 1 & 2 Phil. & Marie (which indured for twenty years) appeareth; which statute, since that time, hath bene favourably and benignely expounded.

Iffint que nul poet tener en frankalmoigne, si non que soit per tittle de prescription, &c. It is to be understood, that a man seised of lands may at this day give the same to a bishop, parson, &c. and their successors in frankalmoigne, by the consent of the king, and the lords mediate and immediate, of whom the land is holden; for the rule is, *quilibet potest renunciare juri pro se introducto*.

So if an ecclesiasticall person hold lands by fealty and certaine rent, the lord at this day may confirme [n] his estate, to hold to him and his successors in frankalmoigne; for the former services be extinct, and nothing is reserved but that he holds of him, and so he did before.

Mes le roy poet, &c. car il est hors de case del statute.

It is cleere that the king is out of the case of the statute; for the statute is *quod feoffatus teneat terram illam, &c. de capitali domino feodi, &c.* and this cannot be intended of the king, who is superior to all, and interior to none, but where the king is bound by acts of parliament, and where not, vide 11 Co. 66. Magdalen Colledge case.

Sect. 141.

ET nota que nul AND note that none **poit tener terres ou tenements en frankalmoigne, forspise del grantor, ou de ses heires. Et pur ceo il est dit, que si soit seignior mesne et tenant, et le tenant est un abbe, que tient**

FORspise del grantor, ou de ses heirs.

The tenure in frankalmoigne is an incident to the inheritable blood of the grantor, and cannot be transferred nor forfeited to any other, no more than a foundership of a house of religion, (which is intended to be in frankalmoigne, or homage ancestrel, or the writ of *contra formam feoffamenti*, or the writ of *contra*

or private statutes.—According to the first, which relates to their several degrees of notoriety, the judges may and ought to take notice of public acts without pleading; but private acts must be pleaded. But there are some exceptions to both parts of this rule. See Law of Nisi Prius ed. of 1775. p. 322. and 1. Sid. 209.—The second rule imports a difference in the mode of trial; for the existence of a public act must be tried by the judges, who are to inform themselves in the best manner they can; but a private act may be put in issue and shall be tried by the record. See Hal. Hist. C. L. 15. and Com. Dig. Parliament R. 5.—A third difference, which hath been taken between a general and a particular act, is, that the latter will not bind strangers, though it is without a saving of their rights. However well founded this last difference may be, it certainly is usual in modern private acts to insert a special saving clause, explaining how far the rights of strangers are intended to be affected.—A fourth difference relates to offering statutes in evidence to a jury; for it is said, that a public act, printed by the king's printer or other person authorized by the crown, is good evidence to a jury; but that of a private act, there must be either an exemplification under the great seal, or a copy sworn to be compared with the parliament roll. Some authorities however do not correspond with this last difference; and others except out of it private acts concerning a whole county. See Vin. Abr. Evidence A. b. 1. Law of Nisi Pri. ed. 1775. p. 225. 1. Stra. 446. It should also be remarked, that there is a difference between proving private acts to a jury, and proving them on the issue of *nul tiel record*, which never goes to a jury; nothing less than an exemplification under the great seal being sufficient in the latter case, 2. Salk. 566. For these and other differences, between general and particular statutes, see further in Vin. Abr. Statutes D. E. 2. 3. and Hatt. Treat. on Stat. cap. 2. p. 11. Though the book last cited is published with the name of Sir Christopher Hatton, lord chancellor to queen Elizabeth, some doubt, whether he was really the author. Nicholl. Engl. Histor. Libr. 2d. ed. 192. However it is at all events a treatise well worth consulting. As to the different forms of statutes, besides the Prince's case in 8 Co. see Pryn. on 4. Inst. 13. Hal. Hist. Com. L. 13. Vin. Abr. Statutes A. Com. Dig. Parliament R. 3. and the Preface to Ruffhead's edit. of Stat.

(1) Here lord Coke explains the king's power of granting licences to alien in Mortmain, notwithstanding the old statutes against

See ante 77. a.—It had a preference with respect to the custody of the infant's body over every other species of wardship.

15. E. 3. confirm. 8.

contra formam collationis, or any other incident to their inheritable blood. But it is no incident inseparable; for the lord may release to the tenant in frankalmoigne, and then the tenure is extinct, and he shall hold of the lord paramount by fealty, as in the case of Littleton, Sect. 139.

Ou de ses heires.

Here (or) hath the sense of (and); for a man cannot at this day grant lands in taile and reserve a rent to his heires, and exclude the grantor himselfe; for the heire cannot take any thing in the life of the ancestor, neither can the heire take any thing by descent, when the ancestor himselfe is seclused. But if a man had granted lands at the common law to hold of his heires, these words (to hold of his heires) are void, and he shall hold of the grantor as he held over, which he should have done, if he had made no reservation at all.

And albeit Littleton saith, that no man can hold lands in frankalmoign but of the grantor or his heires, yet might an abbot by assent of his covent, or a bishop with assent of his chapter, and such like, by license as is aforesaid, have given lands in frankalmoigne, to hold of them and their successors; and as Littleton himselfe agreeth, the king may give land in frankalmoigne, in which case the land shall be holden of him, his heires and successors.

Et pur ceo est dit; si soit seignior mesne et tenant, et le tenant est un abbe, &c. By this it appeareth, that if the feignory be transferred by an act in law to a stranger, and thereby the purity is altered, that the tenure in frankalmoigne is changed to a tenure in socage by fealty, as well as it appeareth before when the feignory or tenancy is granted to another, and the law in this case also createth a new fealty, wherewith the land was not charged before.

Donques le mesnaltie deviendra per escheat al dit seignior paramont.

This new tenure, created by law, shall upon the escheate drowne the feignory; for alwaies the feignory neerer to the land drownes the feignory that is more remote off: and yet the lord in this case, to whom the mesnalty is escheated, shall hold by the same services that he held before the escheat.

Sect. 142.

HOME de religion.

And yet this case extendeth to all ecclesiasticall persons, that hold in frankalmoigne, be they secular or regular; for the mesne ought to acquite all of them: for they be bound [a] to make prayers for their founder, and his heires; and in consideration of those prayers, the founder, &c. is bound to pay to the chiefe lord all rents and services issuing out of that land, as it appeareth by that which followeth.

De luy acquiter.

ET nota, que loutiel home de religion tient ses tenements de son seignior en frankalmoign, son seignior est tenu per la ley de luy acquitter de chescun manner de service, que ascun seignior paramont de luy voet aver ou demander de mesmes les tenements; et fil ne

AND note, that where such man of religion holds his tenements of his lord in frankalmoigne, his lord is bound by the law to acquite him of every manner of service, which any lord paramont will have or demand of him for the same tenements; and if he doth not acquite luy

[a] Pl. Com. 306. b. in Sio-
rington's case.33. H. 6. 6. 39. H. 6. 29.
14. E. 3. Meine 7.

against such alienations, on a principle, which makes the licence rather the waiver or remission of a forfeiture, than a dispensation. The licence being considered in the former way, it is attributing to the king no greater power as lord paramount, than subjects, being mesne lords, may exercise in respect of the forfeitures to which they are intitled on alienations in mortmain. In other words it is construing the statutes, so as not to bring the case of a licence within them; and consequently dispensation became unnecessary. It should also be remembered, that the king's power of granting such licences seems recognized by a statute of Edward the Third. See 18. E. 3. st. 3. c. 3. However the pretended power of suspending statutes by regal authority, without consent of parliament, being declared illegal at the Revolution; and it having been usual to grant licences to alien in mortmain in a manner, which imported an exercise of suspending or dispensing power, that is, with a *non obstante* of the statutes of Mortmain and *quia emptores*; under these circumstances a jealousy of any thing, in the least connected with an assumption of dispensing power, might have influenced many to have confounded such licences with dispensation; and therefore it was deemed prudent to give them a parliamentary sanction. See 7. and 8. W. 3. c. 37. It is observable, that the statute made for this purpose authorizes the king to grant mortmain-licences, without any regard to the person of whom the lands were held; and declares,

ship, except only that of the father where the infant was his heir apparent; even the mother being excluded.—It intitled the lord

luy acquita pas, mes suffra luy destre distraire, &c. donque il avera envers son seignior un brieve de mesne, et recoversa envers luy ses damages et ses costes de son fuit, &c.

him, but suffereth him to be distreyned, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages and costs of fuit, &c.

acquiter is compounded of *ad*, and the old verbe *quietare*, and signifieth in law [b] to discharge, or keepe in quiet, and to see that the tenant be safely kept from any entries, or other molestation for any manner of service, issuing out of the land to any lord, that is about the mesne. [c] And hereof commeth [d] acquitall, and *quietus est*, (that is) that he is discharged; and

[b] Fleta lib. 2. ca. 43. Britton fol. 58. 59. Vide hereafter in this Sect. in brieve de Mesne.

[c] Vide Sect. 142. 540.

[d] 8. E. 2. Corone 424. 20. E. 2. Ibid. 232. Stanf. Pl. Corone 105.

he, that is discharged of a felony, &c. by judgement, is said to be acquitted of the felony, *acquietatus de felonis*; and if he be drawne in question againe, he may plead [e] *auterfoits acquite*. And therefore if such a tenant, as Littleton here speaketh of, be distrained by any lord paramount, the mesne (to keep the tenant quiet) may put his beasts in the powne, instead of the beasts of the tenant.

There be three kinds of acquittals. 1. An acquitall by Deed. 2. An acquitall by prescription. 3. An acquitall by tenure: and by tenure foure manner of wayes. 1. By owelty of services, for service acquits service. 2. Tenure in frankalmoigne, whereof Littleton here speaketh. 3. Tenure in frankmariage. 4. Tenure by reason of dower.

De chescun manner de service. [f] And yet not of services onely, as homage, fealty, rent workes, and other services, but also of improvement of services, as if he be distreyned for reliefe, *Aide pur filemarier, aide pur faire fitz chevalier, &c.* Also for suite service to a hundred. [g] But for fuit reall in respect of refiance within any hundred, leet, or turne, the mesne shall make no acquitall, for that is in respect of his person and refiance.

Brieve de mesne. *Breve de medio*, a writ of mesne, so called by reason of the words of the writ of mesne, which are, *Unde idem A. qui medius est inter C. et prefatum B. A.* who is mesne between C. that is the lord paramount, and B. that is the tenant paravaile. And note, that there be six writs in law, that may be maintained, *quia timet*, before any molestation, distresse, or impleading, as 1. A man may have his writ of *mesne* (whereof Littleton here speaketh) before he be distreyned. 2. A *warrantia cartæ*, before he be impleaded. 3. A *monstraverunt*, before any distresse or vexation. 4. An *audita querela*, before any execution sued. 5. A *curia claudenda*, before any default of inclosure. 6. A *ne injuste vexes*, before any distresse or molestation. And these be called *brevia anticipantia*, writs of prevention.

Et recoversa vers luy ses damages. It is to be knowne, that there be two severall judgements in a writ of mesne, one at the common law, another by the statute of W. 2. ca. 9. At the common law he shall have judgment to recover his acquitall, and if he be distreyned or damnified, his damages and costs: and the processe at the common law was summons, attachment and distresse infinite, in the same county where the writ is brought. * The judgement by the said statute of W. 2. is a forejudger of the mesnalty, and that in two severall cases. One upon processe given by the said statute, *viz.* Summons, attachment, and grand distresse, and if he commeth not, and the writ be returned, he shall be forjudged. The other case is, where the tenant recovereth his acquitall in a writ of mesne, if he be not acquitted afterwards, he shall have a writ of *disfringas ad acquietandum* against the same mesne, and if he commeth not, he shall be forejudged by his default of the mesnalty; and so if he commeth, and it be found against him by verdict, he shall be forejudged: but forjudger in that case is not given against his heire, for that the statute speaketh onely of the mesne, and not of his heires. And the judgment in case of forjudgement is, *quod T. (le mesne) amittat servitium de A. (le tenant) de tenementis predictis, et quod omisso predicto T. prefatus R. (le seignior paramount) modo sit attendens et respondens per eadem servitium per quod T. tenuit*. The said statute, in case of forjudgement, doth not bind a feme covert; and yet if such a judgement be given against a baron and feme, it is not void, but erroneous, and to be reversed in a writ of error. And so a forjudgement against a tenant in taile shall binde the issue in taile in an avowry, untill he reverseth it by error. If two joyntenants bring a writ of mesne, and the one is summoned and severed, the other cannot forjudge the mesne; for he ought to be attendant to the lord paramount, as the mesne was, and that cannot be alone. And so it is if there be two joyntenants mesnes, and in a writ of mesne brought against them, one maketh default, and the other appeares, there can be no forjudger.

[e] 4. E. 3. 35. 17. E. 3. 44. 7. H. 4. 18. 34. H. 6. 47. 13. E. 4. 6. F. N. B. 136. 9. Co. 110. 111. in Tresham's case.

3. E. 3. 14. 77. 5. E. 3. 11. 4. H. 6. 28. 39. E. 3. 19. 11. H. 4. 52. 12. H. 4. 9. 14. H. 4. 17. F. N. B. 136. b. h. 39. H. 6. 30. 33. H. 6. 7. F. N. B. 135. m. 4. E. 4. 35. 12. H. 4. 9. 28. E. 3. 95. 17. E. 3. 39.

[f] 39. H. 6. 31. 2. 9. E. 4. 27. F. N. B. 136 m. 17. E. 2. Mesne. 5. E. 3. 49. * Bracton lib. 2. fol. 84.

[g] 4. E. 3. 42. For this writ see the register fol. and F. N. B. fol. 135. Mirror cap. 2. sect. 13. Bracton lib. 2. fol. 84. Britton fol. 58. Fleta lib. 2. ca. 43. Westm. 2. cap. 9.

W. 2. ca. 9. Vide 8. Co. 134. Mary Shepley's case.

* Bracton lib. 2. fol. 84. Fleta lib. 2. cap. 43.

46. E. 3. 31. 18. E. 2. tit Mesne. F. N. B. 136. 2. H. 4. 7. 17. E. 3. Contra formam Collat. 1. F. N. B. 121.

(Post 233. b.)

7. E. 3. 41. tit. Mesne 18. 9. E. 2. ibid. 67. 14. E. 2. ibid. 70. 9. Co. 73. b. Doct. Husley's case.

(10. Co. 134.)

If

declares, that they shall not be subject to any forfeiture. Before this last act the king's licence only prevented the forfeiture to himself; and if there was any mesne lord, he might take advantage of the mortmain statutes notwithstanding the royal licence. See Fitzh. Nat. Br. 221. O. But the act of William seems to be expressed, so as to extend the operation of the king's licence, and to render it effectual *universally*, by preventing a forfeiture to other lords as well as to the king himself. Another thing deserving of notice is, that the statute is quite silent as to the writ of *ad quod damnum*; which anciently was thought an essential preliminary to the licence, in order that the king might know what prejudice would arise to himself or others from granting it. Fitzherbert indeed tells us, that in his time it was become a common practice to purchase licences to alien in mortmain without suing an *ad quod damnum*, and instead of it to add to the patent, granting the licence, special words to signify that it should be good without any writ. But he adds, that it seems dubious, whether such patents were good, if they turned out to be prejudicial and disadvantageous to the king or others. See Fitzh. N. B. 222. D. Whether since the statute of William writs of *ad quod damnum* previous to licences from the crown to alienate in mortmain are necessary, may deserve consideration;

lord to make a sale of the marriage of the infant, subject only to the restriction of not *disparaging*; and if the infant refused

If the tenant be disseised, and the disseisor in a writ of mesne forjuge the meane, this shall not bind the disseisee. And so if the mesne be disseised, and a forjudgement is had against the disseisor, this doth not bind the disseisee; for the words of the said statute are, *Quando tenens sine præjudicio alterius quam medii attornare se potest capitali Domino.*

But if the daughter, the sonne being in *venter sa mere*, be forjudged, it shall bind the son that is borne afterwards; because he had no right at the time of the forjudgment. And so if the tenant enter in religion, and his heire forejudgeth the mesne, and then the ancestor is deraigned, he shall be bound *causa qua supra*. If there be lord, prior mesne, and tenant, the mesne cannot be forjudged; because he alone can doe nothing to the prejudice or the ditherison of his church: and the like law is of a bishop, parson, and the like.

No forjudgement can be, but when there is but one meane betweene the lord distreyning and the tenant; because the tenant, upon the forjudgement, cannot be attendant to the lord distreyning, in respect there is a meane between them, and so the said statute provideth for in expresse termes.

Nota, the plaintife, in a writ of mesne, may chuse either proceffe at the common law, or upon the said statute of W. 2. Forjudgment is called *forisjudicatio*, and he that is forejudged *foris judicatus*. And Bracton hath this writ, *rex vicecomiti, &c. et non permittas, quod A. capitalis dominus feodi illius habeat custodiam hæredis, quia in curia nostra foris judicatur de custodia, &c.* Fleta calleth it *abjudicationem*, and thereupon commeth *abjudicatus*; for he saith, *Poss proclamationem, &c. factam, abjudicetur medius de feodo et servitio suo* (1).

16. E. 3. Judgm. 117.
(7. Co. 8. a.)

W. 2. ca. 9.

50. E. 3. 23. F. N. B. 137.
Bract. l. 4. 256. b. Brit. f. 58.
b. Flet. li. 2. ca. 43.

CHAP. 7. Sect. 143.

Homage Auncestell.

PER title de prescription en le tenancy, en le sanke le tenant, et auxy en le seignior en le sanke le seignior. Here Littleton doth not define what homage auncestell is, but putteth an example in one case. For in the 146. Section, it appeareth, that blood is not alwayes necessary on the lord's side. In this example here put, there must be a double prescription, both in the blood of the lord, and of the tenant, and therefore I think there is little or no land at all at this day, holden by homage auncestell.

And hereof it is sayd, *Autant est le seignior tenus a son homage, come le homage a son seignior, forsque solcment en reverence.* And herewith agreeth Bracton, *Est tanta et talis connexio per homagium inter dominum et tenentem, quod tantum debet dominus tenenti, quantum tenens domino, præter solam reverentiam.*

Trait a luy garranty auxy en le seignior

TENURE per homage auncestell est, lou un tenant tient sa terre de son seignior per homage, et mesme le tenant et ses auncestors, que heire il est, ont tenus mesme le terre del dit seignior et de ses auncestors, que heire le seignior est, de temps dont memorie ne court, per homage, et ont fait a eux homage. Et ceo est appel homage auncestell, per cause de continuance, que ad este, per title de prescription, en le tenancie en le sanke le tenaunt, et in the seigniorie

TENANT by homage auncestell is, where a tenant holdeth his land of his lord by homage, and the same tenant and his auncestors, whose heire he is, have holden the same land of the same lord and of his auncestors, whose heire the lord is, time out of memorie of man, by homage, and have done to them homage. And this is called homage auncestell, by reason of the continuance, which hath beene, by title of prescription, in the tenancie in the blood of the tenant, and also in the seigniorie

9. H. 3. Vouch. 277. 47. H. 3. Garr. 99. Temps E. 1. Garr. 90.
4. E. 2. Vouch. 245. 45. E. 3. 43. 11. H. 4. 50. 4. H. 6. 26.

Brit. fol. 170. a.

Bract. fol. 78. Glanv. li. 9. ca. 4. 5. 6.

sideration; for which purpose it may be material to inquire, what the practice hath been — Since writing the former part of this note, we are well informed, that writs of *ad quod damnum* have not been usual on granting mortmain licences since the statute of William.

(1) There is not any thing in the 12th of Charles the Second, which in the least varies the tenure in *frankalmoine*, it being expressly saved by the statute. See 12. Cha. 2. c. 24. f. 7. Indeed had the saving been omitted, we do not see, how any of the other provisions in the statute could have affected this tenure; and therefore it is presumed, that the saving was merely the effect of an abundant caution. The statute adds, that it shall not subject tenures in *frankalmoine* to any greater or other services; but what was intended to be guarded against by these latter words is not very obvious.

Continuation of the note concerning the old and new deaneries, which was left unfinished in fol. 98. b.

What we have hitherto observed, as to the manner of constituting the old and new deans, must be confined to England; those of Wales and Ireland being under different circumstances, and therefore reserved for a separate consideration.

Of

fused the marriage tendered by the lord, or married after such a tender and against the lord's content; in the former case,

rie en le sanke le seignior. Et tiel service de homage auncestrel traite a luy garrantie, cestascavoir, que le seignior, que est en vie et ad receive le homage de tiel tenant, doit garranter son tenant, quant il est implede de la terre tenus de luy per homage auncestrel.

the blood of the lord. And such service of homage auncestrel draweth to it warrantie, that is to say, that the lord, which is living and hath received the homage of such tenant, ought to warrant his tenant, when he is impleaded of the land holden of him by homage auncestrel.

Hereby appeareth, what a reverend respect the law hath to ancient inheritances continued in the blood of the lord and of the tenant; for in this example put, if the continuance hath not bin in the blood of both sides, no warrantie belongeth to homage auncestrel; but if ancient continuance hath been on both sides, [m] then such homage auncestrel draweth to it warranty; so as ancient continued inheritance on both parties hath more priviledge and account in law, then inheritances lately, or within memory acquired.

Vide Britton ubi supra. 14. H. 6. 25. 18. H. 6. 2. b. Glanvil. lib. 9. c. 4. 5. and 6. 9. H. 3. Voucher 277. 47. H. 3. Voucher 270. 271. 43. E. 3. 3. 4.

(F. N. B. 134. f.)

[m] See the second part of the Institutes upon the 6th chapter of the statute of Bigamis.

(Post 384. a.)

18. H. 6. 2. b. per Newton.

If the lord grant the services of his tenant by homage auncestrel, the tenant shall not be compelled in a *per quæ servitia* to attorne, unlesse the conusee will grant in court to warrant the land unto him.

If the tenant vouch by force of this warrantie in law, it is a good counterplea, that the tenant (or any one of his ancestors) *recessit de servitio suo & fecit servitium suum A. B. sine aliqua coactione de sua propria voluntate.* 9 H. 3. vouchers 277.

Et ad receive homage de tiel tenant. [a] So as before homage received, the tenant could not absolutely bind the lord to warranty, and therefore of ancient time there lay [b] a writ *de homagio capiendo*, for the tenant against the lord, to compell him to receive his homage for the benefit of his warranty. Which writ you shall read in Bracton and [c] Britton, and the proccesse, and manner of triall thereupon, and the same you shall finde in 47. H. 3.

[a] 9. H. 3. Voucher 277. Temp. E. 1. Gar. 90. 45. E. 3. 23.

[b] Glanvil. lib. 9. c. 4. 5. and lib. 1. cap. 3. Bracton lib. 2. fol. 83.

[c] Britton fol. 172. 173. 47. H. 3. garrantie 59.

Sect. 144.

ET auxy tiel service per homage auncestrel traite a luy acquital. s. que le seignior doit acquiter le tenant envers tous autres seigniors paramont luy de chef-cun manner de service.

AND also such service by homage auncestrel draweth to it acquittal, s. that the lord ought to acquite the tenant against all other lords paramont of him of every manner of service.

Trait a luy acquital. Of acquital somewhat hath beene said in the chapter of Frankalmoigne.

Sect. 142. and 540. (Ante 100.)

Sect. 145.

ET il est dit, que si tiel tenant soit emplede per un præcipe quod reddat, &c. et il vouche a garrantie son seignior, que vient eins per proces, et demanda del tenant que il ad de luy lier a

AND it is said, that if such tenant be impleaded by a *præcipe quod reddat*, &c. and vouch to warrantie his lord, who cometh in by process, and demands of the tenant what he hath to binde

UN præcipe quod reddat. This is understood of the king's writ directed to the sherife of the county where the land lyeth, whereby the sherife is authorised to command the tenant of the land to yeeld the same to the demandant; and of these words of the writ (*præcipe quod reddat*) the writ is so called. Writs of

Of the four Welsh cathedrals, two are without deans; or rather the dignities of bishop and dean unite in the same person, the bishop being deemed *quasi decanus*, and having, it is said, both an episcopal throne and a decanal stall allotted to him in the choir. The cathedral churches of St. David's and Landaff are of this kind. St. Asaph and Bangor, the other two Welsh cathedrals, have the dignity of dean distinct from that of bishop; but the patronage of both deaneries is in the respective bishops, they being neither elective by the chapter, nor donative by the crown. See Ect. Theaur. ed. of 1742. and Will. Parochial. Anglic.

In respect to Ireland, as we are informed, before the Reformation the deaneries of the cathedral churches there were elective by the respective chapters, under a *congè d'élire* from the crown, in much the same manner as the old English deaneries. But since the Irish act of the 2d of Elizabeth, which takes away the election of bishops in Ireland and declares them wholly donative by the king, and hath never been repealed as the English statute of Edward the Sixth to the same effect was, the form of electing to the old deaneries hath been also discontinued, and the king appoints to them by letters patent as to bishopricks. This change, so far as regards the Irish old deaneries, not having yet had a parliamentary sanction, its legality depends on a notion, that the patronage of deaneries as well as of bishopricks was an ancient right of the crown, that the election by the chapter was a mere ceremony, and that the statute for putting an end to it in the case of the bishopricks was a provision of caution and

the infant was liable to the payment of a sum equal to the value of the marriage, that is, to the profit which the lord

(Post 139. b.)
Regist. 159.

of *præcipe* be of foure kindes, *præcipe quod reddat, præcipe quod faciat, præcipe quod permittat, et præcipe quod non permittat, &c.* as appeareth by the register.

Et il vouche a garrantie. *Avoucher*, (in

[d] Mir. cap. 5. sect. 1. and 5. Bract. li. 5. fo. 380. 381. Brit. c. 75. de Gar. Vouch. Fleta l. 6. c. 23, 24, 25, 26. &c. optime. Lamb. Expli. Verb. Advocare.

(Post 365. 389. Hob. 3. 28. Noy 131. 2. Ro. Abr. 738.)

Latin *vocatio*, or *advocatio*) is a word of art, made of the verbe *voco*, and is in [d] the understanding of the common law, when the tenant calleth another into the court that is bound to him to warrantie, that is, either to defend the right against the demandant, or to yeeld him other land &c. in value, and extendeth to lands or tenements of an estate of freehold or inheritance, and not to any chattel real personall or mixt, saving only in case of a wardship granted with warranty (as shall be said more at large in the chapter of warranties) for in the other cases concerning chattels, the partie, if he hath a warrantie, shall not vouche, but have his action of covenant, if he hath a deed, or if it be by *parol* then an action upon his case, or an action of deceit, as the case shall require. Now seeing that one Latin, French, or English word, can have this particular signification, therefore the common lawyer (that I may speake once for all) is driven, as the professors of other liberall sciences use to doe, to use significant words framed by art, which are called *vocabula artis*, though they be not proper to any language. He that voucheth is called the voucher

(Cro. Jam. 307.)

[e] V. Reg. Jud. for all these judicial writs.

[f] V. Vet. N. B. 179. 186. 39. E. 3. 28. 14. H. 6. 7. 17. E. 3. 41. 3. H. 4. 4. 11. H. 4. 72. 45. E. 3. 19. F. N. B. 134. 135. (Post. 393. a.)

vocans, and he that is vouched is called *vouchee* *warrantus*. [e] The proces, whereby the vouchee is called, is a *summonas ad warrantizandum*, whereupon if the sherife returneth that the vouchee is summoned, and he make default, then a [f] *Magnum cape ad valentiam* is awarded, when if he make default againe, then judgement is given against the tenant, and he over to have in value against the vouchee. If the vouchee doe appeare, and after make default, then *parvum cape ad valentiam* is awarded, and if he make default againe, then judgement as before. But if the sherife returne, that the vouchee hath nothing, then after writs of *alias* and *pluries*, a writ of *sequatur sub suo periculo* shall be awarded; and if the like returne be made, then shall the demandant have judgement against the tenant; but he shall not have judgement to recover in value, because the vouchee was never warned, and it appeareth, that he hath nothing. But in the grand *cape ad valentiam*, it appeareth that he hath assets, and his making default after summons is an implied confession of the warranty. And it is called a *sequatur sub suo periculo*; because the tenant shall lose his

land and not one of necessity; and this notion, little consonant as it may appear to some of the facts we have stated in our historical account of the old English deaneries, is not only supported by practice since the reign of Elizabeth, but seems to have been judicially recognized and acted upon in the case of the Irish bishoprick already cited from Croke James and other books. See ante 96. b. in the notes. Such, we are told, is the state of the patronage of the Irish old deaneries in general; but it must be added, that the right of the crown over one or two of them, which either are or are supposed to be under peculiar circumstances, is denied by the chapters. Suits on this subject have been depending between the crown and the chapter of St. Patrick, one of the two cathedrals of the archbishoprick of Dublin; the crown claiming the deanery as a royal *donative*, and the chapter insisting that the dean is *elective* by them on a *congé d'élire*, not from the king, but from the archbishop of Dublin, and that it is so in the true sense of the word, and not in name only like our English deaneries of the old foundation. See in 17. E. 3. 40. a case in which the deanery of York is pleaded to be elective in this form. One amongst other grounds, on which the chapter are said to defend their title, is, that the deanery was founded by an archbishop of Dublin. See War. Irel. by Harr. vol. 1. p. 302. But it seems, that both this fact and the inference from it are denied on the part of the crown. We have also heard, that the chapter of Kildare, which is another of the Irish old deaneries, claim a right of electing their own dean in the same way. As to the Irish new deaneries, we are told that all of them are unquestionably royal *donatives*. The only one, about which there

hath lord might have made by the sale of it; in the latter case, the heir female paid the same sum as for a refusal, but the

garranty, et il monstre, comment il et ses auncesters, quel heire il est, ount tenus sa terre del vouchee et de ses auncesters de temps dont memorie ne curt; et si le seignior, que est vouche, ne avoit resceivre pas homage del tenant, ne dascun de ses auncesters, le seignior (il voit) poit disclaimer en le seigniorie, et ifint ouste le tenant de son garrantie. Mes si le seignior, que est vouche, ad receive homage de le tenant, ou de ascun de ses auncesters, donques il ne disclaimera, mes il est oblige per la ley degarranter le tenant; et donque si le tenant perd sa terre en default del vouchee, il recouvrera en value envers le vouchee de terres et tenements, que le vouchee avoit al temps de le voucher, ou unques puis.

him to warranty, and he sheweth, how he and his ancestors, whose heire he is, have holden their land of the vouchee and of his ancestors time out of minde of man; and if the lord, which is vouched, hath not received homage of the tenant, nor of any of his ancestors, the lord (if he will) may disclaim in the seigniorie, and so ouste the tenant of his warranty. But if the lord, who is vouched, hath received homage of the tenant, or of any of his ancestors, then he shall not disclaim, but he is bound by the law to warrant the tenant; and then if the tenant loseth his land in default of the vouchee, he shall recover in value against the vouchee of the lands and tenements, which the vouchee had at the time of the voucher, or any time after.

land without any recompence in value, unlesse he upon that writ can bring in the vouchee to warrant the land unto him: and if, at the *sequatur sub suo periculo*, the tenant and the vouchee make default, and the demandant hath judgment against the tenant, and after brings a *scire facias* to have execution, the tenant may have a *warrantia carte*, and if he were impleaded by a stranger, he may vouche againe; but if he had judgment to recover in value, he shall never have a *warrantia carte*, or vouche againe, for by this judgement to recover in value he hath benefit of the warrantie. And you shall finde in bookes a recovery with a single voucher, and that is when there is but one voucher; and with a double voucher, and that is when the vouchee voucheth over, and so a treble voucher, &c. Againe, you shall finde there also a foraine voucher, and that is, when the tenant, being impleaded within a particular jurisdiction, (as in London or the like) voucheth one to warranty, and prayes that he may be summoned in some other county out of the jurisdiction of that court. This is called a foraine voucher, but might more aptly be called a voucher of a forainer *de forinsecis vocatis ad warrantizandum*. Note, that by the civill law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no expresse warrantie; but the common law bindeth him not, unlesse there be a warranty, either in deed or in law for *caveat emptor*, as shall be said more at large in the chapter of warrantie in the third booke.

Glouc. ca. 12. F. N. B. 6. c.

(Cro. Jam. 4. 1. Ro. Abr. 96. F. N. B. 94.)

Brit. 174.

Le seignior (fil voet) poet disclaymer en le seignorie. Disclaimer, disclamare, is compounded of *de* and *clamo*, and signifieth utterly to renounce the seignorie.

[a] Note there be divers kinds of disclaymer, that is to say, a disclaimer in the tenancie; a disclaimer in the blood; and a disclaimer in the seignorie; whereof Littleton here putteth his case.

[b] But if the tenant in frankalmoigne bring a writ of mesne against his lord, the lord cannot disclayme in the seignorie; because he cannot hold of any man in frankalmoigne, but of his donor and his heires. And so note a diversity between a tenure in frankalmoigne, whereby divine service is maintained, and homage ancestrell which respecteth temporall service. But if the lord will not disclayme in the seignory, in the case of homage ancestrell, then albeit he hath not received homage, he shall warrant the land.

Si le seignior que est vouche ad receive homage, &c. il ne disclaymera.

Therefore it is good for the tenant, to the intent to oust the lord of his disclaymer, in his voucher to allege, that the lord hath taken homage of him; and if he alledge it not, and the lord offer to disclayme, the tenant may counterplead the same by acceptance of homage. And the reason that the lord cannot disclayme in that case is; for that he hath accepted his humble and reverent acknowledgement, to become his man of life and member and terrene honour, and to be faithfull and loyall to him, for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclayme.

Que il avoit al temps del voucher. Hereby it appeareth, that the tenant shall not be driven to recover in value only those lands, which the lord had from that ancestor, which created the seignory; for that were in manner impossible, for that the seignory must be created before time of memory, and the first creation of the seignory did not create the warranty, but the continuance of both sides time out of minde created the warranty. And that is the reason that a writ of annuity shall not [c] lye against the heire by prescription; because it cannot be knowne, whether he hath any land by descent from the said ancestor, that first granted the annuity. And here is a point worthy of observation, that in the case of homage ancestrell, (which is a special warranty in law) by the authority of Littleton, the lands generally, that the lord hath at the time of the voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an expresse warrantie the heire shall be charged but only for such lands as he hath by descent from the same ancestor, which created the warranty.

Note, what privilege this ancient warranty (created by operation of law) hath more than the expresse warranty. And so you may observe, that in this case *firmior est potentior est operatio legis quam dispositio hominis*.

Al temps de voucher ou unques puis. This is evident and worthy of diligent observation, viz. that the lands of the vouchee shall be liable to the warranty, that the vouchee hath at the time of the voucher; for that the voucher is in lieu of an action, and in a *warrantia carte*, the land, which the defendant hath at the time of the writ brought, shall be lyable to the warranty.

Upon a judgment in debt, the plantife [d] shall not have execution, but only of that land which the defendant had at the time of the judgment; for that the action was brought in respect of the person, and not in respect of the land. But if an action of debt be brought against

hath been any contest, is the deanery of *Dromore*, the collation of which was some years ago claimed by the bishop under letters patent from king James the First; but the patent not being warranted by the king's letter, on which it passed, the crown prevailed.

We shall close this note about the old and new deaneries of cathedral and collegiate churches, with some general observations on the various modes of constituting them. From the inquiries we have made into the subject, it seems to us, that the right to appoint such deans and the mode must generally depend almost wholly upon *charters usage* or *acts of parliament*, and very little on arguments drawn from the nature of the office or from *foundership*, however common those topicks may be. The former indeed can scarce have influence on any case, which may arise as to the appointment of deaneries. What is there in the nature of the office, which is inconsistent with its being *elective presentative donative* or *collative*, or which renders either of those modes so incongruous as to be contrary to any principle of our law? What is there in the office, which imports, that the patronage should necessarily be in the crown, though it usually is? The facts we have stated shew, that in England some deaneries are *nominally elective* under the royal *congè d'élire*, and the rest *really presentative* or *donative* by the crown; and that the only two deaneries of the Welsh cathedrals are *collative* by bishops. Nay, if it can be proved, that election under a

congè

their male was charged the double value, which was called a forfeiture of marriage. — The gardian in chivalry was

no

[a] 47. H. 3. Disclaim. 35. 16. H. 7. 1. 20. E. 2. tit. Nuper Ob. 14. F. N. B. 197. & 151. b. 45. E. 3. 19. 21. E. 3. 50. E. 3. 23. &c. (Doctr. Plac. 131.)

[b] 14. H. 3. tit. Disclaim. B. 33.

47. H. 3. Disclaim. 35. Vide Bract. l. 4. 252. b. 16. H. 7. 1. Brit. 173. 174. (Doctr. Plac. 131.)

[c] 46. E. 3. 5. b. 10. E. 4. 10. b. 19. H. 6. 74. 37. H. 6. 19. 5. H. 7. F. N. B. 152.

28. E. 1. Vouch. 291. 9. Ed. 2. War. Car. 20. 19. Fines 127.

29. E. 3. 3. 18. E. 3. 1. 2. H. 4. 10. 23. E. 3. Recov. in valu. 3. 16. E. 3. Vouch. 85. 19. Ed. 3. Vouch. 24. 22. E. 3. Fitz. Nat. Bre. 134. f.

[d] 2. H. 4. 14. 42. E. 3. 1. 42. All. 17. 9. E. 2. tit. Execut. 249. (1. Ro. Abr. 898. 891. 892.)

Lib. 2.

Cap. 7. Of Homage Aunceftrel. Sect. 146.

[c] 22. Aff. pl. 32.
(Finch. L. 353.)

32. E. 1. Voucher 292.
(2. Ro. Abr. 771.)

Vide Britton fol. 58. 110.

(Doctr. Plac. 133.)

[f] 45. E. 3. 7. 22. E. 4. 35.

Vide Sect. 143.

14. H. 6. 12. 2. H. 6. 9. 38.
Aff. p. 22. 37. Aff. 6. Co. 3.
73. See Deane and Chapter de
Norwich case.

against the heire, and he alieneth, hanging the writ, yet shall the land, which he had at the time of the original purchase, be charged; for that the action was brought against the heire in respect of the land. [e] If a man be nonfuit, the land only, which he had at the time of the amerciament assessed, shall be charged, and not that which he had at the finding of the pledges. For the amerciament is not in respect of the land, but of his want of prosecution, which was a default in his person. But the issues of a juror shall be levied upon the feoffee, albeit they were not lost before the feoffment; because he was returned and sworn in respect of the land. Note the diversity.

If a man give lands in fee with warranty, and binde certaine lands specially to warranty, the the perfon of the feoffor is hereby bound, and not the land, unlesse he hath it at the time of the voucher.

Sect. 146.

SON feignorie est extinct, et le tenant tiendra de feignior prochain paramount, &c. Here two things are to be observed: first that by this disclaymer in the feignory, the feignory is [f] extinct in the land.

Secondly, that after the disclaymer the tenant shall hold of the next lord paramount, by the same services, as the mesne so disclayming held before.

Si un abbe ou prior soit vouch, &c. uncore, &c. uncore il ne poet disclaymer, &c.

Here it appeareth of the lords side, that continuance of blood is not necessary; but yet there must be privy of succession time out of minde in one politique body, for if that body be once dissolved, though a new be founded of the same name, and all the possessions be granted to them, yet the homage ancestrell is gone. But if a prior and convent be translated, concurrentibus hiis que in jure requiruntur, to an abbot and convent, or to deane

and chapter, there the homage ancestrell remaines; for though the name be changed, yet the body was never dissolved, but in effect it remaineth still. If the body politique were founded within time of memory, there cannot be homage ancestrell, for that continuance faileth, and though ancestor is ever properly applied to a naturall body, yet it is called homage ancestrell when the tenure is of a body politique, for that it is ancestrell of the tenants side. But on the other side, an abbot or prior cannot hold by homage ancestrell; for as appeareth by Littleton's examples, it must ever be ancestrell of the tenants side. And where Littleton putteth his case of an abbot or prior, the same law is of a bishop, deane, archdeacon, prebend, parson, vicar, and the like. Another thing here to be observed is, that an abbot or prior cannot disclaime, &c. for regularly it is true, quod meliorem conditionem ecclesie sue facere potest praelatus, deteriozem nequaquam, and againe, ecclesie sue conditionem meliorem facere possunt

congè d'elire from a bishop, instead of one from the king, is an established mode of appointing to any deanery in Ireland, we do not see any legal objection to it merely as a mode, however singular it may be. The argument from foundership will also for the most part be found inconclusive. Several of the English old deaneries were certainly endowed by bishops, either with their own private possessions, or by dismembering those of their respective sees; and yet all are elective under a congè d'elire, not from bishops, but from the king. 1. Stillingf. Ecclef. Caf. 341. But should a case ever happen, in which there is neither charter usage nor statute prescribing a rule, then some general principle of law must be appealed to for a direction; and in such a case, which is barely a possible one, foundership seems to be the true and indeed only criterion of the title to the patronage and right of constituting.

It is feared, the reader will think, that we have dilated too much on the modes of constituting deans of cathedral and collegiate churches; but as there is little of digested matter upon the subject in other books, this may excuse us for detaining him so long here.

For the different instruments and other forms made use of in appointing deans both of old and new chapters in England, see 2. Ought. Ord.—Note, that on promotion to a bishoprick, deaneries, as well as other spiritual preferment, becoming void after consecration, and in consequence of it, the king being by prerogative intitled to the next turn, therefore in this particular instance the English deaneries of the old foundation are not even nominally elective.

not accountable for the profits made of the infant's land during the wardship, but received them for his own private emolument,

possunt sine consensu, deteriorum non possunt sine consensu. And therefore an abbot, prior, bishop, deane, archdeacon, prebend, parson, vicar, or any other sole corporation, that is seised *in auter droit*, cannot disclaime; because, as Littleton saith, they alone cannot devesit any fee which is vested in their house or church. For the wisdom of the law would never trust one sole person, with the disposition of the inheritance of his house or church. But an abbot, and prior had their covent, the bishop his chapter, the parson and vicar their patron and ordinarie, and the like of other sole corporations, without whose assent they could passe away no inheritance.

Ils ne poient anienter ou devesiter chose de fee, &c. These generall words have certaine exceptions; for in a *quo warranto*, at the suit of the king, against a bishop, abbot, or prior, for franchises and liberties, if the bishop, abbot, or prior, disclaime in them, this should binde their successors. If an abbot or prior had acknowledged the action in a writ of annuitie, this should have bound the successor; because he cannot falsifie it in an higher action, and there must be an end of suits. *Expediit reipublica, ut sit finis litium.* But if the abbot levie a fine, or acknowledge the action in a *præcipe quod reddat*, the successor shall be bound *pro tempore*, but he may have a writ of right, and recover the land.

Per force de homage auncestrell, &c. Here (&c.) implyeth or by any other warrantie [i], as by the reason, which our authour here yeeldeth, appeareth.

Chose de fee. [k] For if in an action of debt upon an obligation against an abbot, the abbot acknowledgeth the action, and dieth, the successor shall not avoid execution, though the obligation was made without the assent of the covent; for he cannot falsifie the recoverie in an higher action, *et res judicata pro veritate accipitur*, and this is but a chattell. And so it is of a statute or recognisance, acknowledged by an abbot or prior.

40. E. 3. 27. 5. E. 4. 1. 6. E. 3. 51, 52. (7. Co. 10. 11.)

10. E. 4. 2. 2. 21. H. 7. 20.

6. E. 3. 51, 52.

38. E. 3. 33. 16. E. 3. tit. Abbot 13. 19. E. 3. tit. Abbot. 12. 7. R. 2. Abbot. 7. 12. H. 4. 11. 20. H. 6. fo. ultimo. 4. H. 7. 2. 2. H. 4. 6. 34. Aff. p. 7. 14. E. 4. tit. Abbot. B. 8. E. 3. 28. 12. H. 8. 7.

[i] 12. H. 8. 7.

[k] 7. R. tit. Abbot. 7. See the bookes next above. (6. Co. 8. 2.)

Sect. 147.

ITEM si home, *que tient son terre per homage auncestrel, alien a un auter en fee, le alienee ferra homage a son seignior: mes il ne tient de son seignior per homage auncestrel; pur ceo que le tenancie ne fuit continue en le sanke de les auncesters lalienee; ne lalienee navera jammes garrantie de la terre de son seignior; pur ceo que le continuance del tenancie en le tenant et a son sanke per lalienation est discontinued. Et sic vide, que si le tenant, que tient la terre per homage auncestrell de son seig-*

ALSO if a man, which holds his land by homage auncestrel, alien to another in fee, the alienee shall doe homage to his lord: but he holdeth not of his lord by homage auncestrell; because the tenancie was not continued in the blood of the auncestors of the alienee; neither shal the alienee have warrantie of the land of his lord; because the continuance of the tenancie in the tenant and to his blood by the alienation is discontinued. And so see, that if the tenant, which holdeth his land of his lord

ALIEN a un auter en fee. For

hereby the privy of the estate is altered, and the continuance of it in the blood of the tenant is dissolved. But if the tenant maketh a lease for life, or a gift in taile, this is a continuance of the privy and estate in the tenant in respect of the reversion, that remaineth in him; for the fee, whereof Littleton heere speaketh, was not out of him. But if the tenant maketh a feoffment in fee upon condition, and dieth, his heire performeth the condition, and re-enteth, the homage auncestrell is destroyed in respect of the interruption of the continuance of the privy and estate; and this case was put and not denied in the argument [m] of the case betwene the Lord Cromwell and Andrewes, Mich. 14. & 15. Eliz. which I myselfe heard and observed. As if *cestuy que use* had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the land against

(Post 202. 2.)

[m] 1. Mich. 14. & 15. Eliz.

5. H. 7.

ment, subject only to the bare maintenance of the infant. At least it doth not appear in any work we have seen, what means were provided for enforcing the guardian out of the profits of the estate in wardship to support and educate the infant in a style and manner suitable to his rank and fortune.—Lastly, guardianship in chivalry, being deemed more an *interest* for the profit of the guardian than a *trust* for the benefit of the ward, was saleable and transferrable, like the ordinary subjects of property, to the best bidder, and if not disposed of was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might be devolved upon the most perfect stranger to the infant, one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence. This explication of the nature of wardship in chivalry, general as it is, may well excite a strong idea of the horrid evils necessarily incident to it. On the first reflection it is natural to wonder, how it happened, that a species of guardianship, so constituted on principles repugnant to the voice of nature, so founded in inhumanity, so retarding to the progress of science and literature amongst persons of high birth and with great hereditary estates, and so seemingly replete with mischiefs both public and private, should, in a country distinguished for continual struggles to preserve the valuable and to annihilate the oppressive parts of its constitution, be patiently endured for several centuries after the Conquest, and even remain unreformed by any effectual checks to soften its rigour, till it was wholly taken away at the Restoration. Perhaps however on further consideration of the subject, the wonder may in some measure cease; for the facility of evading guardianship in chivalry, which could

(F. N. B. 135.)

gainst the feoffees for ever; for that the estate and privitie was for the time taken out of the feoffees, and thereby dissolved for ever. But if the land were recovered against the tenant upon a faint title, and the tenant recover the same againe in an action of higher nature, there the homage auncestell remains; for the right was a sufficient meane for the continuance. So it is, if he had reverfed it in a writ of error. [n] If the alienee be impleaded in Littleton's case, and vouche the alienor that held by homage auncestell, albeit he commeth in by fiction of law to many purposes in privitie of his former estate, yet to this purpose he cannot come in as tenant by homage auncestell; because of the discontinuance of the estate and privitie, and, as Littleton saith, the tenancie was not continued in the blood. [o] And Britton saith, *et come ascun nequedent soit vouche per homage, et le seignior tende de averrer, que le tenement, dount il vouche, fuit translate hors del sanke del primer purchaser, per seoffment ou per ascun auter translation, en tel case soit le tenant charger de voucher son seoffor ou ses beires.*

[n] 5. E. 3. per Cantrel.

[o] Britton fol. 170. a.

38. E. 3. 20. 11. H. 4. 22. 17.
E. 3. 4. 59. 73. 74. 26. E. 3.
56. 18. E. 3. 56. 16. E. 3.
Voucher 87. 18. 1. 3. 50. 44.
E. 3. Litt. fol. 169.

Comment que il reprist estate del alienee en fee, &c. For the cause aforesaid, in respect of the interruption of the privitie and continuance of the estate. And herewith agreeth our bookes in cases of warranties in deed, or warranties in law. See more of this in the chapter of warranties.

Sect. 148.

NE ferra homage al

fitz. If A. holdeth of B. as of the manor of Dale, whereof B. is seised in taile; B. discontinueth the estate taile, and taketh backe an estate in fee simple; A. doth homage to B. B. dieth seised, the issue in taile entreteth; A. shall doe homage againe to the heire in taile of B. because he is remitted to the estate taile, and the state in fee, that his father had, in respect whereof the homage is done, is vanished, and the heire in taile is in of a new estate, in respect whereof he ought to doe a new homage. [p] But regularly it is true,

(Post 343. 2.)

[p] Britton 175. 176.

ITEM il est dit, que si home tient sa terre de son seignior per homage et fealty, et il ad fait homage et fealty a son seignior, et le seignior ad issue fits, et devy, et le seigniorie descendist a le fits, en ceo cas le tenant, que fist homage al pere, ne ferra homage al fits; pur ceo que, quant un tenant ad fait un foits homage a son seignior, il est excuse pur terme de sa vie de faire homage a ascun auter heire del seignior. Mes uncore il ferra fealtie al fits et heire le seignior, comment que il fist fealty a son pere.

ALSO it is said, that if a man holds his land of his lord by homage and fealty, and he hath done homage and fealty to his lord, and the lord hath issue a son and dies, and the seigniorie descendeth to the sonne, in this case the tenant, which did homage to the father, shall not doe homage to the sonne; because that, when a tenant hath once done homage to the lord, he is excused for terme of his life to doe homage to any other heire of the lord. But yet he shall doe fealtie to the sonne and heire of the lord, although he did fealtie to his father.

which Littleton saith, that when a tenant hath done once homage to his lord, he is excused for terme of his life to make homage to any other heires of the lord. But he shall doe fealtie to his sonne, albeit he hath done fealtie to the father.

Sect.

only be on a descent, may account both for its being so long submitted to, and for its producing consequences less extensively pernicious than seem almost necessarily incident to it. Various modes of preventing the descent were practised. One was entailing the heir in the ancestor's life time; and another was enfeoffing strangers on condition to pay a sum, far exceeding the value of the land, at a time so fixed as to correspond with the heir's coming of age, who might then enter for breach of the condition. See stat. Marlebridge 52. Hen. c. 6. and 2. Inst. 109. When these modes were declared to be fraudulent, and therefore checked by the statute of Marlebridge, a third, still more fit to attain the same end, succeeded; for uses and trusts being invented, and guardianship in chivalry being only of legal estates, it became the fashion to make feoffments to uses, as well for preventing wardship, as for avoiding reliefs and forfeitures, and indirectly exercising the power of devising; and thus the heir taking only the use of the land on a descent instead of becoming legal tenant, he of course escaped being in wardship. This evasion continued in practice till 4. Hen. 7. when the legislature thought proper once more to interfere in favour of the lord, and made the heir of *cestuy que use* equally liable to wardship in chivalry with the heir of one dying seised of the legal estate. See 4. Hen. 17. c. 17. Ante 84. b. and 2. Inst. 110. Indeed for some time after 4. Hen. 7. there seem to have been no other means of preventing wardship in chivalry, than the ancestor's making a lease for life with remainder to his heir apparent in fee. But this protection of wardship in chivalry was soon followed by a great diminution of its profits; for, in the succeeding reign, the statutes of wills gave the power of devising so as to deprive the lord of the wardship in two thirds of the land holden by knight's service; in which contracted state this odious species of guardianship was suffered to languish, till it was entirely abolished.

Sect. 149.

ITEM si le seignior, apres le homage a luy fait per son tenant, grant le service de son tenant per le fait a un auter en fee, et le tenant attorna, &c. dunque le tenant ne ferra my compel de faire homage. Mes il ferra fealty, coment que il fist fealtie devant a le grauntor; car fealtie est incident a chescun attournement del tenant, quant le seignorie est graunt. Mes si ascun home soit seisie dun mannor, et un auter home tient de luy la terre come del mannor avantdit per homage, le quel tenant ad fait homage a son seignior que est seisie del mannor, si apres un estrange port Præcipe quod reddat envers le seignior del mannor, et recovers le mannor envers luy, et fust execution, en cest case le tenant ferra auterfoits homage a celui, que recovers le mannor, coment que il fist homage devant; pur ceo que lestat celui, que receivoit le primer homage, est defeated per le recovery, et ne girra en le bouche le tenant a fauser ou defeat le recovery, que fuit envers son seignior. Et sic vide diversitatem en

ALSO if the lord, after the homage done unto him by the tenant, grant the service of his tenant by deed to another in fee, and the tenant atturneth, &c. the tenant shall not be compelled to doe homage. But he shall doe fealty, altho' he did fealty before to the grantor; for fealty is incident to every atturnment of the tenant, when the seignory is granted. But if any man be seised of a mannor, and another holds of him the land, as of the mannor aforesaid by homage, which tenant hath done homage to his lord who is seised of the mannor, if afterwards a stranger bringeth a *Præcipe quod reddat* against the lord of the mannor, and recovereth the mannor against him, and sues execution, in this case the tenant shall againe doe homage to him, which recovered the mannor, although he had done homage before; because the estate of him, which received the first homage, is defeated by the recovery, and it shall not lye in the power of the tenant to falsifie or defeat the recovery, which was against his lord. And so see a

ITEM si le seignior, &c. grant le service de son tenant per fait, &c.

Note a diversitie, 13. E. 1. tit. Per quæ servitia, when the lord a- 22. & tit. Gar. 91. (8. Co. 102.)

lieneth the seignorie, and when the tenant alieneth the tenancy; for when the tenant hath done homage, and the seignory is transferred to another, either by the act of the party as alienation, or by act in law as descent, yet the tenant shall not iterate homage, as he shall do fealty; but when the tenant doth homage, and alieneth the tenancy, there is a new tenant, which never did homage, and therefore he ought to doe homage to the lord, albeit his alienor had done it before. And it is to be observed, that none shall doe homage, * S. E. 4 27. b. but the tenant of the land to the lords of whom it is holden; and therefore if homage be due to be done by the tenant, if the tenant alieneth the land to another, the alienor cannot be compelled to doe homage.

Attorne, &c.

Here by (*&c.*) is to be understood, that albeit he pay his rent, performe his annual services, and doe fealty, which

abolished by the famous statute of Charles the Second, together with the other oppressive appendages of military tenures. 2. Inst. 110, 111. The curious reader may see further on this subject in Smith's Commonwealth, Engl. ed. b. 3. cap. 5. Staundf. Prærog. 4. Inst. 183. Ley on Wards and Liv. & ante passim in the chapter of Knight's service and the books there cited, the titles *Garde* and *Guardian* in the Abridgments Crompt. Jurisd. of Co. 112. a. to 125. and Mad. Excheq. fol. ed. 222. — (12) Many of our books, especially some of modern date, are very indiscriminate, when they mention guardianship by *nature*. Sometimes the father is styled guardian by nature of his *heir apparent for the time* in general terms, such as at first appear to intimate, that by our law no other ancestor, except the father, not even the mother, is intitled to the guardianship in that right; and accordingly lord chief baron Comyns makes this inference from the language of the books, though as we conceive too hastily. See Com. Dig. *Guardian* C. 3. Co. 38. a. 6. Co. 22. b. there cited. At other times we are told, that, the father being dead, the mother may have a writ of trespass *quare consanguineum et hæredem cepit*; which imports, that she may also be guardian by nature of her heir apparent. But then the silence in one book as to other ancestors, and the expresse exclusion of the grandfather in another book without the necessary explanation, tend to an opinion, that all ancestors, except the father and mother, are really excluded.

Ant:

which is a part of homage, yet homage he shall not doe.

Mes si ascun home soit seise dun man-

nor, &c. Here it appeareth, that the case of the recovery of the feignorie differeth from the alienation of

the lord, which is his owne act, or the descent of the feignory to the heire, which is an act in law. And the reason of this diversitie is, for that by the recovery the state of him, that received the homage, is defeated; for it shall not lie in the mouth of the tenant to falsifie, or to frustrate or defeat the recovery, which was against his lord of the manor or feignory, for that the tenant had nothing therein, and every man by law ought to meddle in such cases with that, which belongeth unto him, which is worthy of observation concerning falsifying of recoveries.

Note that to falsifie, in legall understanding, is to prove false, that is, to avoyd, or as Littleton here saith, to defeat, in Latine *falsare, seu falsificare, [i] falsum facere.*

But since Littleton wrote, it is recited by act of parliament, that whereas divers, &c. have suffered recoveries against them of divers manors, &c. for the performance of their wills, for the suretie of their wives joyntures, &c. and the recoverors had no remedy to compell the freeholders and tenants, &c. to attourne unto them, nor could by order of law attaine to the rents, services, &c. that act doth give the recoverors power to distreyn and avow; whereupon many have thought, that this doth impugne Littleton's case of the recovery. But *distinguendum est.* Littleton intendeth his case, either upon a recovery by title, (for he saith, that the state of the tenant in the recovery is defeated) or without any consent upon pretence of title, which is all one; for the tenant cannot falsifie, and the lord should avow as one that came in of a former title. And Littleton hath good authority in law to warrant [a] his opinion, and the statute of 7. H. 8. extendeth to common recoveries had by consent and agreement, as appeareth by the act it selfe, which then was, and yet is a common assurance and conveyance, whereof the law taketh notice, and whereupon (as appeareth by the act) an use might be limited. So as it is apparant, that such recoverors came in meere under the state of the lord, &c. and had no remedy (as the statute saith) to compell the freeholders and tenants to attourne, and without attournement could neither distreyn nor avow. Wherefore this statute gave recoverors remedy to distreyn, and a forme to avow and justifie, which they had not before, as it appeareth by the Doctor and Student, who lived at that time. The bodie of the act is, *That such recoverors may distreyn and make avowrie, &c. as those persons, against whom the said recovery is, should have done, &c. if the same recovery had not been had, and have like remedie, &c.*

If a man had made a lease for yeares to begin at Michaelmas, reserving a rent; and before Michaelmas he had suffered a common recovery, the recoveror should distreyn for that rent, which the lessor before the recovery could not. But if the recovery had not beene had, then he might have distreyned, and so it is within the statute. But if a fine had beene levied of a manor, and before attournment the conusee had suffered a common recovery, the recoveror should not distreyn, &c. because the conusee, against whom the recovery was had, could not.

But this act extended onely to distresses and avowries for rents, services, and customes, and gave also a forme of a *quare impedit.* But upon this statute it was holden, that the recoveror could not have an action of debt against the lessee for yeares, nor an action of waite against tenant for life or yeares; and therefore remedy was provided in these cases, by the statute of 21. H. 8.

Sect. 150.

VIENT a son seignior. The tenant

ought to seeke the lord to doe him homage, if the lord be within England; for this service is personall as well of the lord's side, as of the tenant's side, for law requi-

ITEM si un tenant, que doit

per son tenure faire a son seignior homage, vient a son seignior, et dit a

ALSO if a tenant, which ought by his tenure to doe his lord homage, cometh to his lord, and saith unto him, Sir, I

Vide Sect. 558. 33. E. 3. Avowrie 255. 37. H. 6. 33. 39. H. 6. 34. 7. H. 7. 11. Doct. & Stud. fol. 45. 28. H. 8. Dyer 41.

[i] 7. H. 8. cap. 4.

[a] 39. H. 6. 22. 37. H. 6. 38. 35. H. 6. 22.

28. H. 8. Dyer 41.

(Post 215. a. 321. a.)

21. H. 8. cap. 25.

Ante 34. b. 6. Co. 22. b. However in another place we find, that no such opinion was intended to be conveyed; and we are informed, that the grandfather and other ancestors may be guardians by nature of their heirs apparent, as well as the father and mother; tho' being liable to be postponed to others, where the father is not, both they and the mother have a title distinguishable from his in point of inferiority. 3. Co. 38. a. Further some modern books do not confine guardianship by nature to heirs apparent, but denominate the father and mother the natural guardians of all their children; and sometimes even the parents of illegitimate issue seem to have been treated as their natural guardians. 1. Ves. 158. 2. Atk. 15. 70. 9. Mod. 117. Sometimes also the guardianship of female children under 16, as given to the father and mother by the statute of Philip and Mary, is said to be *jure natura*. 4. & 5. Phil. & Mar. c. 8. and 3. Co. 38. b. This various and indefinite manner of expression concerning guardianship by nature must create the most distressing confusion in the minds of students; and for their benefit therefore, we shall attempt to rescue the subject from a part of the obscurity in which it is involved, by offering some few distinctions calculated to reconcile the seeming contrariety of the books, so far as they are capable of being made consistent with each other.

luy, sir, jeo doy a vous faire homage pur les tenements que jeo teigne de vous, et jeo sue icy prist a vous faire homage pur mesmes les tenements; pur que jeo vous pry, que ore ceo voiles recevoir de moy.

ought to doe homage unto you for the tenements which I hold of you, and I am here ready to doe homage to you for the same tenements; and therefore I pray you, that you would now receive the same from me.

reth order and decency. And therefore Bracton saith, *et sciendum, quod ille, qui homagium suum facere debet, obtentu reverentiae quam debet domino suo, adire debet dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commode adiri, et non tenetur dominus querere suum tenentem, et sic debet homagium ei facere.* And the same law it is for fealty; and the diversity between these services and the rent is, because that these are

Bracton fol. 80. a. And Britton fol. 171. agreeth herewith.

personall, and the rent may be payd and received by other, and upon the land is sufficient.

Sect. 151.

ET si le seignior adonques refusa de ceo recevoir, donque apres tiel refusall le seignior ne poet distreiner le tenant pur le homage adere, devant que le seignior requiroit le tenant de faire a luy homage, et le tenant a ceo faire refusa.

AND if the lord shall then refuse to receive this, then after such refusall the lord cannot distreine the tenant for the homage behinde, before the lord requireth the tenant to doe homage unto him, and the tenant refuse to doe it.

AND the reason hereof is; for that when the tenant hath done his endeavour and duty to offer his corporal service, and the lord refuseth the same, or doe not accept his service upon his tender thereof, (which is a refusall in law) then the law, in respect of the lord's fault, requireth, that before the lord can distreine for it, that he doth require the tenant to doe that service, and if he either refuse to doe it, or doe it not when he is required, it is a refusall in law.

Vide Bracton fol. 83. Britton 171. 172. 21. E. 3. 24. 21. Aff. p. 73. 20. E. 3. Avowry 223. 45. E. 3. 9. 7. E. 4. 4. 21. E. 4. 17. 20. H. 6. 31. (9. Co. 79.)

Sect. 152.

ITEM home poit tener sa terre per homage auncestrel, et per escuage, ou per auter service de chivaler, auxibien sicome il poyt tener sa terre per homage auncestrel en socage.

ALSO a man may hold his land by homage auncestrell, and by escuage, or by other knights service, as well as he may hold his land by homage auncestrell in socage.

SO as homage auncestrel may belong as well to a tenure by escuage or knights service, as to a tenure in socage, or to a tenure in nature of socage; whereof there hath somewhat been spoken in the chapter of Socage (1).

CHAP.

(1) The statute of 12. Cha. 2. having taken away *all tenure by homage in general words*, without any exception either express or implied of *homage auncestrel*, the latter, though not particularly named, yet as being one species of homage was virtually included. See 12. Cha. 2. c. 24. s. 1. 2. But most probably it had expired before the statute; for lord Coke doubted, whether even in his time there was any relique of this tenure. Ante 100. b. An early extinction of homage auncestrel is easily accounted for, by recollecting, that a *double prescription*, one in the lord's blood and another in the tenant's, or a *privy of succession time out of mind*, which was much the same in effect, was essential to homage auncestrel; and consequently, that if one alienation either of the feigniory or the tenancy had been made within time of memory, the *homage auncestrel* was destroyed, and it became *simple homage*. In a former note we had occasion to make a general observation on the reason for discharging tenures from *homage*, and on the advantages arising from it, whilst it remained, both to the lord and tenant, particularly to the latter, where the homage was *auncestrel*. Ante 67. b. note 1. We have only to add here, that though amongst us homage of every kind, so far it relates to tenures, is now wholly at an end, yet so intimately blended are the various branches of one system, and in subjects of jurisprudence so dependant is a knowledge of the *present* state of things on a reference to the *ancient* one, that the remnant of tenures in this country can never be duly comprehended, without the aid of a general outline, as well of homage and its effects, as of the other perished parts of the same venerable structure.

other. 1. It seems, that not only the father, but also the mother and every other ancestor, may be guardians by nature, tho' with

H h h

CHAP. 8. Sect. 153.

Grand Serjeantie.

TENURE per grand serjeanty.

Serjeanty commeth of the French word (*serjeant*) i. *satelles*, and [a] *serjeantia idem est quod servitium*. And it is called *magna serjeantia*, or *serjanteria*,* or *magnum servitium*, great service, as well in respect of the excellency and greatnesse of the person to whom it is to be done, (for it is to be done to the king only) as of the honour of the service it selfe; and so Littleton him selfe in this section saith, that it is called *magna serjeantia*, or *magnum servitium*, because it is greater and more worthy than knights service, for this is *revera servitium regale*, and not *militare* onely. Fleta saith, *magna autem serjeantia dici poterit, cum quis ad eundum cum rege in exercitu, cum equo cooperto, vel hujusmodi, ad patriæ tuitionem fuerit feoffatus*.

De nostre seignior le

roy. This tenure hath seven speciall properties. 1. To be holden of the king only. 2. It must be done, when the tenant is able, in proper person. 3. This service is certaine and particular. 4. The reliefe due in respect of this tenure differeth from knights service. 5. It is to be done within the realme (1). 6. It is subject to neither *aïd pur faire fitz chivaler*, or *file marier*. And 7. it payeth no *escuage*.

Come de porter le banner de nostre seignior le roy ou de amesner son host. This great service to the king may (as it appeareth hereby) concerne the warres and matters mi-

TENURE per graund serjeantie est,

lou un home tient ses terres ou tenements de nostre seignior le roy per tiels services, que il doit en son proper person faire al roy; come de porter le banner de nostre seignior le roy, ou sa lance, ou de amesner son hoste, ou destre son marshal, ou de porter son espee devant luy a son coronement, ou destre son sewer a son coronement, ou son carver, ou son butler, ou destre un de ses chamberlains de le rescieit de son eschequer, ou de faire auters tiels services, &c. Et la cause, que tiel service est appell grand serjeanty est, pur ceo que il est plus grand et plus digne service, que est le service en le tenure descuage. Car celui, que tyent per escuage nest pas limite per sa tenure, de faire ascun plus especial service que ascun auter, que tyent per escuage, doit faire. Mes celui, que

TENURE by grand serjeanty

is, where a man holds his lands or tenements of our sovereign lord the king by such services as he ought to do in his proper person to the king, as to carry the banner of the king, or his lance, or to lead his army, or to be his marshall, or to carry his sword before him at his coronation, or to be his sewer at his coronation, or his carver, or his butler, or to be one of his chamberlains of the receipt of his exchequer, or to do other like services, &c. And the cause, why this service is called grand serjeanty, is, for that it is a greater and more worthy service, than the service in the tenure of *escuage*. For he, which holdeth by *escuage*, is not limited by his tenure to do any more especiall service, then any other, which holdeth by *escuage*, ought to doe. But he, which holdeth by grand

[a] Glanvil lib. 9. ca. 4.
[b] Bracton lib. 2. 35. & 84. 85. lib. 1. cap. 10.
• Fleta lib. 1. cap. 10. lib. 2. cap. 9. in fine.
[c] Britton cap. 66. fol. 164. 165. Ockam cap. quod non absolvitur.

45. E. 3. 25. per Finchden. Fleta, ubi supra.

Bracton lib. 2. 84. 11. H. 4. 34.
10. H. 4. Avowry 167. F. N. B.
83. 10. H. 6. Ant. Demesne 11.

27. H. 3. tit. Gard. Stat. de Ward. & Relev. 28. E. 1.

(1) Generally the service of *grand-serjeanty* was of such a kind as necessarily to be *within* the realm; but *some* services, which amount to *grand-serjeanty*, might be due *out of* the realm as well as *within*, and both Littleton and Coke give us instances of such reservations. See sect. 153. b. here, and post 106. b.

with considerable differences, such as denote the superiority of the father's claim. The father hath the *first* title to guardianship by nature, the mother the second; and as to other ancestors, if the same infant happens to be heir apparent to two, as to both a paternal and a maternal grandfather, perhaps in this equality of rights priority of possession of the infant's person may decide the preference, according to the general rule in *aquali jure melior est conditio possidentis*. But this difference merely respects the order of succession to guardianship by nature. But whilst the tenure by knight's service continued, there was another difference, which more strongly marked the superiority of this guardianship when claimed by the father; for he was intitled to the custody of the infant's person, even against the lord in chivalry; but the mother and other ancestors were not allowed to have the same preference.

tient per grand serjeanty, doit faire un especial service al roy, que il, que tient per escuage, ne doit faire.

serjeanty, ought to doe some speciall service to the king, which he, that holds by escuage, ought not to doe.

litary; for some grand serjeanties are to be done in the time of war for the safety of the realme; and some in time of peace, for the honour of the realme.

Ou destre son marshall. * If the king giveth

(4. Inst. 123.)
* Fleta lib. 1. cap. 10. 11. Eliz.
Dier 285. Camd. Brit. 286. 287.
* Ockam cap. Officium constabularii.

lands to a man, to hold of him to be his marshall of his host, or to be marshall of England, or to be constable of England, or to be high steward of England, or the like, these are grand serjeanties; and these and such like grand serjeanties are of great and high jurisdiction, and some of them concerne matters military in time of war, and some services of honour in time of peace. And this is to be observed, that though there were divers lords marshalls of England before the reign of [2] R. 2. yet king R. 2. created Thomas Mowbrey duke of Norfolk, and first earle marshall of England *per nomen comitis marischalli Angliæ.*

[2] In Rot. Patent. de anno 20. R. 2.

Ou de porter son espee, &c. ou destre son sewer a son coronement, &c. These and such like grand serjeanties at the king's coronation are services of honour in time of peace.

Destre un de ses chamberlaines, &c. ou de faire autiels services.

It is also a tenure by grand serjeanty to hold [a] by any office to be done in person concerning the receipt of the king's treasure; *Quia thesaurus regis respicit regem et regnum; and census regis est anima reip.* So it is firmamentum belli, et ornamentum pacis.

(4. Inst. 106.)
[a] Vid. 51. H. 3. statut. 5. 10.
E. 3. c. 11. 14. E. 3. c. 14. 26.
H. 8. ca. 2. 34. & 35. H. 8. c. 16. 11. E. 4. fo. 1. Pl. Com. 207. 208.

Miles camerarii dicuntur, quia pro camerariis ministrant; and concerning their office, this is the effect as Ockam [b] saith, *officium camerariorum in recepta consistit in tribus, scilicet, claves arcarii, &c. bajulant, pecuniam numeratam ponderant, et per centenas libras in forulas mittunt.* But discontinuance in effect hath worne out their office. And yet they continue their name, and keepe the keyes of the treasure where the records doe lye.

[b] Ockam cap. Quid sit Scaccarium. Gervasius Tilburienfis in Libro Nigro sub custodia camerariorum.

And another saith, *camerarius dicitur à camera, quia camera est locus, in quem thesaurus reconditur, vel conclave in quo pecunia reservatur.* So as camerarius in legall signification est custos regii census: and Willielmus de Bellocampo comes Warwici held officium camerarii in scaccario.

Rot. claus. 6. E. 1. memb. 1.

Or by any office concerning the administration of justice, *quia justiciā firmatur solium.*

Ex lectura Marrowe.

It appeareth by an ancient record, [c] that *Varianus de sancto Petro tenuit de domino rege in capite medietatem serjantie pacis per servicium inveniendi decem servientes pacis ad custodiendam pacem in Cestria.*

[c] Ex inquisitione post mortem Variani de sancto Petro, 4. E. 2. Cestr. Vm. 7. Ass. 12. 7. E. 3. 57.

See Ockam of the first institution and ancient order of the exchequer, Dier 4. Eliz. 213. the usherie of the exchequer holden by grand serjeanty.

Tiels services, &c. Here by (&c.) is to be understood other like services not expressed, as partly appeareth by that which hath beene said, *viz.* to be steward of England, constable of England, chamberlayne of England, and other honourable services, whereof more shall be said in this chapter.

Ou un especial service al roy. That is to say, that this great service be specially set downe; for it may consist of divers branches, as to goe with the king in his warre in the foreward, and to returne in the reareward; and also to pay rent, &c. but yet it must be certaine and particular.

Sect. 154.

ITEM si tenant, que tient per escuage moruist, son heire esteant de pleine age, sil tenoit per un fee de chivaler, le heire ne paiera forsque C. s. pur reliefe, come est ordaine per le statute de Magna Charta, cap. 2. Mes si celuy, que tient de roy per grand

ALSO if a tenant, which holds by escuage, dyeth, his heire being of full age, if he holdeth by one knight's fee, the heire shall pay but a C. s. for reliefe, as is ordained by the statute of Magna Charta, c. 2. But if he, which holdeth of the king by grand serjeantie

(Ante 83. 2.)

It is by this last diversity, that lord Coke in another place reconciles the books, which appear to exclude the mother and all other ancestors except the father from guardianship by nature; it being observed by him, that they only apply to cases, in which the right to the infant's person was in contest with the lord in chivalry. 3. Co. 38. b. Rutcliffe's case. 2. According to the *strict* language of our law, only an *heir apparent* can be the subject of guardianship by nature; which restriction is so true, that it hath even been doubted, whether such a guardianship can be of a daughter, whose heirship, though denominated *apparent*, yet, being liable to be superseded by the birth of a son, is in effect rather of the *presumptive* kind. 3. Co. 38. b. Ante 84. a. Therefore when guardianship by nature is extended to children in general, or to any besides such as are *heirs apparent*, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus when in chancery the father and mother are styled the *natural* guardians of all their children born in marriage, or of any of their illegitimate issue, we should suppose those, who express themselves so generally, to refer to that sort of guardianship, which the order and course of nature, as far as we are able to collect it by the light of reason, seems to point out, and to mean, that it is a good rule to regulate the guardianship by, where *positive* law is silent, and it is in the discretion of the lord chancellor to settle the guardianship. So too when lord Coke says, that the custody of a *female* child under sixteen, to which the father, and after his death the mother, is intitled by the provisions of the statute of the 4. and 5. Philip and Mary, is *jure natura*, we should understand him to mean, not that such a custody was a *guardianship by nature* recognized by our common law, but merely that it was a *statutory* guardianship adopted by the legislature in conformity to the dictates of nature,

*serjeantie morust, son heire es-
teant de plein age, le heire paie-
ra al roy pur reliefe le value de
les terres ou tenements per an
(ouster les charges et reprises)
queux il tient del roy per grand
serjeantie (1). Et est ascavoir,
que serjeantia en Latin idem est
quod servitium, et sic magna ser-
jeantia idem est quod magnum
servitium.*

dieth, his heire being of full age,
the heire shall pay to the king for
reliefe one yeares value of the
lands or tenements which he hold-
eth of the king by grand serje-
antie over and besides all charges
and reprises. And it is to be un-
derstood, that *serjeantia* in Latine
is the same *quod servitium*, and so
magna serjeantia is the same *quod
magnum servitium*.

11. H. 4. 72. b.

Paiera al roy pur reliefe le value de ses terres, &c. And herewith agreeth

11. H. 4. 72. b.

Serjeantia idem est quod servitium. Hereby it appeareth that the explanation
of ancient words and the true sence of them are requisite, and to be understood *per verba notiora*.

Sect. 155.

TENANTS *per es-
cuage doient faire
leur service hors del
roialme.*

F. N. B. 83. E.
(4. Co. 88.)

For he, that holdeth by
cornage or castle-guard, hold-
eth by knights service, and
is to doe his service within
the realme; but he holdeth
not by escuage, and therefore
Littleton materially saide ten-
nant *per escuage*, and not te-
nant by knights service (2).

ITEM *ceux, que
teignent per es-
cuage, doient faire
leur service hors de
roialme; mes ceux, que
teignent per graund
serjeantie, pur le gre-
inder part doient
faire leur services
deins le roialme.*

ALSO they, which
hold by escuage,
ought to doe their
service out of the
realme; but they,
which hold by grand
serjeantie, for the
most part ought to
do their services with-
in the realme.

Pur le greinder part. For to bear the king's banner, or his lance, or to lead his
host, and to be his marshall, &c. may be as well without the realme; and therefore Littleton
saide (for the greatest part.)

Sect. 156.

4. H. 5. cap. 7. 22. E. 4. cap. 8.
Camden in Britannia.

EN *les mar-
ches de
Scotland. Mar-
ches* is either a Sax-
on word, and sig-
nifieth *limites, bour-
dours*, or an Eng-
lish word, *viz.*
Markes. *Nota*, for
that it lyeth neere
to Scotland, it is
sayd in the mar-
ches of Scotland,
and yet the land

ITEM *il est dit, que en
les marches de Scot-
land ascuns teignent de
roy per cornage, cesta-
scavoir, pur ventier un
cornu, per garner homes
de pais, quant ils oyent
que le Scottes ou auters
enemies veignent ou
voient enter en Engle-
terre; quel service est*

ALSO it is said, that in
the marches of Scot-
land some hold of the
king by cornage, that is
to say, to winde a horne, to
give men of the countrie
warning, when they heare
that the Scots or other e-
nemies are come or will
enter into England; which
service is grand serjeanty.
graund

(1) See as to reliefs ante 69. b. 76. a. 83. a.

(2) Here lord Coke shews, that escuage, though usually an incident to knight's service, is not always so; that is, that knight's
service may be without escuage. On the other hand, escuage, if *uncertain*, which we must understand it to be when men-
tioned generally, cannot be without knight's service. To express this in fewer words, escuage is inseparable from knight's
service, but knight's service is not so from escuage. This tends to confirm what we observed in a former note, that escuage
ought to be considered rather as an incident to the tenure by knight's service, than as a distinct tenure. However, it at the
same time seems to point out the reason for calling some tenures by knight's service tenures by escuage; because such a deno-
mination distinguished that species of knight's service, to which escuage was incident, from cornage, castle-guard, and
such other tenures by knight's service as were not liable to escuage. We think this a more satisfactory way of justifying
Littleton against the censure of Mr. Madox for using the term of *tenure by escuage*, than resorting to the distinction suggested
by Sir Martin Wright; who, as we have formerly hinted, attempts to prove, that though generally escuage was an incident
to tenure by knight's service, yet sometimes it was a tenure of itself. Ante 73. note 2. But still we must confess the justice of
Mr. Madox's animadversion, so far as it applies to the calling *homage* and *fealty* tenures; because the former being incident to
every species of knight's service, except where the tenant was exempt from it by profession, and the latter being an incident
to all tenures except tenures at will or at sufferance, it could answer no purpose of discrimination thus to denominate any te-
nure.

nature, and upon principles of general reasoning. But though what our law calls guardianship by nature is thus confined to
the

graund serjeanty. Mes si ascun tenant tient d'ascun autre seignior, que de roy, per tiel service de cornage, ceo nest pas grand serjeantie, mes est service de chivaler, et trait a luy garde et mariage; car nul poit tener per grand serjeanty si non de roy tanselement.

But if any tenant hold of any other, lord then of the king, by such service of cornage, this is not grand serjeanty, but it is knights service, and it draweth to it ward and marriage(2); for none may hold by grand serjeanty, but of the king only.

whereof Littleton here speaketh, lieth in England (1).

Per cornage.

Cornagium is derived (as *cornuare* also is) à *cornu*, and is as much (as before hath beene noted(3) as the service of the horne. It is also called in old bookes *bornageld*.

Note a tenure by 27. H. tit. Gard. 148. 3. E. 3. cornage of a common person is 66. in fine. 16. E. 3. Avoine 90. F. N. B. 83.

knights service, of the king it is grand serjeanty; so as the royall dignity of the person of the lord maketh the difference of the tenure in this case (4). And I find that there were *cornicularii* amongst the Romans, *et dicti fuerunt cornicularii quia cornu faciebant excubias militares*, and *magna serjeantia* is appropriated only to this tenure.

Sect. 157.

ITEM home poit veier anno 11.

H. 4. que Cokayne, adonque chiefe baron deschequer, vient en le common banke, portant ovesques luy la copie dun recorde in hæc verba. Talis tenet tantam terram de domino rege per serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c. Et il demaunda, sil fuit graund serjeanty ou petite serjeantie. Et Hanke adonques disoit, que il fuit graunde serjeantie; pur ceo que il ad service a faire per corps dun home, et sil ne purra trover nul home a faire le service pur luy, il mesme doit faire. Quod alii

ALSO a man may see in anno 11. H.

4. that Cokayne, then chiefe baron of the exchequer, came into the common place, and brought with him the copy of a record in these words. *Talis tenet tantam terram de domino rege per serjeantiam ad inveniendum unum hominem ad guerram ubicunque infra quatuor maria, &c.* And he demanded, if this were grand serjeanty, or petite serjeanty. And Hanke then said, that it was grand serjeanty; because he had a service to do by the bodie of a man, and if he cannot find a man to doe the service for him, he himselfe ought to doe it(5). *Quod alii alii justiciarum concess-*

ET sil ne purra trover nul home a faire le service pur luy, &c. Hereby it ap-

peares, that tenant by grand serjeantie may in some cases make a deputy, and therefore the diversitie is, that, where the grand serjeanty is to be done to the royall person of the king, or to execute one of those high and great offices, there his tenant cannot make a deputie without the king's licence, and therefore Littleton hath said before that such services are to be done in proper person. But he, that holdeth to serve him in his warre within the realme or by cornage, may make a deputie.

(*) *Johannes de Archier* qui tenet de domino rege in capite per serjeantiam archerie, &c. in comitatu Glouc. hæres in custodia.

Infra quatuor maria. That is within the kingdome of England, and the dominions of the same kingdome (6).

Now it is good to be seene what persons that hold by grand serjeantie may doe and performe that honorable service in person, and who ought not to be received thereunto

11. H. 4. 72. 24. E. 3. 32. V. d. Hill. 8. E. 1. Middle inter Pleita de Banco. Sir John Moyle's case.

11. H. 4. 72.

(*) Claus. 18. H. 3. M. 5.

Rot. Escheator. 41. H. 2. nu. 23. Stephen Haringdon's case.

nure. In fact it was not the practice to call any tenure a tenure either by fealty or by homage, except in the case of homage auncetrel; and though Littleton begins his account of tenures with homage and fealty, yet we may very well suppose his previous explanation of them and escuage, or at least of the former, to have been made merely as an introduction to the description of knight's service. We should not be thus prolix in observing on a controversy, which is more verbal than any thing else, if it was not for the sake of convincing the reader, that however properly Mr. Madox guards against confounding the incidents of a tenure with the tenure itself, still it would be an injustice both to Littleton and Coke to impute any such misconception to them; and therefore, that so far as Mr. Madox's animadversion hath this tendency, respectable as his writings are, it ought to be rejected. Indeed it is highly improbable, that grave and learned authors, like Littleton and Coke, to both of whom, particularly the former, the whole doctrine of tenures was so much more familiar than it can possibly be in modern times, when the practice in respect to tenures is confined to a very narrow circle and we are mere theorists as to the greater part of the subject, should adopt an error so fundamental.

(1) See further as to the marches of Scotland 4. Inst. 281. and Nicholf. Leges March.—(2) This passage seems rather to imply, that wardship and marriage were not incident to tenure by *cornage*, when it was of the king and therefore called grand serjeanty. But this was not the meaning of Littleton, as appears from a subsequent section, in which he is more explicit and expressly tells us, that all tenures by grand serjeanty were liable both to ward and marriage. See sect. 158.—(3) See ante 69. b.

—(4) See

the heir apparent, yet we must not from thence conclude, that parents have not a right to the custody of their other children;

Lib. 2. Cap. 8. Of Grand Serjeantie. Sect. 158.

[a] 1. R. 2. Rot. Claus. m. 45.

unto, but ought to make a sufficient deputy. At the coronation of [a] king R. 2. John Wilshire citizen of London exhibited his petition to the high steward of England in his court, that where the said John held certain lands in Hayden in the county of Essex of the king by grand serjeantie, viz. to hold a towell

when the king should wash his hands before dinner the day of his coronation, &c. and prayed that he might be accepted to doe this office of grand serjeantie, the judgement followeth. *Et quia apparet per record' de Scaccario domini regis in curia monstrat' quod predicta tenementa tenentur de domino rege per servitium predictum, ideo dictus Johannes admittitur ad servitium suum hujusmodi faciendum per Edmundum comitem Cantabrigie deputatum suum, et sic id. n. com. in jure ipsius Johannes manutergium tenuit, quando dominus rex lavabat manus suas dicto die coronationis sue ante prandium.*

By which record it appeareth, that the said John Wilshire, being of his quality and having not any dignity, could not doe and performe this high and honorable service to the royall person of the king, but did make an honorable deputy, who performed it in his right; which is worthy of observation.

Vid. 1. R. 2. Memb. 45.

At the same coronation William Furnevall exhibited his petition in the same court, that where he held the manor of Farnham, in the county of Buck, with the hamlet of Cere in the same county, by the service to find to the king at his coronation a glove for his right hand, and to support the king's right hand the same day, while he held in his hand the verge royall, the judgement followeth. *Qua quidem petitione debite intellecta, et facta publica proclamatione, si quis clameo ipsius Willielmi in ea parte contradicere vellet, nemineque ei contrariante, consideratum fuit, quod idem Willielmus, assumpto per eam primitus ordine militari, ad servitium predictum admitteretur faciendum; et postmodo (videlicet) die Martis proximo ante coronationem predictam dominus rex ipsum Willielmum apud Kenington honorifice prefecit in militem, et sic idem Willielmus servitium suum predictum dicto die coronationis juxta, considerationem predictam, perfecit et in omnibus adimplevit.* By which it appeareth, that a knight is of that dignity, that he may performe this high and honorable service in his owne person; and although this William Furnevall was descended of an honorable family, yet before he was created knight he could not performe it.

And Sir John de Argentine Chivalier performed the service of grand serjanty, to be the king's cup-bearer at the same coronation.

[m] Vid. 1. R. 2. m. 45.

[m] Anne, which was the wife of Sir John Hastings earle of Pembroke, who held the manor of Ashley in Norfolk of the king by grand serjantie, viz. to performe the office of the napery at his coronation, was adjudged to make a deputy; because a woman cannot doe it in person, and thereupon she deputed Sir Thomas Blount knight, who performed the same in her right. John, sonne and heire of John Hastings earle of Pembroke, exhibited in the same court his petition, shewing that by his tenure he was to carrie the great spurs of gold before the king at his coronation, &c. The judgement is, *Audita et intellecta billa predicta, pro eo quod dictus Johannes est infra etatem, et in custodia domini regis, quanquam sufficienter ostenditur per recorda, et evidencias, quod ipse servitium predictum facere deberet, consideratum extitit, quod esset ad voluntatem regis, quis dictum servitium ista vice in jure ipsius Johannis faceret; et super hoc dominus rex assignavit Edmundum comitem Marchie ad deferendum dicto die coronationis predicta calcaria in jure prefati heredis, salvo jure alterius cujuscunque.* Et sic idem comes Marchie calcaria illa predicto die coronationis coram ipso domino rege deferbat. By which it appeareth, that the heire, before he hath accomplished his age of one and twenty yeares, cannot performe his great and honourable service, but during the minoritie the king shall appoint one to performe the service.

Vid. 1. R. 2. m. 45.

Sect. 158.

46. E. 3. 15. a. per Finchden.

HERE Littleton saith, that he, that holds by grand serjeantie, doth hold by knights *ET nota, que* AND note, that all, which hold of nont de roy per grand the king by grand ser-

—(4) See post 108. b. where for a like reason a service, which if it was to be done to a subject, would be *seage*, is distinguished by the denomination of *petit serjeanty*.—(5) Particular respect is due to the opinions of ancient times on the subject of tenures; but in the instance of the case here mentioned to be put to the judges, their resolution seems so inconsistent with the nature of grand serjeanty, as described both by Littleton and Coke, that it may be allowable to doubt the propriety of the opinion. Littleton states the doing the service to the king in *proper person* as a thing essential to grand serjeanty; and lord Coke enumerates it amongst the special properties of this tenure, with the exception only of performing the service by deputy when the tenant himself is incapable. Ante 106. b. But if this be so, how can a service, expressly reserved to be done by any person, fall within the description? It is observable indeed, that Littleton recites the opinion of the judges without the least approbation; and that even they themselves, when pressed to declare, what the relief ought to be, whether 5 l. as for a tenure by escuage, or a year's value of the lands as for a grand serjeanty, avoided answering; from which hesitation it seems, as if they were not disposed to adhere to their first opinion in all its consequences. On the other hand, if the tenure in question was not grand serjeanty, but mere knight's service, it tends to prove, that though the personal service, in lieu of which escuage was payable, was in general due only on foreign expeditions, yet by special reservation it might be due within the realm. However, reserving service in war within the realm was a thing so unusual in practice, that the service, for which escuage was a commutation, was called *servitium forinsecum*; a denomination, which according to lord Hale, is founded on the circumstance of its being due out of the realm. See ante 69. b. note 3. In a former note on escuage, we adopted lord Hale's opinion as to the reason of calling knight's service *servitium forinsecum*; because we thought his conjecture a probable one. Ante 74. a. note 1. But

for our law gives the custody of them to their parents till the age of fourteen by the guardianship of nurture, which species of guardians-

serjeanty, teignent de roy per service de chevalrie; et le roy per ceo avera garde, mariage, et reliefe; mes le roy n'averá de eux escuage, s'ils ne teignent de luy per escuage.

serjanty, hold of the king by knights service; and the king for this shall have ward, marriage and reliefe; but he shall not have of them escuage, unless they hold of him by escuage.

service, which is so said of the effects. And therefore Littleton doth add, that the king shall have ward marriage and reliefe, which are the effects of knights service, &c.

Sometimes in ancient records, *servitium militare* is called *servitium hauberticum*, or *servitium brigandinum*, or *servitium loricatedum*. And a haubert or brigandine signifieth a coat of mail (1).

CHAP. 9. Sect. 159.

Petit Serjeantie.

TENURE per petit serjeanty est, lou home tient sa terre de nostre seignior le Roy de render al Roy annualment un arke, ou un espee, ou un dagger, ou un cuttel, ou un launce, ou un paire de gants de ferre, ou un paire de spoures d'ore, ou un jete, ou divers fetes, ou de render autres tiels petit choses touchants le guerre.

TENURE by petite serjeanty is, where a man holds his land of our soveraigne lord the king, to yeeld to him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a paire of gloves of maile, or a paire of gilt spurs, or an arrow, or divers arrowes, or to yeeld such other small things belonging to warre

DE nostre seignior le roy. And so Littleton concludeth this chapter, that a man cannot hold by grand serjeanty or petite serjeanty, but of the king, and of the king as of his person, and not of any honour or manor. (2) And it is to be observed, that regularly a tenure of the king as of his person is a tenure *in capite*, so called *ex capite* propter excellentiam: because the head is the principall part of the body, and he that holdeth of any common person as of his person, he in truth holdeth *in capite*; but againe *ex capite* it is only in common understanding applyed to the king, and that feigniorie of a common person is called a tenure in grosse, that is, by itselfe, and not linked or tied to any manor, &c.

Britton fol. 164. Bracton lib. 2. fol. 35. Fleta lib. 2. cap. 9. Ockam cap. Quid be avibus oblati.

(6. Co. 6.)

And this tenure of the king *in capite*, is said [a] to be a tenure of the king as of his crowne, that is, as he is king. [b] And therefore if one holdeth land of a common person in grosse as of his person, and not of any manor, &c. and this feigniorie escheateth to the king (yea though it be by attainder of treason) he holdeth of the person of the king, and not *in capite*; because the originall tenure was not created by the king. And therefore it is directly said, that a tenure of the king *in capite*, is when the land is not holden of the king as of any honor, castle, or manor, &c. but when the land is holden of the king as of his crowne (3).

[a] Bracton lib. 2. fol. 87. (2. Ro. Abr. 504.) [b] 3. E. 3. Tenures B. 94. 10. H. 8. 41. 28. H. 8. Livery B. 57. 29. H. 8. ibid. 58. 6. H. 8. Dier. 58. Vide Lestrate de 1. E. 6. cap. 4. F. N. B. 5. K. (2. Ro. Abr. 72, 73.)

Note that an honor is the most noble feigniorie of all others, and originally created by the king, but may afterward be granted to others. See for the creation of an honor, 13 H. 8. cap. 5. 33 H. 8. cap. 7. 38. 37 H. 8. cap. 18. (4)

And it is to be observed, that a man may hold of the king *in capite*, or of his crowne, as well in socage, as by knight's service (5).

De render al roy annualment un arke, ou un espee, &c. As grand serjeanty must be done by the body of a man, so petite serjeanty hath nothing to do with the body of a man, but to render some things touching warre; as a bow, a sword, a dagger, a knife, a launce, a pair of gantlets of iron, or shafts and such like.

Magna Chart. cap. 27.

It is to be observed that grand serjeanty or knights service is not in law called *liberum servitium*, as socage is, but *per feodum unius militis*, &c. But to finde the king so many ships for

Regist. fo. 2. F. N. B. fo. 1.

But the reader should recollect, that others explain the denomination in a different way. Ante 74. b.—(6) On many occasions it may be of importance thoroughly to understand the phrase of *infra*, or as according to classical style it ought to be, *infra quatuor maria*; for there are various subjects, as well of the law of nations, as of municipal law, which are necessarily connected with it. Of the former kind are the sea dominion claimed by our king and its incidental rights; especially the right of salutation by striking of the flag and lowering the top-sail to our ships of war; a ceremony, which, however it may be construed by foreigners as a mere compliment, is considered by ourselves as a recognition of sovereignty. Of the latter sort are the doctrine concerning effoins *de ultra mare*, and all those cases, which turn upon the allegation of being beyond sea; as questions of legitimacy, of outlawry, and on the statutes of limitation particularly may. But notwithstanding the necessity of knowing, for such a variety of purposes, what is the sense of the term of being *within the four seas*, we do not find the subject sufficiently enlarged upon, either by lord Coke, or indeed scarce any other writers deserving of being called original; except Mr. Selden, who is very copious upon it; and Sir Philip Medows, who, though not so favourable to our claim of sea dominion, nor so generally known as the former, is well intitled to notice. See Seld. Mar. Claus. lib. 2. per tot. but more particularly in cap. 1. & 24. and Medows's Observat. concerning the Dominion, &c. of the Seas, in a small tract, which was published in 1689. In this scarcity of information on the subject, it may be acceptable to the reader to be assisted in his enquiries by a short but pointed view of the subject; for which purpose we shall first mention the origin of the phrase of the *four seas*, and explain its most general and extended sense.

The continuation of this note will be found after the note at the end of the notes to 108. b.

(1) The tenure by grand serjeanty still continues, though it is so regulated by the 12. of Cha. 2. as to be made in effect free and common socage, except so far as regards the merely honorary part of grand serjeanty; for the first part of the statute, which destroys the incidents to tenures by knight's service, of which grand serjeanty was the highest species, is expressed with a generality sufficient to reach grand serjeanty; but then a proviso follows, by which the honorary services of this tenure are expressly saved. It is observable, that the proviso for this purpose is penned with an inaccuracy, which leads to a very mistaken idea of the incidents to grand serjeanty. The honorary services are preserved with a cautious exception of several burthenome properties, such as marriage wardship and *voyages royal*; to which are added *escuage* and the *aids pur faire fitz chevalier et fille marier*, though these latter were certainly quite foreign to grand serjeanty. See ante 105. b. From this undistinguishing mode

of

guardianship, though it differs from that by nature not only in name but also in duration and some other particulars, as will appear

Bract. li. 2. fo. 35.

9. H. 3. Gard. 145.

for his passage is called *liberum servitium*; and therefore it is said, *per liberum servitium ad inveniendum nobis quinque naves ad transitum nostrum ad mandatum nostrum*. And therefore clearly such a tenure is neither grand serjeanty, nor knights service; because nothing is to be done by the body of any man, nor in that case touching war, but ships to be found. And this is the reason, that Littleton yeeldeth of the examples he doth here put, because that such a tenant by his tenure ought not to go, nor to do any thing in his person, touching war. And here-with agreeth Bracton, *ex parvis serjeantiis, quæ non respiciunt regem nec patriæ defensionem, nullum competere debet maritagium nec custodiam, &c.*

If a man holdeth land of the king, to finde an horse of such a price and a saddle and a bridle by forty dayes, or any other time, when the king goeth with his army against Wales, this is petite serjeanty, and no grand serjeanty for the cause aforesaid.

Sect. 160.

TIEL service nest
forsque focage, &c.

But as it hath beene said, the dignity of the person of the king giveth the name of petite serjeanty, which in case of a common person should be called plain focage *ab effectu*: for it shall have such effects or incidents as belong to focage, and neither ward nor marriage, &c. for they belong to knights service.

9. H. 3. Gard. 145.

Mog. Chart. ca. 28.
Vide Stat. de Wardis & Relevis
28 E. 1.

Of this tenure the great charter in the person of the king faith thus. *Nos non habebimus custodiam heredis, &c. occasione alicujus parvæ serjeantie, quam tenet de nobis per servitium reddendo nobis cultellos, sagittas, &c.*

ET tiel service ne
est forsque focage
en effect; pur ceo
que tiel tenant per
son tenure ne doit
aler, ne sayre ascun
chose, en son proper
person, touchant le
guerre, mes de ren-
der & payer annual-
ment certaine choses
al roy, sicome home
doit payer un rent.

AND such service is
but focage in ef-
fect; because that such
tenant by his tenure
ought not to goe, nor
doe any thing, in his
proper person, touch-
ing the warre, but to
render and pay year-
ly certaine things
to the king, as a
man ought to pay a
rent.

Sect. 161.

OF this suf-
ficient hath
beene sayd before,
saying that *parva*
serjeantia is only
appropriate to this
tenure (1).

Vide Sect. 1.

ET nota, que home ne
poyt tener per grand
serjeantie, ne per petit
serjeanty, sinon de roy,
&c.

AND note, that a man
cannot hold by grand
serjeanty, nor by petite
serjeanty, but of the king,
&c.

CHAP. 10. Sect. 162.

Tenure en Burgage.

Bracton lib. 3. Traet. 2. Britton
fol. 164. Mirror cap. 2. sect. 18.
10. Co. 123, 124. The May-
or of Lynn's Case. 40. All.
p. 27. 43. E. 3. 32. 21. E. 4.
53. & 54. 21. H. 7. 15. 2. E.
3. cap. 3.

[6] Bracton lib. 3. fo. 124.
Fleta lib. 1. cap. 47.

BURGAGE, in Latine
burgagium, is derived of
this word *burgus*, which is
vicus, pagus, or villa, a
towne (2); and it is called a
burgh (3), because it sendeth
burgesses to parliament.

Of burghs some be incorporate, and some not; and some be walled, and some not. [6] It

TENURE en bur-
gage est, lou an-
tient burgh est, de que
le roy est seignior, &

TENURE in bur-
gage is, where an
ancient burrough is, of
which the king is lord,

of expression, and from the confusion and redundancy so conspicuous in most parts of the statute, we are inclined to infer, that those, who attribute the framing of it to lord chief justice Hale, found themselves on a loose report, very injurious to the memory of that shining ornament of his profession. See Gilb. Eq. Rep. 176.—(1) In a former note we mentioned Mr. Madox's disapprobation of calling any tenures of the king by way of distinction *tenures ut de persona*. We shall here explain his reasons for rejecting the phrase more fully. The phrase seems unnecessary; for that of *ut de corona* fully answers the same purpose of distinction. It also seems injudicious, and to tend to an erroneous idea of tenures; because it supposes, that some tenures are not of the person, whereas in truth all are, and none can hold feudally of an inanimate thing, or otherwise than of a man's person. Mad. Baron. Ang. 167. This is the substance of Mr. Madox's objections to the phrase; and we still think, that in strict propriety of speech, his animadversion on those, who use it, is justifiable. However in justice to lord Coke it should be remembered, that he was not the inventor of the phrase; Mr. Madox himself tracing its origin to the latter end of the reign of Henry the Eighth.—(2) Mr. Madox is not less adverse to thus distinguishing tenure in capite from tenure *ut de honore*, than to the distinction of *ut de persona*; nor are his reasons less convincing. Tenore in capite, in its genuine sense, signifies a tenure of another *sine medio*, that is, immediately and without the interposition of any mesne or intermediate lord; and therefore when an honor or other feignior came into the hands of the crown by escheat or otherwise, its tenants were as much tenants in chief to the king, as those who were so by original grant from the crown. In proof of this Mr. Madox selects from ancient records a great variety of instances between the 8th of Richard I. and the 20th of Henry VI. in which tenures *ut de honore* are expressly styled tenures in capite; and as Mr. Madox adds no instances of a later time than Henry the Eighth and queen Elizabeth, in which the words in capite are omitted, it may be conjectured, that the error complained of by Mr. Madox originated soon after the time of Henry the Sixth. Mad. Baron. Angl. 181. The design of excluding tenures *ut de honore* from the description of tenures in capite was to distinguish those estates, which were held of the king by a tenure originally created by the king, from those held of him by a tenure commencing by the subinfeudation of a subject; between which there were many differences in point of incident very essential both to the lord and tenant. Mad. Baron. Angl. 12. But it should have been recollected, that the distinction aimed at was already marked, with equal sufficiency and more correctness, by denominating tenures of the first sort tenures *ut de corona*, and those of the second tenures *ut de honore*. The influence of this mistaken notion of tenancy in capite is very evident, as well throughout the statute of Charles the Second for taking away the oppressive fruits of knight's service and tenure in capite, as in those grants from the crown, which in the *tenendum* are expressed to be *ut de honore et non in capite*. See Mad. Excheq. fol. ed. 432. But great as this error about tenure in capite may be, lord Coke is excusable for conforming in his language to it; because before his time it had been adopted by the legislature. See 37. H. 8. c. 20. f. 2. 3. 4. 1. E. 6. c. 4. f. 1. 2. & 3. and Mad. Baron. Angl. 233.

[6] For the remainder of the notes to 108. a see fol. 110. a.

(1) The tenure of petit serjeanty is not named in the 12. of Cha. 2. but the statute is not without its operations on this tenure.

appear by the next note, is founded on a like conformity to the order of nature. It being thus explained, who are intitled to

ceux, que ont tenements deins le burgh, teignent del roy leur tenements, que chescun tenant per son tenement doit payer al roy un certain rent per an, &c. Et tiel tenure nest forsque tenure en socage.

and they, that have tenements within the burrough, hold of the king their tenements; and every tenant for his tenement ought to pay to the king a certaine rent by yeare, &c. And such tenure is but tenure in socage.

was in former times taken for those companies of ten families, which were one anothers pledge; and therefore a pledge in the Saxon tongue a *borhoe*, whereof some take it that a burgh came, whereof also commeth headborough or borrowhead, *capitalis plegius*, a chiefe pledge, viz. the chiefe man of the borhoe, whom Bracton called *frithburgus*; and hereof also commeth burgbote, which, as Fleta saith, signifieth *quietanciam reparationis murorum civitatis aut burgi*.

Every city is a burgh, but every burgh is not a city; whereof more shall be said hereafter. And the termination of this word *burgagium*, (as before hath beene noted) signifieth the service whereby the burgh is holden. And of this word (burgh) two ancient and noble families take their names, viz. *de Burgo*, and *de Burgo caro*, *Burchier*.

De que le roy est seignior. But it may be holden of another, as by that, which F. N. B. 64. d. immediately followeth, appeareth.

Sect. 163.

ET mesme le manner est, lou un autre seignior espectral ou temporall est seignior de tiel burgh, et les tenants de tenements en tiel burgh teignent de leur seignior a payer, chescun de eux, un annuel rent.

AND the same manner is, where another lord spirituall or temporall is lord of such a burrough, and the tenants of the tenements in such a burrough hold of their lord to pay, each of them yearly, an annual rent.

THIS is evident, and needeth no explanation. Only this by the way is to be observed, that bishops, being lords of parliament, have not been called lords spirituall &c. so lately, as some have imagined. 16. R. 2. ca. 5. 1. H. 4. ca. 2.

Sect. 164.

ET est appel tenure en burgage; pur ceo que les tenements deins le burgh sont tenus del seignior del burgh per certaine rent, &c. Et est ascarvoire, que les antient villes, appel

AND it is called tenure in burgage; for that the tenements within the burrough be holden of the lord of the burrough by certaine rent, &c. And it is to wit, that the ancient townes, called burroughes, be

PER certaine rent, &c. By (&c.) here is implied fealty, or other service, as to repaire the house of the lord, &c.

Les ancient villes appel burghes.

So as a burgh is an ancient towne, holden of the king or any other lord, which sendeth burgesses to the parliament.

And it is to be observed, that *Burgh* and *Burie* have all one signification; as *Canterburie*, *Burie Saint Edmond*, *Sudburie*, *Salisbury*, *Baeburie*, *Hoyesburie*, *Malmesburie*, *Sbastesburie*, *Toukef-*

It being necessarily a tenure *in capite*, though in effect only so by socage, *livery* and *primer seisin* were of course incident to it on a descent; and these are expressly taken away by the statute from every species of tenure *in capite*, as well *socage in capite* as *knights service in capite*. See ante 77. a. But we apprehend, that in other respects *petit seignior* is the same as it was before; that it continues in denomination, and still is a dignified branch of the tenure by socage, from which it only differs in name on account of its reference to *war*.—(1) For the difference between *town* and *borough*, see post 115. b.—(2) For the etymology of *borough*, besides Spelman, Du Fresnoie, and the other glossarists, see Whitt. on Parliam. 497. Brad. on Bor. 1. and Mad. Firm. Burg. 2.—(3) Mr. Madox cautions his readers against this derivation of *borough*. Mad. Firm. Burg. 2. His reason, we presume, was, that *borough* was a word far more ancient than the practice of sending burgesses to parliament. However it is possible, that some boroughs might be denominated towns, till they were allowed to chuse representatives in parliament; and that they acquired the name of *boroughs* from the circumstance of having that privilege. If any towns did become *boroughs* in this way, it in some degree accounts for lord Coke's explication of the word, though it will not wholly justify him as an etymologist.

Continuation of the note about the Four seas from 108. a.

The appellation of the *four seas* takes its rise from the four parts, into which the sea encompassing Great Britain, by reference to the four cardinal points of the globe, is divided. All these parts taken together are sometimes called the *British seas*; but considered separately each varies in its denomination with the coasts of the island. To the *West* our sea is by ancient writers called *Vergivian*, not only including the sea between Great Britain and Ireland, but extending over the Atlantick ocean, which washes the western coast of the latter; and this western part of our sea is subdivided; for so much as runs between England and Ireland is called *St. George's Channel*, or the *Irish sea*, and the sea on the west coast of Scotland is sometimes named

the guardianship by *nature*, and what infants are its objects, we shall conclude with some few other particulars concerning it.—This guardianship continues till the infant attains the age of *twenty-one*.—The books inform us, that it extends no further than the custody of the infant's *person*; a peculiarity, we did not sufficiently advert to, when we were writing a preceding note, which in the last sentence is unguardedly expressed, as if receiving the profits of lands might be part of the office of guardian

Teukisbury, and others send Burgeses to the parliament. *Vide pro villis, parochiis et hamlettis postea, section 171.*

Cities. *Civitas*, whereof commeth the word city. A city is a borough incorporate (2); which hath, or have had a bishop; and though the bishopricke be dissolved, yet the city remaineth.

In the time of William the conquerour it is declared in these words. *Item nullum mercatum, vel forum fit, nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis clausis et muro vallatis, et castellis, et locis tutissimis, ubi consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ, quæ constitutæ sunt à bonis prædecessoribus nostris, deperire non possunt, nec defraudari, nec violari, sed omnia rite et per judicium et justitiam fieri debent: et ideo castella et burgi et civitates sunt et fundatæ et edificatæ; scilicet ad tuitionem gentium, et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate et integritate et ratione.* So as by this it appeareth, that cities were instituted for three purposes. First, *Ad consuetudines regni nostri, et jus nostrum commune, et dignitates coronæ nostræ conservandæ.* 2. *Ad tuitionem gentium et populorum regni.* And thirdly, *Ad defensionem regni.* For conservation of laws, whereby every man enjoyeth his owne in peace; for tuition and defence of the king's subjects; and for keeping the king's peace in time of sudden uprores; and lastly for defence of the realme against outward or inward hostility.

Civitas et urbs in hoc differunt, quod incolæ dicuntur civitas, urbs verò complectitur ædificia; but with us the one is commonly taken for the other. Villeins sont coultiviers de fief demurrans in villages upland; car de ville est dit villeine, et de boronghes burgeses, et de cities citizens.

Every borough incorporate, that had a bishop within time of memory, is a citie, albeit the bishopricke be dissolved; as Westminster had of late a bishop, and therefore it yet remaines a city (3). The burgh of Cambridge, an ancient city, as it appeareth by a judicall record (which is to be preferred before all others) where *mos civitatis Cantabrigiæ* is found by the oath of twelve men the recognitors of that assise; which (omitting many others) I thought good to mention, in remembrance of my love and duty *almæ matri academia Cantabrigiæ.*

There be within England two archbishopricks, and twenty-three other bishopricks. Therefore so many cities there be; and Cambridge and Westminster being added, there are in all twenty-seven cities within this realme, and may be more, than at this time I can call to memory.

It is not necessary, that a city be a county of itselfe; as Cambridge, Ely, Westminster, &c. are cities, but are no counties of themselves, but are part of the counties where they be.

Counties. Or shires, the one taken from the French, the other from the Saxon, in Latine *comitatus*. Counties are certaine circuits or parts of the kingdome, into the which the whole realme was divided for the better gouvernement thereof, so as there is no land, but it is within some county. And every of them is governed by a yearly officer, which we call a Shireve; which name is compounded of these two Saxon words *Shire* and *reve*, [i] *præpositus* or *præfectus comitatus*. But hereof more hereafter in his proper place shall be spoken. There be in England forty-one counties, and in Wales twelve.

Veignent les burgeses al parliament, &c. Parliament is the highest and most honourable and absolute court of justice in England, consisting of the king the lords of parliament and the commons. And againe, the lords are here divided into two sorts, *viz.* spirituall and temporall. And commons are divided into three parts, *viz.* into knights of shires or counties, citizens out of cities, and burgeses out of burroughes; the words of the writ to the sherife for the election being, *duos milites gladiis cinctos magis idoneos et discretos comitatus tui, et de qualibet civitate comitatus tui duos cives, et de qualibet*

named the *Caledonian*, *Deucalidonian*, or *Scottish* sea, and sometimes the *North* sea. On the *North* side of our island there is also the *Scottish* or *North* sea. To the *East* we have the *German* ocean, which is bounded principally by the opposite coasts of Germany and the United Provinces. Lastly, to the *South* there is the *British* Channel, or sea, as some denominate it; which runs along the *French* coast, and, comprehending the bay of Biscay, ends with the northern coast of Spain. See Seld. Mar. Claus. lib. 2. cap. 1. and the introductory account of the British ocean prefixed to the description of Ireland in Camd. Britan. Such is the description of the four seas, as we have it principally from Mr. Selden. But it should be observed, that the description is framed with a view to the whole island of Great Britain, as in Mr. Selden's time it became united under the government of the same king; and not to England, as distinct from Scotland, according to the sense of our English law-books before the reign of James the First; for in them the four seas were understood with more restriction, and to be those, which encompassed England only. See Medows's Observ. on the Domin. of the Seas, 11. Seld. Mar. Claus. lib. 2. cap. 31. and Justice's Treat. on Sea-Laws 1st ed. 165. Another thing, very necessary to be attended to, is the very large and comprehensive terms of the description, so far as they regard the *West* and *North* parts of the British seas; the former seeming to reach to the eastern shore of the continent of America, and the latter to be in some measure without any certain limits. Even the two other parts do not seem to be marked out with that nice precision, the want of which, as the reader will readily conceive, may under some circumstances be the cause of considerable embarrassments, both in transactions with foreign states, and in the exercise of judicial authority amongst ourselves. See Seld. Mar. Claus. lib. 2. c. 30. 31. 32. The difficulties arising from this uncertainty will be best understood, by considering what the extent of the phrase of the *four seas* is in some particular instances. But this illustration shall be attempted in another place, where lord Coke gives the opportunity of resumming the subject. See post 244. a.

(1) See ante 108. b. note 4.—(2) This implies, that unless a borough is corporate, it cannot be a city. But if this was lord Coke's idea, it is not quite accurate; for though in general the description may be true, yet it is not universally so. Westminster is a city and also a borough, so far at least as the sending members to parliament can intitle it to that denomination;

guardian by nature. See ante note 8. of 88. b. Carth. 386, ante 84.—It yields as to the custody of the person to guardianship in focage, where the title to both guardianships concur in the same individuals as they necessarily do in the case of father or mother, if lands held by a focage-tenure descend on the heir apparent being an infant, and may in the case of other ancestors; the reason of which is explained elsewhere. See fol. 88. b. note 8. But guardianship in focage ending at fourteen, we presume, that after that age the father, or other ancestor having a like title to both guardianships, becomes guardian by nature till the infant's

Lamb. fol. 125.

Mirror cap. 2. sect. 18. Britton fol. 87.

Mich. 7. R. 1. Rot. 1. (which was in Anno Dom. 1195.) in an Ass. of Darreine Presentment for the Church of St. Peter's in Cambridge.

(Post. 168. a.)

10. Co. 123, 124. Vid. Devant sect. 97.

quolibet burgo duos burgenſes de discretioribus, et magis ſufficientibus, &c. all which have voyces and ſuffrages in parliament. You ſhall reade in the parliament rolls, that (as hath beene ſaid) there is *lex et conſuetudo parliamenti, quæ quidem lex quærenda eſt ab omnibus, ignorata à multis, et cogita à paucis*. Of the members of this court ſome be by deſcent, as ancient noblemen; ſome by creation, as nobles newly created; ſome by ſucceſſion, as biſhops; ſome by election, as knights, citizens, and burgeſſes.

It is called parliament; becauſe every member of that court ſhould ſincerely and diſcreetly *parler la ment* (1) for the general good of the common wealth; which name it hath alſo in Scotland (2); and this name before the Conqueſt was uſed in [a] the time of Edward the Confeſſour, William the Conquerour, &c. (3) It was anciently before the Conqueſt called *miſhel ſnoth, miſhel gemote, calla witenage mote*; that is to ſay, the great court or meeting of the king and of all the wiſemen, ſometime of the king with the counſell of his biſhops nobles and wiſeſt of his people. This court the Frenchman called *les eſtates*, or *laſſemble des eſtates*. In Germany it is called a *diet*. For thoſe other courts in France that are called parliaments, they are but ordinary courts of juſtice; and (as *Paulus Jovius* affirmeth) were firſt eſtabliſhed by us.

The king of England is armed with divers counſels, one whereof is called *commune concilium*, and that is the court of parliament, and ſo it is legally called in writs and judicial proceedings *commune concilium regni Angliæ*. And another is called [b] *magnum concilium*: this is ſometime applied to the upper houſe of parliament, and ſometime out of parliament time to the peers of the realme lords of parliament, who are called *magnum concilium regis*; for the prooſe whereof take one [c] record for many in the fiſt yeare of king H. 4. at what time there was an exchange made betweene the king and the earle of Northumberland, whereby the king promiſeth to deliver to the earle lands to the value, &c. *per advice et aſſent des eſtates de ſon realme et de ſon parliament (pareſſi que parliament ſoit devant le feaſt de St. Lucy) ou autrement per advice de ſon grand counſell, et auters eſtates de ſon realme, que le roy ferra aſſembler devant le dit feaſt, in caſe que le parliament ne ſoit*. And herewith agreeth the act of parliament in 37 E. 3. cap. 18. where it is ſaid, before the chancellour treaſurer and great counſell. (4) Thirdly (as every man knoweth) the king hath a privy counſell for matters of ſtate; (as for example) [d] *Henricus de bello monte baro de magno et de privato concilio regis juratus*, and many others before and after. The fourth counſell of the king are his judges of the law for law matters; and this appeareth frequently in our [e] bookes, and muſt be intended, when it is ſpoken generally by the counſell it is to be underſtood *ſecundum ſubjectam materiam*; for example, if it be legal, then by the king's counſell of the law, *viz.* his judges (5).

Now for the antiquity of this high court of parliament, whereof Littleton here ſpeaketh, it appeareth, that divers parliaments have beene holden long before and untill the time of the Conqueror, which be in print, and many more appearing in ancient records and manuſcripts (6).

[f] *Le roy Alfred aſſembler les counties, &c. et ordeina pur uſage perpetual, que deux foitz per an ou plus ſovent pur miſter in temps de peace ſe aſſemblerent a Londres, a parlerment ſur le guidament del people de Dieu, et coment ſoy garderent de pecher, viveront en quiet, et receiveront droit per uſages et ſanits judgements. Per ceſteſtate ſe fieront pluſors ordinaſces per pluſors roys jeſque a temps le roy que ore eſt, que ſuit le roy E. 1.* (7) The concluſion of that great parliament holden by king Ethelſtan at Grately is very remarkable, which I have ſcene in theſe words. *All this was enacted in that great ſynod or counſell at Grately, whereat was the archbiſhop Wolfeſelme, with all the noblemen and wiſe men, which king Ethelſtan called together*.

There have beene in the time of, and ſince the Conqueſt, in the reignes of H. 1. king Stephen, H. 2. R. 1. king John, H. 3. &c. 280 ſeſſions of parliament, and at every ſeſſion divers acts of parliament made, no ſmall number whereof are not in print (8).

The juriſdiction of this court is ſo tranſcendent, that it maketh, enlargeth, diminiſheth, abrogateth, repealeth and reviveth lawes, ſtatutes, acts and ordinances, concerning matters eccleſiaſtical, capitall, criminall, common, civill, martiall, maritime, and the reſt. None can begin, continue, or diſſolve the parliament, but by the king's authority. Of which court it is ſaid, [a] *Que il eſt de tresgrand honor et juſtice, de que nul doit imaginer choſe diſhonorable*. [b] *Habet rex curiam ſuam in concilio ſuo in parliamentis ſuis, preſentibus prelatibus, comitibus, baronibus, proceribus, et aliis viris peritis, ubi terminatæ ſunt dubitationes judiciorum, et novis injuriis emerſis nova conſtituuntur remedia, et unicuique juſtitia prout meruerit retribuetur ibidem*. But this properly doth belong to the juriſdiction of courts, and therefore this little taſte hereof ſhall ſuffice.

Sect.

nation; and yet it certainly is not corporate. Mr. Madox mentions Weſtmiſter as a borough *not corporate*; and we ourſelves have ſeen papers in the archives of the dean and chapter of Weſtmiſter, which confirm his idea. *Mad. Firm. Burg. 49*. This fact is material to another purpoſe. Weſtmiſter not being corporate, and yet having, as we apprehend, firſt ſent members to parliament in the reign of Edward the Sixth, is an inſtance, that the inhabitants of a town may acquire the right of having repreſentatives in parliament *within time of legal memory* without being incorporated, and therefore ſeems inconſiſtent with the doctrine of lord chief juſtice Holt on this ſubject in *Aſhby and White*. See 3. *Pryn. Brev. Parl. ſect. 7. p. 188. 1. Will. Notit. Parl. 7. and 21. of the preface. Car. Rights of Eleſt. part 2. page 233. 1. Stow's Survey Strype's ed. of 1720. p. 8. and 10. of the 2d appendix, and 2. Dougl. Hiſt. of Caſ. of Controv. Eleſt. 296. 297. 298*. It is with great pleaſure, that we cite Mr. Douglas's work, as it affords the opportunity of congratulating the ſtudent, on the acceſſion of a collection of excellent reports on the law of parliamentary election, accompanied with an inſtructive hiſtorical preface, and very judicious annotations. This is the only work of the kind, except one lately published from Mr. Glanville's manuſcript; and they are both particularly valuable, on account of their tendency to *diffuſe* the knowledge of a branch of law, which *before* was too much confined to the narrow circle of the few favourites in poſſeſſion of the *præſice*.—(3) This is rather an unapt example of the truth of lord Coke's poſition; for Weſtmiſter, as we have already ſtated, is *not* a borough *incorporate*. See *ſupra* note 2. As to Weſtmiſter's being a *city*, it became ſo by *expreſs creation*, and not *ſingly* by making it the ſee of a biſhop, however ſufficient that of itſelf might have been; the letters patent, which erected the biſhoprick, ordaining, *quod tota villa noſtra Weſtmonaſterii extunc et deinceps in perpetuum ſit civitas, ipſamque civitatem Weſtmonaſterii vocari*. See the letters patent in 1. *Burn. Reform. page 246. of the Appendix*.

The continuation of the notes to 108. a. intended to be introduced here, is neceſſarily poſtpoſed to fol. 111. a.

(1) The latter part of this etymology is juſtly exploded; but it is ſome excuſe for lord Coke, that it did not firſt come from him, it being to be found in preceding authors of eminence. See *Lamb. Archeion* in the chapter of *Parliament*, and 1. *Whitl. on Parliament 174*. A learned writer of the preſent time ſuggeſts, that perhaps *parliament* may be a compound of *parly* and *ment*, two Celtick words, the former anſwering to *parler* in French, and the latter ſignifying *abundance*, and both together importing the ſame as *great talk* amongſt the Indians of North America. *Barringt. Obſ. on Ant. Stat. 2d ed. 56*. But though we do not doubt, that there are two ſuch words in the Celtick language, we are ſcarce more ſatisfied with this derivation, than with that expreſſed by lord Coke. The opinion adopted by Mr. Lambard ſeems far the moſt probable; and this is, that *parliament* is not a compound word, but *ſimply* derived from the French verb *parler*, with the addition of *ment* in the termination; which mode of converting *verbs* into *nouns* as well as into *adverbs* is common in the French tongue. *Lamb. Archeion* in the chap. of *Parliament*. A like practice prevailed in the formation of the *Roman* language; and thence

infant's age of twenty-one. See *Carth. 384*.—Laſtly the father may diſappoint the mother and other anceſtors of the guardian-ſhip

4 H. 8. cap. 8.

[a] *Treatif. de Modo tenend. Parliam. 21. E. 3. fo. 60. a. Johannes de Rupicella tempore regis Johannis. Pol. Virgil. li. 3. tempore H. 1. W. 1. 3 E. 1. in the title.*

(Doct. & Stud. 164. 3. Inſt. 125, 179. 4. Inſt. 53.)

[b] *Bracton lib. 1. cap. 2. Regiſt. 280.*

[c] 27. Aug. 5. H. 4.

[d] In *Doct. Clauf. 16. E. 2.*

M. 5.

(7. Co. 36.)

[e] 43. Aſſ. 15. 27. H. 6. 5. 1.

R. 3. 11. Regiſt. 191, 123, 123.

4. E. 3. 2. 39. E. 3. 35. 3. Aſſ.

15. 19. E. 3. Judgement 174.

W. 1. ca. 1. Laſtat de Templar.

16. R. 2. Stat de Præmunire.

See the ſame published by Mr. Lambert.

[f] *Mirror ca. 1. ſect. 2. Vide*

Statutes de 4. E. 3. ca. 14. & 36.

E. 3. ca. 10.

Mirr. ca. 2. ſect. 4. 7. 10. 14.

ca. 4. de Defaults, & cap. de Ho-

micide cap. 1. ſect 13. cap. 4. de

Poyns. Ockam quid cum Ven.

Math. Pariſ. 212, 213.

[a] *Pl. Com. 398. b. Doct. &*

Stud. ca. 55. fol. 164.

[b] *Fleta lib. 2. ca. 2. Fortescue*

de Laudibus legum Angliæ, Brac-

lib. 1. ca. 2.

(Doct. & Stud. 32.)

Sect. 165.

CUSTOMES et u-

sages. *Consuetudo*, is one of the maine triangles of the lawes of England; those lawes being divided into common law, statute law, and custome. Of which it is said, * that *consuetudo quandoque pro lege servatur in partibus, ubi fuerit more utentium approbata, et vicem legis obtinet; longævi enim temporis usus et consuetudinis non est vilis auctoritas.* [c] *Longa possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino.*

Of every custome there be two essentiall parts, time and usage; time out of minde, (as shall be said hereafter) and continuall and peaceable usage without lawfull interruption (2).

Que nont pas autres villes. It is necessary to be knowne what customes may be

(Post. 115. b.)

(*) Bract. lib. 1. ca. 3. fol. 2.

[c] Idem lib. 2. fol. 52.
(Dav. 33. a.)

(Doct. Plac. 104. 5. Co. 84. a.)

(*) 44. E. 3. 33. 40. Aff. 4. 27.
41. 21. E. 4. 54. 43. E. 3. 32.

[d] 21. E. 4. 53. 54.
(6. Co. 59. b.)

(*) 21. E. 4. 54. 15. E. 4. 29.
11. H. 7. 14. 44. E. 3. 18. 21.
H. 7. 40.

[c] Bract. lib. 4. 271. 34. E. 1.
Detinue 60. 17. E. 2. Detinue
58. 3. E. 3. Dett. 156. 30. E. 3.
25. 39. E. 3. 6. 9. 10. 31. E. 3.
Render 6. 17. E. 3. 27. 21. E.
4. 28. 22. E. 4. 8. 7. E. 3. 51.
30. E. 3. 23. 34. H. 8. Dier 54.
F. N. B. 122. 5. E. 3. Treas.
13.

Vide Glagvil lib. 7. ca. 3. 9.

Bract. lib. 4. Tract. 6. ca. 13.
F. N. B. 150. o. Pl. Com. 413.
(Ante 33. b.)

AND this is called frank banke, *francus bancus*. *Consuetudo est in partibus illis, quod uxores maritorum defunctorum habeant francum bancum suum de terris sockmannorum teneat nomine dotis* (7).

thence the true source of derivation for *testamentum*, and other similar Latin words; though an injudicious desire to render them more significant and expressive of the qualities of the subjects to which they are applied, than their true deduction would warrant, gave birth to a forced and fanciful kind of etymology, like that now so properly rejected in the instance of the word *parliament*. This false taste in respect to etymology is of a very ancient date; nor were lord Coke and his contemporaries more chargeable with it, than some of the most admired and pure classical writers of antiquity, not excepting even *Cicero*. See Menag. Jur. Civil. Amœn. cap. 39. particularly in his observations on the word *testamentum*, and Tayl. Elem. Civ. L. 7. It seems to have originated from not attending to the real office of etymology, and confounding it with the definition of the subject to which a word is applied; two things quite distinct in their nature, though it frequently happens, that they reflect light on each other.—(2) For a history of the origin and constitution of the parliament in Scotland before the Union of the two kingdoms in the reign of queen Ann, and of the change made by the establishment of one parliament for Great Britain, see the Treatise on the Laws of Election for Scotland, with which Mr. Wight hath lately obliged the public.—(3) Mr. Lambard guesses, that the word *parliament* was introduced here soon after the Conquest. He cites *Westminster the first*, as the most ancient statute in which he had observed the word to be used; though from a passage in the statute of Edward the Second, mentioning *parliaments* in the times of that king's progenitors, he infers, that the word had been adopted several reigns before. Lamb. Archeion cap. Parliament, and Westminster. 1. 3. E. 1. and Articuli Cleri 9. E. 1. One of Mr. Prynne's arguments against the great antiquity of the *modus tenendi parliamentum* is the frequent use of the word *parliament*; he insisting, that it was never applied to denote the great council of the nation in any of our ancient records or writings prior to the reign of Hen. 3. See Pryn. on 4. Inf. 2. See further Brad. Introduct. to Engl. Hist. 71.—(4) In the controversy about the origin of the *Commons* in parliament, Mr. Tyrrel contends, that anciently *commune consilium* sometimes denoted an assembly distinct from parliament, and one composed of fewer persons; and particularly, that the *commune consilium*, mentioned in the clause of king John's *Magna Carta* about assenting of- cuage, which enumerates only archbishops bishops abbots counts and the greater barons, was of this sort. Tyrrel. Biblioth. Politic. 311. 314.

For the remainder of the notes to 110. a. see fol 112. a.

(1) Another thing essential to a good custom is, that it be reasonable; which doctrine, together with the other general rules concerning customs, is well explained and applied in the famous Irish case of *Tanistry* reported by Sir John Davies. See Dav. 31. b.

ship by nature, by appointing a testamentary guardian under the statutes of Philip and Mary and of Charles the Second, which

ITEM per le-

greinder part ti-
elx burghes ont di-
vers customes et u-
sages, que nont pas
autres villes. Car
ascuns burghes ont ti-
el custome, que si home
ad issue plujors fits et
morust, le puisne fits
enheritera tous les
tenements, que fueront
a son pere deins meme
le burgh come heire a
son pere per force de
custome; et tiel cus-
tome est appel burgh
English.

ALSO for the grea-
ter part such bo-
roughes have divers
customes and usages,
which be not had in
other towns. For some
boroughes have such
a custome, that if a
man have issue many
sonnes and dyeth, the
youngest son shall in-
herit all the tenements,
which were his father's
within the same bo-
rough, as heire unto
his father by force of
the custome; the which
is called borough En-
glish (1).

Sect. 166.

ITEM en ascun
burghes, per le
custome, feme avera
pur sa dower tous
les tenements, que fue-
ront a sa baron, &c.

ALSO in some bo-
roughes, by cu-
stome, the wife shall
have for her dower all
the tenements, which
were her husbands.

Que

Que fueront a sa baron, &c. Here is implied by (&c.) that in some places the [1] F. N. B. 150. (Ante 33. b.) wife shall have the moiety of the lands of her husband, so long as she lives unmarried; as in gavelkinde. And of lands in gavelkinde a man shall be tenant by the curtesie without having 10. E. 3. Aude 129. of any issue. (1) In some places the widow shall have the whole, or halfe, *dum sola & casta vixerit*, and the like.

Sect. 167.

ITEM, en ascuns burghes, per le custome, home poit deviser per son testament sesterres & tenements, que il ad en fee simple deins mesme le burgh al temps de son morant; & per force de tiel devise, ce-luy, a que tiel devise est fait, apres le mort le devisor, poit entrer en les tenements issint a luy devises, a aver & tener a luy, solon-que la forme & effect del devise, sans ascun liverie de seisin destre fait a luy, &c. (4)

ALSO in some boroughs, by the custome, a man may devise by his testament his lands and tenements, which he hath in fee simple within the same borough at the time of his death; and by force of such devise, he, to whome such devise is made, after the death of the devisor, may enter into the tenements so to him devised, to have and to hold to him, after the forme and effect of the devise, without any liverie of seisin thereof to be made to him, &c.

Devise. This is a (5. Co. 73. b.)

French word, and signifieth *sermocinari* to speake, for *testamentum est testatio mentis, & index animi sermo* (2). So as a devise per son testament is to speake by his testament, what his minde is to have done after his decease.

Per son testament.

Testamentum est [m] duplex, [m] Vide sect. 58

1. *In scriptis.* 2. *Nuncupativum, seu sine scriptis.* And in some cities and boroughs, lands may [n] passe as chattels by will nuncupative or paroll without writing (3). *Revera [o] terminatum est, quod [o] Brañ. lib. 4. fol. 272. potest legari, ut catallum, tam Fleta lib. 5. cap. 5. & lib. 2. hereditas, quam perquisitum, cap. 50.* per barones London' & burgenses Oxon. Ideo verum est, quod in burgis non jacet assisa mortis antecessoris. But in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum* when it concerneth chattels.

Ses terres ou tenements. And by the same custome he may devise a rent out of the same lands and tenements (5).

Que il ad en fee simple. For lands in taile are not devisable by will; and therefore he in this place necessarily added (*que il ad en fee simple*) and purposely omitted the same in the clause concerning borough English; because there an estate taile is included.

Poit entrer. Note, the custome of a city or borough concerning the devise of lands is, *quod licet unicuique civi sive burgenfi, &c. ejusdem civitatis sive burgi tenementa sua in eadem civitate sive burgo in testamento suo in ultima voluntate sua, tanquam catalla sua, legare cuicunque voluerit, &c.* [p] Now if a man deviseth, either by speciall name or generally, goods or chattels reall or personall, and dyeth, the devisee cannot take them without the assent of the executors (6). But when a man is seised of lands in fee, and deviseth the same in fee, in taile, for life, or for yeares, the devisee shall enter; for in that case the executors have no meddling therewith. And in the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in [q] the devisee before he doth enter, and in that case nothing [r] (having regard to the estate or interest devised) descendeth to the heire. But if the heire of the devisor entreth and holdeth the devisee out, he may either enter as Littleton here saith, or have his writ called *ex gravi querela*; and this writ (without any particular usage) is incident to the custome to devise; for otherwise, if a descent were cast before the devisee did enter, the devisee should have no remedy. After an actuall possession this writ lyeth not; for then the devisee may have his ordinary remedy by the common law.

And

31. b. — (3) This doctrine, about the restriction of customs to places of a particular denomination, will appear more satisfactory, by considering the reason of having some restraint, and the nature of that, which lord Coke points out as the established one. The policy of some restraint is founded on the uncertainty and confusion, which would ensue from an infinite diversity of customs, if every place, however small and inconsiderable, should be allowed to set up special customs in direct opposition to the general custom of the realm. On this principle the privilege of having special customs, derogating from the common law, is in general denied to inferior places, such as *upland towns*, not being either *cities* or *boroughs*, and *hamlets*; though it is allowed to larger or more important districts, such as *counties*, *manors*, *hundreds*, *honors*, *cities*, and *boroughs*. The special cases, hinted at by lord Coke as an exception to this restraint, seem to be those, in which the custom tends to advance some right recognized by the common law. Thus a town's having a church, being a right at common law, a custom for a way to or repairing the church operates by rendering the exercise of that right more effectual. See Robins. Gavelk. 31. & 225. However the case of dower by custom, mentioned by lord Coke in the chapter on dower, seems to be an instance within the exception, without being within the reason of it. But of this example lord Coke writes doubtfully; for, after inferring from the text of Littleton, that customary dower may be within a *town*, he observes, that it is safer to alledge it within a *manor*. See ante 33. b. — (4) But this extension of Borough English to the collateral line must be specially pleaded. See Robins. on Gavelk. 38. 43. 93. and in the Appendix. — (5) See acc. as to estates tail in Gavelkind land, though expressly limited to the heirs male of the body at common law. Dy. 179. b. See also ante fol. 10. a. note 3. But as Borough English may be extended by special custom, so may it be restrained; and therefore the customary descent may be confined to *fee simple*. See Appendix to Robins. Gavelk. and March 54. there cited. — (6) See as to the denomination of Borough English and the subject in general, Append. to Robins. Gavelk.

(1) Accord. ante 30. a. All the differences, between curtesy and dower of Gavelkind land and the same estates at common law, are minutely explained and commented upon in Mr. Robinson's book on Gavelkind. See page 135. and 139. — (2) See ante fol. 110. a. note 1. — (3) But now by the 29. Cha. 2. c. 3. a will of lands devisable by custom is not good, unless it is in writing and signed and attested in the same manner as a will of lands devisable by statute. See post. 111. b. *Nuncupative* wills of *personalty*, except those of soldiers in actual service and mariners at sea, are also newly regulated by the same statute. — (4) The &c. is not in L. & M. — (5) But it was formerly much controverted, whether a rent-charge in *esse*, issuing out of such lands and having commenced *within time of memory*, was within the custom of devising; and it was not settled to be so, till the case of Randal and Jenkins in the time of lord Hale. See 1 Mod. 112. and Robins. on Gavelk. 79. to 84. As to rents-*service*, they of course followed the nature of the reversion or feignory, to which they were incident; nor was there any doubt as to the custom's extending to other rents, if they had existed *immemorably*. — (6) Acc. Perk. sect. 488. 570 and 572. to 576. The other authorities relative to this doctrine will be found in Vin. Abr. *Devise* A. a. and Com. Dig. *Administration* C. 5.

Continuation of notes to fol. 108. a. from fol. 108. b.

(4) The first book of Mr. Madox's *Baronia Anglica* is principally employed in explaining the nature of an honor. He objects to the propriety of the statutes of Hen. 8. referred to by lord Coke; and as they only create *titular* honors and therefore cannot give a just idea of the nature of the *genuine* honor, which is a *land barony*, blames lord Coke for his reference. Mad. Bar. Angl. 8. 9. 10. and 236. — (5) See Mad. Baron. Angl. 238. 239. where the learned author observes on the inaccuracy of language in the 12. Cha. 2. about tenure *in capite*. The title of the act expresses, that it was made for taking away tenure *in capite*; and the first enacting clause proceeds on the same idea. But had the act been accurately penned, it would simply have discharged such tenure of its oppressive fruits and incidents; which would have assimilated it to *free and common socage*, without the appearance of attempting to annihilate the *indelible* distinction between holding *immediately* of the king and holding of him through the medium of other lords. See ante note 3.

which will be the subject of a subsequent note. See *infra*, note 14. — (13) Here we shall bring into one point of view some few

[f] 27. H. 8. cap. 10. Britton fol. 212. 78. b. 164. Vide before in this sect. 32. H. 8. cap. 2. 34. H. 8. ca. 5.
[r] Vide 3. Co. 25. &c. in Butler and Baker's case. 6. Co. 16. & 76. 8. Co. 84. 85. 9 Co. 133. 10. Co. 82. 83. 84. 11. Co. 24. 1. Co. 25. a.
[u] Dier 4. & 5. Phil. & Mar. 155. an. 6. Eliz. Dalison. Pasch. 20. Eliz. betweene Barber and his wife plaintife, and William Long defendant in a writ of partition. Bendloe's adjudged. (9. Co. 133.)

[x] 6. Co. 17. 18. Sir Edward Clere's case. 3. Co. 34. b. Butler and Baker's case.

10. Co. 80. 81. Leon. Lovey's case.

Leon. Lovey's case, and Butler and Baker's case. Ubi supra.

(1. Sid. 56.) Leon. Lovey's case. Ubi supra, fol. 81.

8. Co. 84. 85. Sir Richard Pexhal's case. 3. Co. 33. Butler and Baker's case.

6. Co. 17. 18. in Sir Edward Clere's case.
(8. Co. 173. Post 271. Cro. Cha. 38.)

And well said Littleton, that lands and tenements were devisable in burghes by custome; for that [f] at the common law no lands or tenements were devisable by any last will and testament, (1) nor ought to be transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing (2); but as Littleton here saith, that by certain private customs in some burghes they are devisable. But now since Littleton wrote, by the statutes of 32. and 34. H. 8. lands and tenements are generally devisable (3) by the last will in writing of the tenant in fee simple, whereby the ancient [r] common law is altered, whereupon many difficult questions, and most commonly disherison of heires (when the devisors are pinched by the messengers of death) doe arise and happen. But [u] these statutes take not away the custome to devise, (4) whereof Littleton speaketh: for though lands devisable by custome be holden by knights service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knights service by force of the statute is utterly void for a third, and the same shall descend to the heire. If he hath any lands holden by knights service *in capite*, and lands in socage, he can devise but two parts of the whole; but if he hold lands by knights service of the king, and not *in capite*, or of a meane lord, and hath also lands in socage, he may devise two parts of his land holden by knights service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his life-time he conveyeth any part of his lands to the use of his wife, or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will [x] no more, but to make up the land so conveyed two parts of the whole. And if the lands to conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage lands; so as it is apparent, that the benefit of the lords was more carefully provided for, than the good of the heire. But if a man, holding some land of the king by knights service *in capite*, convey two parts of his land to the use of his wife for life, now (as hath beene said) he can devise no part of the residue, but yet he may by his will devise the reversion of the two parts so conveyed to his wife: for the intention of the act is to give power to dispose of two parts intirely.

If the devisor leave a full third part of the land immediately to descend in fee simple or in taile, he may devise the other two parts in fee simple. If a third part be not left, it shall be made up according to the act. But hereditaments, that are not of any yearly value, as *bona & catalla felonum & fugitivorum*, waives, estrayes, and the like, can neither be left to descend for any part of the third part, or devised as part of the two parts. But yet if such franchises of uncertaine value be holden of the king *in capite*, they shall restrain the devise of all his lands and make it void for a third part. So it is, if a man hath a reversion expectant upon an estate taile dry and fruitlesse holden of the king by knights service *in capite*, yet that shall restrain him to devise but two parts of his lands onely. And where the statute speaks of a remainder, it is to be intended only of such a remainder, as may draw ward and marriage by the common law. As if a reversion upon a state for life be granted to one for life, the remainder in fee, during the life of the grantee for life it is not within the statute; but if he dyeth, this is such a remainder, as is within the statute, although it be dry and fruitlesse. If a gift in taile or a lease for life be made, the remainder in fee, this remainder in fee is not within the statute. But if a man hath lands holden by knights service *in capite* in possession, reversion, or remainder, and also seised of socage land, and devise by his will all his lands, and after he selleth away the *capite* land, or that land is recovered from him, the will is good for the whole socage land. The values both of the third part and the two parts of the lands shall be taken, as they happen to be at the time of the death of the devisor; for then his will takes effect.

He, that holds by knights service in chief, deviseth by his will a rent, common, or other profit as shall amount to the value of two parts out of all his lands: this rent issueth only out of the two parts, and the third part is free of it. And if he hath lands holden by knights service, and not *in capite*, he may charge two parts of the knight service land as is aforesaid, and all his socage land, &c. And if he hath onely socage land, he may by his will charge it at his pleasure, so as the king's and lord's third part is free, and the heire's two parts charged; and this is onely by force of the statute of 34. H. 8.

If a man make a feoffment in fee of his lands holden by knights service to the use of such person and persons, and of such estate and estates, &c. as he shall appoint by his will, in this case, by operation of law the use and state vests in the feoffor, and he is seised of a qualified fee. In this case, if the feoffor limit estates by his will by force and according to his power, there the uses and estates growing out of the feoffment are good for the whole, and the last will is but directory. (.) But in that case, if the feoffor had devised the land (as owner thereof) without any reference to the feoffment and power thereby given, then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the use of his wife, &c. and after devised the residue by his will without any reference to his power by the feoff-

(1) The testamentary power over land was certainly in use among our Anglo Saxon and Danish ancestors; though it seems to have been rather adopted from the remnant of the Roman laws and customs they found here, than brought from their own country: for, as Tacitus, writing of the ancient Germans, says, *successores sui cuique liberi et nullum testamentum*. Spelm. Posthum. 21. 127. After the Norman Conquest, the power of dividing land ceased, except as to socage lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to terms for years or chattel interests in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded, partly from the solemn form of transferring land by livery of seisin introduced at the Conquest, which could not be complied with in the case of a last will; partly from a jealousy of death-bed dispositions; but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was established or at least perfected by the first William. See Wright's Ten. 172. In the reign of Edward the first, the statute of *Quia emptores* removed in great measure this latter bar to the exercise of testamentary power; that is, in respect to all freeholders, except the king's tenants *in capite*. But the two former obstructions still continued to operate; though indeed this was in name and appearance only; for soon after the statute of *Quia emptores*, feoffments to uses came into fashion, and, last wills were enforced in Chancery as good declarations of the use; and thus through the medium of uses the power of devising was continually exercised in effect and reality. But at length this practice was checked, not accidentally, but designedly, by the 27th of Hen. 8. which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependant on the intention of parties, were invented. However the bent of the times was so strong in favour of every kind of alienation, that the legislature, in a few years after having interpolated to restrain an indirect mode of passing land by last wills, expressly made it devisable. This great change of the common law was effected by the statutes of the 32. and 34. of Henry 8. which taken together gave the power of devising to all having estates in fee simple, except in joint tenancy, over the whole of their socage land, and over two thirds of their lands holden by knights service. The operation of these statutes, was further extended by the conversion of knights service into socage in the 12. Cha. 2. But still copyhold lands, and also, as the best opinion seems to have been, estates *pur autre vie* in freehold lands, remained undevisable. On the one hand they were not devisable at common law; because they came within the description of real estate. On the other hand, they, or at least the former, are not within the statutes of Henry 8. these requiring, that the tenure should be socage, which a copyhold is not, and that the party should have an estate in fee simple, which is more than a tenant *pur autre vie* can be said to have. See as to copyhold lands 2. Ro. Rep. 383. and as to estates *pur autre vie* in freehold lands Cro. Eliz. 804. Mo. 625. 1. Saund. 261. 1. Saik. 619. This defect of provision in the statutes of wills is now supplied as to estates *pur autre vie* by the 29. Cha. 2. c. 3. which makes them devisable in the same manner as estates in fee simple. But no provision is yet made in respect to copyhold estates; and therefore the power of devising is now indirectly exercised over these by an application of the doctrine of uses, similar to that which was antiently resorted to in respect to freehold lands; for the practice is to surrender to the use of the owner's last will; and on this surrender, the will operates as a declaration of the use and not as a devise of the land itself. See 2. Ro. Rep. 383. 2. Atk. 37. Gilb. on Uses 36. From this deduction it appears, that the testamentary power is now exercisable, either directly or indirectly, over land of every tenure now in use, and also over every

few general things relative both to guardianship by socage and that by nurture.

Guardianship by socage, like the one in chivalry springs wholly out of tenure. Therefore the title to it cannot arise, unless the infant is seized of lands, or other hereditaments lying in tenure, holden by socage. Ante fol. 87. b.—Like guardianship in chivalry

feoffment, yet this will shall enure to declare the use upon the feoffment; because he had no power as owner of the land to devise any part of it. (1) But if the feoffment had been made to the use of his last will, although he deviseth the land with reference to the feoffment, yet it taketh effect only by the will, and not by the feoffment. (2) All which and many other points of intricate and abstruse learning you shall more largely read in my Reports.

Sauns aucun liverie de seisin destre fait a luy, &c. For in his life time livery of 40. Ass. 38. seisin could not be made; because his will is ambulatorie till his death, and no estate passeth during his life; neither can livery be made after his decease, for then it cometh too late. Here (&c.) (3) implyeth that the devise is good without any attornment of any lessee or tenant.

Sect. 168.

Nota, coment que home ne poit granter, ne doner, ses tenements a sa feme, durant le coverture; pur ceo que sa feme et luy ne sont forsque un person en ley: uncore per tiel custome il poit deviser per testament ses tenements a sa feme, a aver et tener a luy en fee simple, ou en fee taile, pur terme de vie ou pur terme des ans; pur ceo que tiel devise ne prist effect forsque apres la mort le devisor, car tous devises ne preignent effect forsque apres la mort le devisor. Et si home fait a divers temps divers testaments, et divers devises, &c. uncore le darrein devise et volunt fait per luy estoiera, et lauters sont voides (4).

ALSO, though a man may not grant, nor give, his tenements to his wife during the coverture; for that his wife and he be but one person in the law: yet by such custome he may devise by his testament his tenements to his wife, to have and to hold to her in fee-simple, or in fee taile, or for tearme of life, or yeares; for that such devise taketh no effect, but after the death of the devisor. And if a man at divers times makes divers testaments, and divers devises, &c. yet the last devise and will made by him shall stand, and the others are voyd.

HOME ne poit granter, ne doner, ses tenements a sa feme, &c.

This opinion is [a] cleere, for by no conveyance at the common law a man could during the coverture, either in possession reversion or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other conveyance to the use of his wife; and now the state is executed to such uses by the statute [b] of 27. H. 8. for an use is but a trust and confidence, which by such a mean might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that Littleton here yeeldeth (5).

Durant le coverture. That is, during the continuance of the marriage. For to cover in English is *tegere* in Latine, and is so called, for that the wife is *sub potestate viri*, and she is disabled to contract with any without the consent of the husband. [c] *Omnia, quæ sunt uxoris, sunt ipsius viri. Non habet uxor potestatem sui, sed vir.*

Un person en ley.

Vir & uxor sunt quasi unica persona, quia caro una, & sanguis unus. Res licet sit propria uxoris, vir tamen ejus custodit, cum sit caput mulieris. Idem lib. 5. Tract. 5. cap. 25. (Hob. 2. Cro. Eliz. 129. Plowd. 414.) 10. H. 7. 20.

If *Cesey* que use had devised, that his wife should sell his land, and made her executrix and dyed, and she tooke another husband, she might sell the land to her husband, for she did it in *auter droit*, and her husband should be in by the devisor (6).

Per testament. Testamentum is (as is said before) *testatio mentis*, and is favourably to be expounded according to the meaning of the testator. *In contractibus benigna,*

in sort of interest in land, which, not being fettered with intails, can be transferred by alienation taking effect in the owner's lifetime.

The remainder of the notes to fol. 111. b. will be found in fol. 114. b.

(1) This was the point adjudged in Sir Edward Clere's case; and though, as the whole of the land is now devisable, the doctrine of that case is no longer of consequence in respect to the extent and exercise of the power of devising, yet it may be material for other purposes; for it comprehends a general rule, settling how an act shall operate, where it may take effect in two ways, that is, either as the execution of a power derived from interest, or as the execution of a power not arising from interest but specially reserved. In the great case of *Commendams* the doctrine is well explained by lord Hobart, and finely applied. Hob. 160. — (2) The distinction here made, between a feoffment to the use of a last will, and one to such uses as the feoffor should appoint by last will, seems extremely subtle. However lord Coke reports it as adopted by the judges in Sir Edward Clere's case; and according to Moore the same point was adjudged in *Bathey and Trevilian*. Mo. 278. But then as to the former of these cases, the opinion on this point must have been extra-judicial, the feoffment having been to such uses as should be appointed by will, and not to the use of the will itself; and as to the latter case, it went off finally on another point. The reasoning in support of the distinction will be found post 271. b. and more at large in Mo. 516. — (3) See note 4. of fol. 111. a. — (4) The words *& lautres sont voides* are not in L. and M. Roh. or P. — (5) See further on this subject ante note 1. fol. 3. a. — (6) Acc. post 187. b. It is agreed in the books, that a wife may, without her husband, execute a naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture; and in the case put by lord Coke the devise gives no more. The rule is the same, where both an interest and an authority pass to the wife, if the authority is collateral to and doth not flow from the interest; because then the two are as unconnected, as if they were vested in different persons. Rep. temp. Finch 346. As too a feme covert may without her husband convey lands in execution of a mere power or authority, so may she with equal effect in performance of a condition, where land is vested in her on condition to convey to others. W. Jo. 137, 138. The reason, why in these instances the wife may convey without her husband, seems to be, that he can receive no prejudice from her acts, but a great one might arise to others, if his concurrence should be essential. Yet if the legal estate of lands is vested in a married woman on trust for another, some hold, that she cannot pass it to *cessuque trust*, unless the husband joins; and therefore that if she makes feoffment or fine without him, the first will be void, the latter voidable. This was the opinion of judge Jones in the case of *Daniel and Upley*; but the judges *Whitlock* and *Dodridge* dissented from Jones, and held, that the husband's joining was not any more requisite than in the other cases. W. Jo. 137. Perhaps however Jones's opinion may be most conformable to strictly legal doctrine; and his thus distinguishing a trust from a power and a condition may be accounted for. Trusts are properly the subjects of consideration for the courts of equity only; and though in them the legal estate is made subservient to the trust, yet the courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts. See further as to acts by a feme covert without her husband, under the titles *Baron and Feme Executor* and *Administration* in the Abridgements. — (7) See the note on this sort of etymology in fol. 110. a.

Continuation of notes to fol. 110. a. from fol. 110. b.

(5) Lord Coke in another place repeats the expression, that for matters of law the judges are the king's counsel. Post. 304. a. But

chivalry, it is deemed to take place on a descent only; though some have argued to the contrary. Ante note 1. fol. 87. b. — The

[d] 4. E. 2. tit. Devise 23.
[e] 44. Aff. p. 36. 44. E. 3. 33.
18. E. 3. 8.
[f] Britton 264.

2. H. 5. 8. 2. R. 3. 22.
(Cro. Eliz. 9. Cro. Jam. 49. 290.
649.)

in testamentis benignior, in restitutionibus benignissima interpretatio facienda est.

A son feme. And Littleton himselfe yeeldeth the reason; [d] because the devise doth not take effect till after the decease of the devisor. And in some [e] places the custome is generall, that he may devise any lands, &c. in some [f] places land onely which the devisor purchased; in some place that he may devise any estate; in some places for life onely, &c.

But albeit the last will doth not take effect untill after his decease, yet if a feme covert be seised of lands in fee, she cannot devise the same to her husband; because at the making of her will she had no power being *sub potestate viri* to devise the same, and the law intendeth it should be done by coercion of her husband.

Divers testaments. For *voluntas testatoris est ambulatoria usque ad mortem* (as hath beene said before) and the later will doth countermand the first. And it is truly sayd that the first grant and the last will is of greatest force.

Divers devises, &c. Here by (&c.) is to be understood as well devises of chattels reall or personall, as of freehold and inheritance: also that in one will where there be divers devises of one thing the last devise taketh place. *Cum duo inter se pugnancia reperiuntur, in testamento ultimum ratum est* (1).

Sect. 169.

*QUE ses executors
poient aliener ou
vender ses tenements.*

And that, which in Littleton's time a man might doe by custome, in some particular places, he may now doe by the statutes of 32. & 34. H. 8. generally.

32. H. 8. cap. 2. 34. H. 8. ca. 5.

*Les executors a-
pres le mort leur testator
poient vender.*

Here it appeareth, that the executors having but a power, as Littleton putteth the case, to sell, they must all joyn in the sale. Then put the case, that one dies, it is regularly true, that being but a bare authoritie, the survivour cannot sell. But if a man deviseth his land to A. for terme of life, and that after his decease his lands shall be sold by his executors generally, (as Littleton here putteth his case) and make three or foure executors, and during the life of A. one of the executors dieth, and then A. dieth, the other two or three executors may sell; because the land could not be sold before, and the plurall number of his executors remaine. But if they had beene named by their names, as by I. S. I. N. I. D. and I. G. his executors,

49. E. 3. 16. 29. Aff. 17. 39.
Aff. 17. 9. H. 6. 24. 15. H. 7.
12. 21. 14. H. 8. 6. 30. H. 8. tit.
Devise Br. 31. 2. Eliz. Dyer 177.
(6. Co. 16. 1. Ro. Abr. 328. Mo.
61. 62. 147. Cro. Cha. 382.)

*ITEM per tiel cus-
tome home poit
deviser per son testa-
ment, que ses execu-
tors poient aliener et
vender ses tenements,
que il ad en fee sim-
ple, per certaine summe
de money a distribu-
ter per son alme (2). En
cest cas, coment que
le devisor devie seisie
de les tenements, et
les tenements descen-
dant a son heire; un-
core les executors, a-
pres le mort leur tes-
tator, poient vender
les tenements issint a
eux devises, et ouster l'
heir, et ent faire seoff-
ment alienation et e-
state per fait, ou
sans fait, a eux, a
queux le vend est fait.
Et issint pois veier icy
un cas, ou home poit
faire loial estate, et un-
cor il navoit riens en*

*ALSO by such cus-
tome a man may
devise by his testa-
ment, that his execu-
tors may alien and
sell the tenements
that he hath in fee
simple, for a certaine
sum, to distribute for
his soule. In this case,
though the devisor
die seised of the te-
nements and the te-
nements descend un-
to his heire; yet the
executors after the
death of the testator
may sell the tenements
so devised them, and
put out the heire,
and thereof make a
seoffment alienation
and estate by deed,
or without deed, to
them to whom the
sale is made. And so
may ye here see a case,
where a man may
make a lawful estate,*

But he omits explaining, whether they are so called, on account of their judicial opinions in the king's courts, of their opinions in parliament when advised with by the lords, or any extra-judicial opinions the king may be intitled to demand from them. As to the latter, they were not favoured by lord Coke, as appears by his behaviour in the great case of Commendams in the reign of James the first, when the king severely reprimanded the judges, for disobeying his mandate to postpone proceeding in a cause concerning the prerogative till they were consulted by him. Though lord Coke was deserted by the other judges, who asked pardon for having remonstrated against the king's command; and though the privy council decided, that the command was agreeable to law; yet lord Coke bluntly refused either to retract or apologize. See lord Coke's life in the Biograph. Britann. One thing much relied on by those, who justified the king's order, was the oath of the judges, which is printed in the statute book as a statute of Edward the third, and expressly requires them to *counsel the king in his business*. See 18. E. 3. stat. 4. But what is thus called a statute lord Coke denies to be one, and indeed very properly; for it has not the least resemblance of a statute, being simply the form of an oath. 3. Inst. 146. 224. However, it must be admitted, there are various instances of the king's consulting the judges and of their giving their opinions *extra-judicially*. Several of these instances are referred to in the reports of lord Fortescue, who endeavours to shew, that even in the case of ship-money the *extra-judicial* opinion first given was condemned, not because it was *extra-judicial*, but because it was grossly contrary to law. Fortesc. Rep. 386. 389. Rushw. vol. 3. Append. 212. Some instances of such consultations have happened since the Revolution, particularly some few years after in Sir John Fenwick's case, and in the reign of George the first, when it was made a question whether the education and marriage of the prince of Wales's children belonged to the king or to their father, and still more recently in the case of admiral Byng during the last reign. See Fortesc. Rep. 385. But however numerous and strong the precedents may be in favour of the king's *extra-judicially* consulting the judges on questions in which the crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve; least the rigid impartiality, so essential to their judicial capacity should be violated. The anticipation of judicial opinions on causes *actually depending* should be particularly guarded against; and therefore a wise and upright judge will ever be cautious, how he *extra-judicially* answers questions of such a tendency. So far one may venture to qualify the right: because even the house of lords have declined taking the opinion of the judges for a reason of this sort, though their attendance on that assembly is confessedly for assisting the lords in matters of law. See Fortesc. Rep. 384. 385. But it would be a presumption in us, if we were to be more particular on a subject of so much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly ascertained by precedent or authority. See further on this subject Folt. 199. 241.—(7) The statutes of Edward the third cited by lord Coke in the margin require a parliament to be holden once every year; but it seems doubtful, whether they were meant to limit the duration of each parliament, or merely the intermission of holding parliaments. The 16. Cha. 2. c. 1. which directs, that the sitting of parliaments shall not be discontinued above three years, is certainly for the latter purpose, and therefore still continues in force, notwithstanding the modern statutes for making parliaments first triennial and afterwards septennial, these being for the former purpose. See 6. W. & M. c. 2. 1. Geo. 1. c. 38.—(8) See Pref. to Ruffhead's stat. 21.

(1) There is a great contrariety in the books, on the effect of two inconsistent devises in the same will. Some hold with lord Coke,

The title to this guardianship is in such of the infant's next of blood, as cannot have by descent the socage estate, in respect of which

les tenements al and yet he hath naught
temps del estate fait. in the tenements at
Et le cause est, pur the time of the estate
ceo que la custome et made. And the cause
usage ad este tiel (1). is, for that the cu-
Quia consuetudo, ex stome and usage is
certa causa rationa- such. For a custome,
bili usitata, privat used upon a certain re-
communem legem. sonable cause, depriveth,
the common law.

then in that case the survivors could not sell the same, because the words of the testator could not be satisfied; and I myself knew this case adjudged. A speciall verdict was found, that A. was seised of certaine lands in fee, and devised the same in taile; and if the donee died without issue, that his said land should be sold by his sons in law; he in truth having five sons in law. One of his sons in law died in the life of the donee, and

(1. Co. 173.)
• Mill. 26. El. inter. Vincent & Lee in the King's Bench.
(Cro. Eliz. 26. 1. Leon. 285.
Mo. 147. 4. Co. 68. Cro. Cna.
382. 1. Rel. Ab. 328.)

after the donee dyed without issue, and then the sours of the sonnes in law sold the land, and it was adjudged that the sale was good; because they were named generally by his sonnes in law, and the lands could not be sold by them all, and the words of the will in a benigne interpretation are satisfied in the plural number, albeit that they had but a bare authority: but if they had bin particularly named, it had beene otherwise. But if a man deviseth lands to his executors to be sold, and maketh two executors, and the one dieth, yet the survivor may sell the land; because as the state, so the trust shall survive, and so note the diversity between a bare trust, and a trust coupled with an interest. In both those cases the executors may [a] sell part of the land at one time, and part at another, as they may finde purchasers.

39. Aff. p. 17. 4. Eliz. Dier 210.
23. El. 2. Dier 371. Pasch. 32.
Eliz. Ro. 1307. in Communi Banco, and so resolved in Vincent's case. (1. Sid. 6. Post 181.
b. 236. a. 315. b.)

In Littleton's case admit that one executor had refused to sell, then, as the law stood when Littleton wrote, it was cleare, that the others could not sell. But now by the statute [b] of 21 H. 8. it is provided, that where lands are willed to be sold by executors, that though part of them refuse, yet the residue may sell. And albeit the letter of the law extendeth only where executors have a power to sell, yet being a beneficiall law, it is by construction extended where lands are devised to executors to be sold. Yet in neither of those cases, albeit one refuse, can the other make sale to him that refused; because he is party and privy to the last will, and remains executor still. Mine advice to them that make such devises by wills, to make it as certaine as they can, as that the sale be made by his executors or the survivors or survivor of them, if his meaning be so, or by such or so many of them, as take upon them the probate of his will, or the like. And it is better to give them an authority then an estate; unlesse his meaning be they should take the profits of the lands in the meane time, and then it is necessary that he deviseth, that the meane profits till the sale shall be affets in their hands, for otherwise they shall not be so. But hereof thus much shall suffice (2).

[a] 1. Co. 173. in Digge's case.
[b] 21. H. 8. cap. 4.

Et ent faire feoffment. For albeit the executors in this case have no estate or interest in the land, but only a bare and naked power, yet this feoffment amounteth to an alienation, to vest the land in the feoffee, as it appeareth here, and the feoffee shall be in by the devisor.

(1. Leon. 60)
Tr. 27. H. 8. in the Common Place, Serjeant Bendic's Report.
(1. Rol. Abr. 329. 1. Leon. 87.
225.)

Per fait ou sauns fait. And therefore if by the custome a man deviseth, that a reversion or any other thing that lyeth in grant shall be sold by the executors, they may sell the same without deed (3); for the vendee shall be in by the devisor, and not by executors, as hath beene said.

49. E. 3. 16. 38. Aff. 3. 39. Aff.
17. 13. E. 3. Devise 3. 14. H.
8. 10. 15. H. 7. 12. b.
(9. Co. 77. a.)

Consuetudo ex certa causa rationabili usitata privat communem legem.

Quia consuetudo, contra rationem introducta, potius usurpatio, quam consuetudo, appellari debet. Consuetudo prescripta & legitima vincet legem.

Privat communem legem. For no custome or prescription can take away the force of an act of parliament (4); and therefore Littleton materially speaketh here of the common law.

19. H. 6. (1. Leon. 31.)

Sect. 170.

ET nota, que nul AND note, that no
custome est a- custome is to bee
lowable, mesque tiel allowed, but such cu-
custome, que ad este use stome, as hath bin used

Prescription. Pre- scription is a title taking his substance of use and time allowed by the law. *Prescriptio est titulus ex usu & tempore substantiam capiens*

(4. Co. Luttrell's case. 9 Co. 57.
2. Rol. Abr. 265. 266. 1. Sid.
161. 1. Rol. Abr. 560. 566. Cro.
Cha. 175.)

Coke that the second devise revokes the first. Plowd. 541. Others think, that both devises are void on account of the repugnancy. Ow. 84. But the opinion, supported by the greatest number of authorities, is, that the two devisees shall take in moieties. The authorities, for and against lord Coke's opinion, are well collected and arranged in a note in the English edition of Plowden. See page 541. — Also amongst those, who think, that both devises shall operate, there is some difference as to the manner, in which the two devisees ought to take. In some of the old books it is said generally, that there shall be a jointenancy. But according to the modern opinion, and, as it seems, the best, there will be a jointenancy or a tenancy in common, according to the words used in limiting the two estates; by which we presume it is meant, that, if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a jointenancy, the devisees shall be joint-tenants, but otherwise shall be tenants in common. See 3. Atk. 493. — (2) The distribution here meant probably was giving money to the church to have masses for the testator's soul; a superstition very common in the time of Littleton, and than not inconsistent with any law. Afterwards indeed uses and trusts of land for such purposes were restrained by the 23. of Hen. 8. c. 11. commonly called the statute of *superstitious uses*, though not wholly, the statute allowing them if they were not appointed for more than twenty years, and without any limitation of time in the instance of cities and towns corporate having customs to devise in mortmain. But now we apprehend, that, independently of the statute of Henry the eighth, devises of this kind could not have effect: for either they would be void by the mortmain statutes, or, when not within the reach of any of them, would be deemed superstitious by our courts of equity; which would therefore direct the money to be applied to some use really charitable, at the court's discretion, or, should the determined cases not be thought strong enough to warrant the exercise of a discretion so large, would consider the devisee as a trustee for such as would be intitled if there was no devise. See the cases referred to in Vin. Abr. *Charitable Uses* D.

(1) &c. in L. and M. — (2) What my lord Coke advances in this and the preceding folio, about the effect of a will devising that executors shall sell land, is open to a variety of observation. — He first supposes, that such a devise passes no interest or estate to the executors, but merely a power or authority; and thence he infers, that, like common naked authorities, it will not survive. But these positions seem at least controvertible, having been expressly contradicted by decisions since lord Coke's time: and though both should be admitted to be true in point of law, they would not avail in a court of equity; as this jurisdiction, notwithstanding the extinction of the power at law, would compel it's execution in favour of those, for whose benefit the power was given. As to the power's not surviving for want of an interest, lord Coke himself, both here and in other places, concedes, that if one devise lands to be sold by his executors, an interest will pass. See post 181. b. 236. a. Now such a devise so resembles *devising that executors shall sell the land*, as to give the distinction made between them the appearance of too curious and overstrained a refinement; such as rather consists in the formal arrangement of words, than of any thing substantial. But the subtlety of the distinction is not the only objection to it; lord Hale, whilst he was chief baron of the exchequer, referring to a case, in which it was adjudged against the distinction. Hardr. 419. However it has been adopted in cases since the first publication of the Coke upon

which the guardianship arises, by descent, without any distinction between the whole and half blood. If there are two or more

(4. Co. 36.)

(6. Co. 60. a. 65. b. 66.)
 12. E. 4. 1. 2. Mariae, Br. Prefec.
 100. 6 E. 6. Dyer 71. 14. Ed. 3.
 Bar. 277. 43. E. 3. 32. 7. H. 6.
 26. 22 H. 6. 14. 16. E. 2. tit.
 Prescript. 53. 45. Aff. 8. 40. Aff.
 27. 41. 21. E. 4. 53, 54.

(9. Co. 57.)

Bract. fo. 51, 52.

capiens ab autoritate legis. In the common law a prescription, which is personal, is for the most part applied to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors, for, as a naturall body is said to have ancestors, so a body politique or corporate is said to have predecessors. And a custome, which is locall, is alledged in no person, but layd within some mannor or other place.

As taking one example for many. I. S. seised of the mannor of D. in fee prescribeth thus: that I. S. his ancestors, and all those whose estate he hath in the sayd mannor, have time out of minde of man had and used to have common of pasture, &c. in such a place, &c. being the land of some other, &c. as pertaining to the sayd mannor. This properly we call a prescription. A custome is in this manner. A copyholder of the manor of D. doth plead, that within the same mannor, there is and hath been such a custome time out of mind of man used, that all the copyholders of the said mannor have had and used to have common of pasture, &c. in such a wast of the lord, parcell of the sayd mannor, &c. where the person neither doth or can prescribe, but alledgeth the custome within the mannor. But both to customes and prescriptions, these two things are incident inseparable, viz. possession or usage, and time. Possession must have three qualities, it must be long, continual and peaceable, *longa, continua, & pacifica*: for it is said, *transferruntur dominia, sine titulo & traditione, per usucapionem, s. per longam, continuam, & pacificam possessionem.* Longa. i. *per spatium temporis per legem definitum*, of which hereafter shall be spoken. Continuum dico, ita quod non sit legitime interrupta.

per title de prescription s. de temps dont memorie ne curt. Mes divers opinions ont este de temps dont memory, &c. & de title per prescription, que est tout un en ley. Car ascuns ont dit, que temps de memory serra dit de temps de limitation en un brieve de droit; scilicet de temps le roy R. le i. puis le conquest, come est done per le statute de Westminster 1. pur ceo que le brieve de droit est le plus haut brieve en sa nature, que poit estre, et per tiel brieve home poit recover son droit de la possession son auncestors de puis auncient temps, que home purroit per ascun brieve per le ley, &c. Et entant que il est done per le dit estatute, que en brieve de droit nul soit oye a demander de le seisin son auncestors de puis longe temps, que de temps le roy R. avantdit, issint ceo est prove, que continuance de possession, ou auters customes et usages uses puis le dit temps, est le title de prescription, &c. et loc certum est. Et auters

by title of prescription, that is to say, from time out of minde. But divers opinions have beene of time out of mind, &c. and of title of prescription, which is all one in the law. For some have said, that time out of mind should bee said from time of limitation in a writ of right; that is to say, from the time of king Richard the first after the Conquest, as is given by the statute of Westminster the first, for that a writ of right is the most highest writ in his nature, that may be. And by such a writ a man may recover his right of the possession of his ancestors, of the most ancient time, that any man may by any writ by the law, &c. And in so much that it is given by the said estatute, that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time, than of the time of King Richard aforesaid, therefore this is proved, that continuance of possession, or other customs and usages used after the same time is the title

upon Littleton. Thus in the case of Hovel and Barnes in the 12th of Charles the first, though the judges held that such a power of selling given to two executors survived, yet they disavowed founding themselves on the will's passing an interest. See W. Jo. 352. and Cro. Cha. 381. Nay, even in a case of much later date, lord chancellor King acted, as if he deemed the distinction settled at law; for he directed the heir to join in a sale, in which his concurrence would otherwise have been unnecessary. See Yates and Compton 2. P. Wms. 308. In respect to the operation of such a devise, considered as a mere authority, the strict notion about naked powers is certainly with lord Coke; and some of the old books, besides those cited by him, very much favour it's application to the case of executors. Dy. 119. ed. 1688. the case in marg. and Mo. 61. But there are some respectable authorities the other way: for Perkins is of opinion, that the power of selling may be exercised by the surviving executor; and Brooke infers the same doctrine to be the point adjudged in a case of Edward the third; and further it was held accordingly, by three judges in the reign of Charles the first, on a reference to them out of chancery. Perkins sect. 550. Bro. Abr. Devise 50. and the case of Hovell and Barnes Cro. Cha. 381. W. Jo. 352. This latter opinion seems most likely to conform to the meaning of a will in cases of this sort; for it can scarce be imagined, that a testator, when he intrusts his executors with a power of selling land, should mean to have those, for whose benefit he directs the sale, disappointed by the death of one of the persons invested with an authority, which the survivor is equally capable of executing. Perhaps too it may be possible to justify the opinion, by proving a power of selling thus given to executors to be something more than the case of a naked power. Where a naked power is vested in two or more *nominatim*, without any reference to an office in it's nature liable to survivorship, as an executorship is, it without doubt would be a contradiction of the general rule to allow the power to survive. But where a power of selling is given to executors, or to persons *nominatim* in that character, it is not wholly irreconcilable with the rule to deem a surviving executor a person within the description; for by the death of one executor the whole character of executors becomes vested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, why should not the power annexed to it also survive, as well as where it survives by reason of being coupled with an interest? This manner of accounting for the opinion, that a power of selling annexed to an executorship may survive, is only a conjecture, hazarded for the sake of reconciling a particular case with a general rule; the reasons, which influenced those who adopted the opinion, not appearing in any book we have seen. However the conjecture is agreeable to the manner, in which lord Hale, in a

manuscript

in equal degree, he, who first gains possession of the heir, shall have the custody of him; except where they happen to be brothers or sisters, or to be the infant's lineal ancestors, the law preferring the eldest in the former case, and the father or other male ancestor in the latter. But if the infant derives lands by descent both *ex parte paternâ* and *ex parte maternâ*, in which case it may be possible not to find any next of kin incapable of inheriting to the infant, the next of kin on either side, first seising the infant, is intitled to the custody of his person, and the custody of the lands coming *ex parte paternâ* goes to the maternal heir, and so *vice versa*, as to the lands coming *ex parte maternâ*. Should however the infant derive lands by descent in such a way,

ont dit, que bien et verity est, que seisin et continuance puis le dit limitation (1) est un titre de prescription, come est avantdit, et per cause avantdit. Mes ils ont dit, que il y auxy un auter titre de prescription, que fuit a la common ley devant ascun estatute de limitation de brieve, &c. et ceo fuit lou un custome, ou un usage, ou auter chose, ad este use de temps dont memorie des homes ne curt a le contrarie. Et ils ont dit, que il est prove per le pleder, lou home voit pleder un titre de prescription de custome (2). Il dirra, que tiel custome ad este use, de tempore cujus contrarium memoria hominum non existit, etc. est autant a dire quant tiel matter est plede, que nul home adonque en vie ad oye ascun prooffe a le contrary, ne avoit ascun conusans a le contrary; et entant que tiel titre de prescription fuit a le common ley, et nient ouste per ascun estatute, ergo il demurt come il fuit a le common ley, et le plus tost, entant que la dit limitation de brieve de droit (3) est de cy long temps passe (4). Ideo

of prescription, and this is certaine. And others have said, that well and truth it is, that seisin and continuance after the limitation &c. is a title of prescription, as is aforesaid; and by the cause aforesaid. But they have sayd, that there is also another title of prescription that was at the common law, before any estatute of limitation of writs, &c. and that it was, where a custome or usage, or other thing, hath beene used, for time whereof mind of man runneth not to the contrary. And they have said, that this is proved by the pleading, where a man will plead a title of prescription of custome. Hee shall say, that such custome hath beene used from time whereof the memory of men runneth not to the contrary, that is as much to say, when such a matter is pleaded, that no man then alive hath heard any prooffe of the contrary, nor hath no knowledge to the contrary; and insomuch, that such title of prescription was at the common law, and not put out by an estatute, ergo, it abideth as it was at the common law, and the rather, insomuch that the said limitation of a writ of right, is of so long time passed, Ideo quære de hoc. And

pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit iusta. Ut si verus dominus statim cum intrusor vel disseisor ingressus fuerit seisinam, nitatur tales viribus repellere, et expellere, licet id, quod inciperit, perducere non possit ad effectum, dum tamen cum defecerit, diligens sit ad impetrandum & proseguendum. Longus usus, nec per vim, nec clam, nec precario, &c. Idem fol. 222. b.

If a man prescribeth 13. E. 4. 6. to have a rent, and likewise to take a distress for the same, it cannot bee avoyded by pleading, that the rent hath beene alwayes paid by cohercion, albeit it began by wrong.

Un titre de (Dr. & Stud. 16. 5. Co. 72.)

prescription. Seeing that prescription maketh a title, it is to be seene; first to what things a man may make a title by prescription without charter; and secondly, how it may be lost by interruption.

For the first, as to 21. H. 6. Prescrip. 44. 21. E. 4. such franchises and liberties as cannot be seized as forfeited, before the cause of forfeiture appeare of record, no man can make a title by prescription; because, that prescription being but an usage in pais, it cannot extend to such things as cannot bee seized, nor had, without matter of record; as to the goods and chatels of traitors, felons, felons of themselves, fugitives, of those that be put in exigent, deodands, conufance of pleas, to make a corporation, to have a sanctuary, to make a coroner

manuscript note on a Coke upon Littleton we have been favoured with, is represented to have considered the power's surviving when given to two executors, as in the case of Lovel and Barnes. The words of the note are these. *Hales chief baron says, it is so, because they were to sell by reason officii; yet the law stands, that authorities shall not survive; and perhaps it had been otherwise, if he had ordered his land to be sold by A. and B. not being named executors, and one of them had died, for that seems to be a personal trust.* The conjecture also receives great countenance from some books, in which it is said, that such a power of selling given to executors shall pass to their executors and administrators; for if an authority, not being coupled with an interest, becomes transmissible in the way of succession in infinitum till executed, by reason of it's being given to executors, much more may it survive for a like reason. Kelw. 44. 2. Brownl. 194. If indeed the doctrine in the books we refer to is well founded, it will prove a power of selling land given to executors capable both of transmission and survivorship. But whether lord Coke's notion of the power's not surviving, or the opposite one, most conforms to strictness of law, is not now of any great importance; as such a power, though extinct at law, would certainly be enforced in equity. This has long been the practice of our courts of equity; these rightly deeming the purpose, for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise, and the persons named to execute the power of selling to be mere trustees; which brings the case within the general rule of equity, that a trust shall never fail of execution for want of a trustee, and that if one is wanting the court shall execute the office. The relief is administered by considering the land, in whatever person vested, as bound by the trust, and compelling the heir, or other person having the legal estate, to perform it. There are many printed precedents of thus executing not only powers actually extinct at law, or supposed to be so, but also such as, in point of law, either for want of the will's naming by whom they should be executed, or because those named have died before the testator, never could exist or take effect. Some of these precedents are as early as the reign of Charles the first. See Locton and Locton 2. Freem. 136. and 1. Cha. Caf. 179. Garfoot and Garfoot 1. Cha. Caf. 35. Gwilliam and Rowel Hardr. 204. Pit and Pelham 2. Freem. 134. 1. Cha. Rep. 283. and 1. Cha. Caf. 176. T. Jo. 25. 1. Lev. 304. See also Mar. of Eq. 37. and Vin. Abr. Devise Q. c. and S. c. Nor do the courts of equity appear ever to have confined this relief, as they certainly do many kinds of aid, to persons of particular and favoured descriptions, such as wife children or creditors; for though in some of the old cases, the persons relieved were of one or other of these descriptions, yet in others nearly of the same time the parties are

For the notes to this side of fol. 114. a. see 114. b. and for the remainder of the notes to 222. a. see 222. b.

way, as lets in both the paternal and maternal blood successively to the inheritance, but with a preference of the former, as where

(1. Ro. Abr. 270. 9. Co. 29. Post 195. a.)
[e] 22. E. 3. Coron. 241. 9. H. 7. 11. 20. 18. H. 6. Prefec. 45. 11. H. 4. 10. 21. H. 7. 33. 9. E. 4. 12. 39. E. 3. 35. 46. E. 3. 16. 11. H. 6. 25. F. N. B. 91. 1. H. 7. 24. Stamf. Pl. Cor. 38. 44. E. 3. 4. 22. E. 4. 43. 44. 3. E. 3. Brook Prefec. 57. 44. Aff. pl.
(*) 8. H. 6. 16.
[f] 12. E. 4. 16. 32. H. 6. 25. 12. Eliz. Diet. 288, 289.

11. E. 3. tit. Issue 40.
(2. Ro. Abr. 271. 2. Inst. 19. Cro. Jam. 155, 156. 454.)
15. E. 3. tit. Judgment 133. 14. E. 3. ibid. 155.

(2. Ro. Abr. 271. 278.)

(*) Mich. 43. & 44. Eliz. in a prohibition between Nowell pl. and Hicks vicar of Edmonton defendant in the King's Bench.
(2. Co. Bishop of Winton's case. 6. Co. 69. 3. Co. 9. 2. Ro. Abr. 292.)

(Dr. & Stud. 17. a.)
[e] Bracton fol. 314.

(1. Ro. Abr. 685.)
[f] Regist. 158. Bract. fo. 373. 5. Aff. p. 2. 34. H. 6. 40.
[g] Stat. de Mert. 20. H. 3. ca. 8.
[h] Westl. 1. an. 3. E. 1. c. 8.
Vide W. 2. 13. E. 1. ca. 46.
[i] Mirror ca. 5. sect. 1.

ner, &c. to make conservators of the peace, &c. (1).

[e] But to treasure

trove, waifes, c-
straies, wrecke of sea, to hold pleas, courts of leets, hundreds, &c. infange thiefe, outfange thiefe, to have a parke, warren, royall fishes, as whales, sturgions, &c. Fayres, markets, franke foldage, the keeping of a gaole, tolle, a corporation by prescription, and the like, a man may make a title by usage and prescription onely without any matter of record. (*) Vide Sect. 310. where a man shall make a title to lands by prescription.

But it is to be observed, [f] that although a man cannot, as is aforesaid, prescribe in the said franchise to have *bona & catalla proditorum, felonum, &c.* yet may they and the like bee had obliquely or by a meane by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona & catalla proditorum, felonum, &c.*

As to the second, by what meanes a title by prescription, or custome, may be lost by interruption. It is to be knowne, that the title, being once gained by prescription or custome, cannot be lost by interruption of the possession for ten or twenty yeares, but by interruption in the right, as if a man have had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right.

In a writ of mesne the plaintife made his title by prescription, that the defendant and his ancestors had acquited the plaintife and his ancestors, and the terre-tenant time out of minde, &c. the defendant tooke issue, that the defendant and his ancestors had not acquited the plaintife and his ancestors and the terre-tenant; and the jury gave a special verdict, that the grandfather of the plaintife was enfeoffed by one Agnes, and that Agnes and her ancestors were acquitted by the ancestors of the defendant time out of minde before that time, since which time no acquittal had beene; and it was adjudged and affirmed in a writ of error, that the plaintife should recover his acquittal, for that there was once a title by prescription vested, which cannot be taken away by a wrongfull cesser to acquite of late time, and albeit the verdict had found against the letter of the issue, yet for that the substance of the issue was found *viz.* a sufficient title by prescription, it was adjudged both by the court of Common Pleas, and in the writ of error by the court of King's Bench for the plaintife, which is worthy of observation.

a *modus decimandi* was alledged (*) by prescription time out of minde for tithes of lambes; and thereupon issue joyned; and the jury found, that before twenty yeares then last past there was such a prescription, and that for these twenty yeares he had paid tithes *in specie*, and it was objected, first that the issue was found against the plaintife, for that the prescription was generall for all the time of prescription, and twenty yeares faile thereof. 2. That the party by payment of tithes *in specie* had waived the prescription or custome. But it was adjudged for the plaintife in the prohibition; for albeit the *modus decimandi* had not bin paid by the space of twenty yeares, yet, the prescription being found, the substance of the issue is found for the plaintife. And if a man hath a common by prescription, and taketh a lease of the land for twenty yeares, whereby the common is suspended, after the yeares ended he may claime the common generally by prescription; for that the suspension was but to the possession, and not to the right, and the inheritance of the common did alwayes remaine, and when a prescription or custome doth make a title of inheritance (as Littleton speaketh) the partie cannot alter or waive the same *in pais* (2).

Temps dont memory, &c. & de title per prescription, que est tout un en ley. So as the time prescribed or defined by law is, time, whereof there is no memorie of man to the contrary. [e] *Omnis querela, & omnis actio injuriarum, limitata infra certa tempora.*

Temps de limitation. Limitation, as it is taken in law, is a certaine time prescribed by statute, within the which the demandant in the action must prove himselfe or some of his ancestors to be seised.

Enbrieve de droit. In [f] ancient time the limitation in a writ of right was from the time of H. 1. whereof it was said *à tempore regis Henrici senioris*. After that by the statute of [g] Merton the limitation was from the time of H. 2. and by the statute [h] of W. 1. the limitation was from the time of R. 1. And this is that limitation, that Littleton here speaketh of. Whereof in the Mirror in reproofe of the law it is thus said, [i] *Abusio est de counter cylonge temps, dont nul ne poet tesmoigner de vier & de oyer, que ne dure my generalment ouster 40 ann.* Time

are not stated to have fallen within either of them, and we have not heard of any case, in which relief has been refused on that account. See Lofton and Lofton already cited, and the case of Tenant and Browne cited in 1. Cha. Caf. 180. The reason of not favouring particular persons in this instance will appear evident, when it is considered, that testamentary powers to sell are deemed to be in the nature of trusts, and trusts are executed in equity for all persons indiscriminately. +

(1) See an observation on this doctrine against prescribing to make conservators of the peace, in 2. Hawk. Pl. C. b. 2. c. 8. f. 10 — (2) It is observable, that Mr. Serjeant Rolle has incorporated most of the preceding passages relative to prescription into his abridgment. See Ro. Abr. tit. *Prescription* and the additional matter in Vin. Abr. same title R. — S. — T.

Notes to 114. a.

(1) &c. in L. & M. and Roh. — (2) &c. in L. & M. and Roh. — (3) &c. in L. & M. and Roh. — (4) &c. in L. & M. and Roh.

Continuation of notes to 111. b. from fol. 112. a.

(2) See note 1. — (3) But a statute, made since lord Coke's time, requires a number of forms, besides writing, in a will of lands or tenements devisable by the *statute of wills*; for by the statute against frauds and perjuries a will of such property is void, unless it is signed by the testator, or by some person for him in his presence and by his direction, and is also attested and subscribed in his presence by three witnesses. See 29. Ch. 2. c. 3. Also by the last mentioned statute the same forms are required, as well in devises by *custom* as in those of estates *pur autre vie*. But these regulations do not extend to *copyhold* estates and *terms for years*; the statute of frauds and perjuries, so far as it regulates devises of land, being expressly confined to the three former kinds of devises. As to *copyholds*, a devise of them operates only as a declaration of uses on the surrender to the use of the will; and therefore if the form required by the surrender, which is usually nothing more than a testamentary declaration in writing, is observed, it is sufficient without any witness; and even a *nuncupative* will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form, till the 29. of Cha. 2. required all declarations of trusts to be in writing. See 2. Atk. 37. and Barnad. Ch. Rep. 9. In respect to *terms for years*, they, falling within the description of personal estate, are deviseable by will accordingly. But this must be understood with some distinction. Thus if they are terms, not in *gross*, but vested in trustees to attend the inheritance, they so follow the nature of the latter, that if the owner devises the land generally by a will not so attested as to pass the inheritance, not even the *trust* of the term will pass. See 2. P. Wms. 236. Also as to terms in *gross*, though a testator being possessed of such may transmit them by the same unsolemn kind of will as other personalty, yet he cannot create them by will, without observing all the forms essential to a devise of real estate; because

where the infant derives lands by descent from a brother who was the first purchaser, and there is no next of kin but such as may inherit from the infant, it seems unsettled, who should have the guardianship. — If the person intitled to be guardian in socage is himself under custody of a guardian, the latter is intitled to the custody of both; to the former in his own right, and to the latter *pur cause de ward*, that is, in right of his wardship of the former. — Being wholly for the infant's benefit, and not in any respect for the guardian's profit, it is not a subject either of alienation for forfeiture or succession, as wardship in chivalry was; and consequently if the guardian in socage becomes incapable or dies, the wardship devolves upon the person next in degree of kindred to the infant.

+ For the remainder of the notes to 113. a. see 116. b.

Time of limitation is twofold, first, in writs, and that is by divers acts of parliament; secondly to make a title to any inheritance, and that (as Littleton here saith) is by the common law.

Limitation of times in writs are provided by the said statute of Merton (1), and after by the said statute of W. 1. which Littleton here citeth, and which was in force when he wrote, but is since altered by a profitable and necessary statute [k] made anno 32. H. 8. and by that act, the former limitation of time in a writ of right is changed and reduced to threescore yeares next before the *teste* of the writ, and so of other actions, as by the statute at large appeareth. But it is to be observed, that this act of 32. H. 8. extendeth [l] not to a formedon in the descender (2); [l] Mich. 10. & 11. Eliz. Dyer 278. Fitzwilliam's case. nor to the services of escheage homage and fealty (3), for a man may live above the time limited by the act. Neither doth it extend to any other service, which by common possibility may not happen or become due within sixty yeares, as to cover the hall of the lord, or to attend on his lord when he goeth to warre or the like; nor where the seisin is not traversable or issuable (4). Neither doth it extend to a rent created by deed (5), nor to a rent reserved upon any particular estate; for [m] in the one case the deed is the title, and in the other the reservation; nor to [m] 8 Co. 65. Sir Wil. Foster's case. any writ of right of advowson, *quare impedit*, or assise of *darreine presentment* (for there was a parson of one of my churches that had been incumbent there above fifty yeares, and dyed but lately) or any writ of right of ward, or ravishment of ward, &c. but they are left as they were before the statute of 32. H. 8 (6). But hereof thus much for the better understanding of Littleton shall suffice (7). 1. Mar. Parliam. 2. cap. 5. Vide 17. E. 3. 11. Pl. Com. 371. b.

De temps le roy R. 1. And that was intended from the first day of his raigne; for (from the time) being indefinitely, doth include the whole time of his raigne, which is to be observed. Vide 34. H. 6. 36.

Briefe de droit. Breve de recto, a writ of right, so called, for that the words in the writ of right are, *quod sine dilacione plenum rectum teneas*.

Title de prescription al common ley, &c. de temps dont memorie des homes ne curge al contrarie. Docere oportet longum tempus, & longum usum illum, viz. qui excedit memoriam hominum; tale enim tempus sufficit pro jure. Braet. lib. 4. fol. 230. Fleta lib. 4. cap. 24. (5. Co. 72. Dr. & Stud. 16. b.)

Ascun prooffe al contraire. For if there be any sufficient prooffe of record or writing to the contrary, albeit it exceed the memory, or proper knowledge of any man living, yet is it within the memory of man: for memory or knowledge is twofold. First, by knowledge by prooffe, as by record or sufficient matter of writing. secondly, by his owne proper knowledge. A record or sufficient matter in writing are good memorialls; for *litera scripta manet*. And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said *tradere memorie*. And this is the reason, that regularly a man cannot prescribe or alledge a custome against a statute; because that is matter of record, and is the highest prooffe and matter of record in law. But yet a man may prescribe against an act of parliament, when his prescription or custome is saved or preserved by another act of parliament. (8. Co. 121.) 28. Aff. 25. 38. Aff. 18. 45. E. 3. 26. 5. H. 7. 10. 8. H. 7. 7. 11. H. 7. 21. Dyer 23. Eliz. 273.

There is also a diversity betweene an act of parliament in the negative and in the affirmative; for an affirmative act doth not take away a custome (8); as the statutes of wills of 32. and 34. H. 8. doe not take away a custome to devise lands, as it hath beene often adjudged. Moreover, there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there aswell as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for as our author saith, *consuetudo, &c. privat communem legem* (9). As the statute of *Magna Charta* provideth, that no leet shall be holden but twice in the yeare (10), yet a man may prescribe to hold it oftener, and at other times (11); for that the statute [n] was but in affirmance of the common law (12). (2. Ro. Abr. 266. 4. Inff. 274. 298. 303. 2. Inff. 20. 11. Co. 63. 12. Co. 22. Plow. 207. Cro. Jam. 313. 2. Rol. Abr. 266.)

So the statute [o] of 34. E. 1. (13) provideth, that none shall cut downe any trees of his owne within a forest without the view of the forrester: but inasmuch as this act is in affirmance of the common law (14), a man may prescribe to cut downe his woods within a forest without the view of the forrester (15). And so was it adjudged in 16 Eliz. in the exchequer by Sir Edward Sanders chiefe baron, and other the barons of the exchequer, as Sir John Popham chiefe justice of the King's Bench reported to me. [n] 6. H. 7. 2. 8. H. 4. 34. 12. H. 7. 18. 31. H. 6. Lect 11. 18. H. 6. 13. [o] 34. E. 1. tit. Forest. Rast. 1. E. 3. cap. 2. (Doc. Plac. 342. 2. Rol. Abr. 266. Ante 2. Post. 165. b. 233. a. Cro. Jam. 155. Dr. & Stud. 164.)

In the cire of the forest of Pickering, before Willoughby Hungerford and Hanbury justices itinerants there, anno 8. E. 3. I reade [p] a claime made by Henry de Percy, lord of the mannor of Semor within the said forest. The forestors, verderours, and regarders found his claime to be true, viz. *Quod predictus Henricus de Percy, & omnes antecessores sui tenentes manerium*

because the interest, in right of which the testator creates the term, is *real estate*, and creating the term is a *partial devise* of it. Besides appointing new forms of executing wills of real estate, the 29. of Cha. 2. prescribes how devises shall be revoked.—(3) See note 1.—(4) Whilst the power of devising depended wholly on the statutes of Henry the eighth, it was frequently of importance to resort to the custome of devising, as being most beneficial for the devisee. The power by custome might be larger than the statutory power; the former sometimes enabling to devise the whole, where the latter could only be exercised over *two parts*. 2. Sid. 153. There was also an essential difference between the two powers in the mode of execution; for a will in writing was conceived to be necessary to a devise under the statutes, but a *nuncupative* will might be sufficient under the custome. 2. Sid. 154. But these differences do not now subsist any longer. As on the one hand the 12. of Cha. 2. by communicating to all freehold lands the qualities of the tenure by *common socage*, has rendered the power of devising the whole under the statutes of Henry the eighth *universal*: so on the other hand the 29. of Cha. 2. against frauds and perjuries requires the same solemnities of writing, signing, and attestation to a devise by custome, as to one under the statutes. See ante fol. 111. b. note 1. and 111. a. note 3. The two powers of devising being thus assimilated, and made for the most part commensurate, it can seldom happen, that it should be necessary to call the power by custome in aid; though it is possible, as where the custome enables an infant of fourteen or a feme covert, neither of which is capable of devising under the statutes. As to the infant, see 37. Hen. 6. 5. Perk. sect. 504. 2. And. 12. 5. Co. 84. and as to the *feme-covert* 5. Com. Dig. 14. where it is said, that by the custome of London the may devise to her husband, but without citing any authority.—(5) Adjudged acc. in Mytton and Lutwich W. Jo. 7.

(1) See cap. 39. and lord Coke's Commentary upon it in 2. Inff. 238.—(2) The statute mentions formedons in *remainder* and *reverter*, and limits them to fifty yeares; but omits formedon in *descender*. Nor is the latter deemed to be comprehended within the clause of the statute relative to writs of right: for a formedon is not in the strict sense a writ of right; though it certainly is in the nature of one, the *mere right* being equally triable in both. Accordingly, in the case cited by lord Coke from Dyer, three judges held, that a formedon in *descender* was not within the statute. The other judge doubted. See also the additional case

infant, not being inheritable to him. Fitzherbert indeed in his *Natura Brevium* cites two cases of Edward the third; in which guardian in socage granted the wardship to a stranger, and the grant was awarded good. F. N. B. 143. P. The same author too in his abridgment gives another case of the same reign, according to which a lease of guardianship in socage was pleaded. Fitzh. Abr. Garde 161. But possibly these cases import, only that a guardian in socage may place the body of the infant under the custody of another, and that such placing will be a good answer to an action for ravishment of the ward; not that the guardianship itself

(8. Co. 136. Cro. Jam. 155.)

manerium prædictum, à tempore quo non extat memoria, & sine interruptione aliquali, tenuerunt prædictum manerium cum pertinentiis extra regardum forestæ, & habuerunt woodwardum portantem arcum & sagittas ad præsentandum præsentanda de venatione tantum, &c. & habuerunt in boscu suis de Semere forgeas & mineras, & amputarunt, dederunt, & vendiderunt boscu suum infra manerium prædictum, sine visu forestariorum pro voluntate sua, & fugarunt & ceperunt vulpes, lepores, capriolos, &c. sicut idem Henricus Percy superius clamat. Which claime by prescription, and found as is aforesaid, the justices doubted onely of two points. The first, forasmuch as the said manor was within the limits of the forest, it should not onely be contra assisam forestæ, for his woodward to beare bow and arrowes, where by law he ought to beare but an hatchet, and no bow nor arrowes within the forest, but also de facili cedere possit in destructionem ferarum, &c. and therefore doubted whether it might bee claimed by prescription. Their second doubt was concerning fugationem, & captionem capriolorum in boscu suis prædictis, eo quod est bestia venationis forestæ; & transgressores inde convicti finem facerent ut pro transgressionem venationis: and for that difficulty, the claime was adjourned into the King's Bench. But of the other parts of the prescription no doubt at all was made; and the like had been allowed in the same eyre, as in the case of Thomas lord Wake of Lydell, and of Gilbert of Acton, in the same eyre, Rot. 37. and of others.

(Post 126. a. 283. a. ante 17. a. 10. Co. 88. 1. Sid. 336.)

Il est prove per le pleader. Note one of the best arguments or proofes in law is drawne from the right entries or course of pleading; for the law it selfe speaketh by good pleading, and therefore Littleton here saith, it is proved by the pleading, &c. as if pleading were *ipsum legis viva vox*.

Entant que tiel title per prescription fuit al common ley, &c. Note all the prescriptions, that were limited from a certaine time, were by act of parliament, as from the time of H. 1. which was the first time of limitation set downe by any act of parliament, and so from the raigne of R. 1. &c. But this prescription of time out of memory of man was (as Littleton here saith) at the common law, and limited to no time. Also here is implied a maxime of the law, *viz.* that whatsoever was at the common law, and is not ousted or taken away by any statute remaineth still.

(Ante 110. b. Post 344. a.)

Common ley. The law of England is divided, as hath beene said before, into three parts; the common law, which is the most generall and ancient law of the realme; of part whereof Littleton wrote; 2. Statutes or acts of parliament; and 3. Particular customes (whereof Littleton also maketh some mention.) I say particular, for if it be the generall custome of the realme, it is part of the common law.

(Pref. to 8th. Co.)

The common law hath no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remaines still, as Littleton here saith. The common law appeareth in the statute of *Magna Charta* and other ancient statutes (which for the most part are affirmations of the common law) in the originall writs, in judicall records, and in our bookes of termes and yeares. Acts of parliament appeare in the rolls of parliament, and for the most part are in print. Particular customes are to be proved.

Sect. 171.

(2. Inst. 669.)

Ville. Villa quasi *ve-*
hilla, quod in eam con-
uebantur fructus. And it is
called *viens*, because it is *pro-*
pe viam. Villa est ex pluribus
mansionibus vicinata, & collata
ex pluribus vicinis. If a town
be decayed so as no houses re-
maine, yet it is a towne in
law. And so if a borough be decayed, yet shall it send burgesses to the parliament, as
old Salisbury and others doe. It cannot be a towne in law, unlesse it hath, or in time past
hath had, a church and celebration of divine service, sacraments and burials. What
alteration hath beene made in townes, heare what a great lawyer saith. *In Anglia*
nullula tam parva inveniri non poterit, in qua non est miles, armiger, vel paterfamilias,
&c. magnis ditatus possessionibus, nec non liberi tenentes alii & valescent plurimis suis
patrimoniis sufficientes, &c. And it appeareth by Littleton, that a towne is the *genus*,
and a borough is the *species*; for hee saith that every borough is a towne, but every
towne is not a borough. *Et sub appellatione villarum continentur burgi & civitates.*

Vid Linwood verbo *Vicus*. Bract.
lib. 5. fol. 434. & lib. 4. fol. 211.
Fortescue cap. 29. 7. E. 6. Fines
levie de terre. Br. 91.

34. E. 1. Quare imp. 187.

Fortescue cap. 29.

Fortescue cap. 24.

ITEM, chescun **A**LSO, every bo-
burgh est un vil-
le, mes nemy è con-
verso. Plus serra dit
de custome en le tenure
de villenage. rough is a towne,
but not è *converso*.
More shall bee sayd of
custome in the tenure
of villenage.

case in the margin of Dy. ed. 1688. fol. 278. a. But as the 21. Jam. 1. c. 16. requires formedons of every kind to be brought within twenty years after the descent of the title, this defect of the former statute is now of no consequence.—(3) Acc. 3. Lev. 21.—(4) The reason is plainly this. The limitation in the 32d. of Henry the eighth is wholly referable to seisin; the statute requiring a seisin within a certain time according to the nature of the writ; that is, sixty years for writs of right, fifty for possessory writs founded on an ancestor's possession, thirty for possessory writs founded on the party's own possession, and so on. Now the limitation being thus dated from a seisin, it would be absurd to extend the statute to actions, in which seisin, not being issuable, can never become the subject of evidence or trial.—(5) This was the point adjudged in Sir William Foster's case cited by lord Coke in the margin; and there is a much earlier adjudication to the same effect in Moore. See Mo. 31. The reason of this exemption of rents created by deed out of the statute is of the same kind as is explained in note 4; the statute pointing at rents, to which the title is by seisin. But according to Sir William Jones, such exemption should be understood with this qualification; that the certainty of the rent should appear in the deed: because otherwise the quantum or quality of the rent is no more ascertained by the deed, than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over without expressing what that is, and the latter rent not having commenced by deed is one, of which seisin is the proper proof; in such a case, seisin, as Sir William Jones thought, is equally requisite to both rents, and consequently both ought equally to be deemed within the limitation of the 31. of Hen. 8. See W. Jo. 238.—(6) It was doubtful whether the several writs, here mentioned in respect to advowsons and wardship, were not within the statute of Henry the eighth; and to remove this doubt a statute of Mary cited by lord Coke was made, declaring, that the former statute should not extend to them. The reasons of that statute are fully explained in Plowden. See fol. 371. But so far as regards *advowsons*, this statute of Mary is no longer of any use: it being enacted by the 7th. of Anne, c. 18. that no usurpation shall displace the estate of the patron, and that he may present on the next avoidance, as if there had not been any usurpation; which provision in effect takes away all limitation of suits about the right of patronage. See 3. Blackit. Comm. 5th. ed. 250.

For the continuation of the notes to 115. a. see 116. a.

itself may be transferred by bargain and sale. However should these ancient authorities not bear the former construction, they seem sufficiently answered by the doctrine and practice of later times; for in them, the acknowledged qualities of guardianship in socage being, that it is a personal trust wholly for the infant's benefit, and neither transmissible by succession nor devisable, are not consistent with its being assignable; and we have lord chief justice Vaughan's authority for saying, that even in his time common experience proved the contrary. See Plow. 293. Vaug. 181. See too Post 90. b. note 1.—It extends not only to the person and socage estates of

Berevica, or *berewit*, in Domesday signifieth a towne. *He berevica pertinent ad Berchley*. Domesday. Glouc.
(*Et sic recitat plus quam viginti villas.*)
There be in England and Wales eight thousand, eight hundred and three townes, or thereabouts.
See more of *villis*, *parochiis*, & *hamlettis*, in the ancient authors of the law, and plentifully in our other bookes. But let us now heare what Littleton saith (1).

Bract. ubi sup. Flet. li. 4. c. 15.
& lib. 6. ca. 49. Brit. fo. 124. & 274. &c.

CHAP. II.

Villenage.

Sect. 172.

TENURE en villenage est plus properment, quant un villain tient de son seignior, a que il est villain, certaine terres ou tenements solongue le custome del manor au auterment a la volunt son seignior, & de faire a son seignior villain service; come de porter & de carier le fme le seignior hors del city ou del manor (1) son seignior, jesques a le terre son seignior, en gisant ceo (2) sur le terre, & hujusmodi. Et ascuns franke homes teignent lour tenements, solongue le custome del certaine manors, per tiels services. Et lour tenure auxy est appel tenure en villenage, et uncore ils ne sont pas villeines; car nul terre tenu en villenage, ou villeine terre, ne ascun custome surdant de la terre, ne unques ferra

TENURE in villenage is most properly, when a villeine holdeth of his lord, to whom he is a villeine, certaine lands or tenements according to the custome of the manor, or otherwise at the will of his lord, and to doe to his lord villeine service; as to carry and recarry the dung of his lord out of the city, or out of his lord's manor, unto the land of his lord, and to spread the same upon the land, and such like. And some free men hold their tenements, according to the custome of certaine manors, by such services. And their tenure also is called tenure in villenage, and yet they are not villeines; for no land holden in villenage or villein land, nor any custome arising out of the land, shall ever make a free man villeine. But a

TENURE en villenage. Villeine is the French word *villaine*, and that a *villa*, quia *villa adscriptus est*; for they, which are now called *villani*, of ancient times were called *adscriptitii*. And in the common law he is called *nativus*; quia *pro maiore parte natus est servus*: and this is hee which the civilians call *servus*. [a] *Thryn* in the Saxon tongue is *liber*, and *then servus*. *Theme* (sometimes written *theame* corruptly) is an old Saxon word, and signifieth *potestatem habendi in nativos sive villanos, cum eorum sequelis, terris, bonis et catallis*. But *teame* sometime corruptly written *theam* is of another signification; for it is also an old Saxon word, [b] and signifieth, where a man cannot produce his warrant of that which hee bought according to his voucher.

Lib. Rub. 76. & 77. Glanv. li. 5. ca. 1. & 2. &c. Vide Bract. li. 1. ca. 6. &c. Brit. fo. 77. & 67. 82. 97. 98. 125. 126. 147. Flet. li. 1. c. 3. Flet. li. 2. cap. 44. Idem li. 4. cap. 11. & 12. Mir. ca. 2. sect. 18. Ockam.

(F. N. B. 77. a.)
[a] Flet. li. 1. ca. 24.

[b] Vide Lamb. inter leges Sancti Edw. fo. 132. nu. 25.

Villenage. *Villenagium*, (as in like cases hath beene sayd where the termination is in *age*;) is the service of a bondman. And yet a free man may doe the service of him, that is bond. And therefore a tenure in villenage is twofold; one, where the person of the tenant is bond, and the tenure servile; the other, where the person is free, and the tenure servile. [c] *Servus terra, liberos de sanguine existentes, villanos facere non potest*. And therefore it is said, [d] *est enim ratio et regula generalis in istis duobus casibus, quod liber homo nihil libertatis propter perso-*

(F. N. B. 12. 2. Rol. Abr.

[c] *Servus terra, liberos de sanguine existentes, villanos facere non potest*. [d] Bract. li. 4. fo. 170.

(1) We do not observe, that there is any thing in the statute of Charles the second for taking away military tenures, which in the least varies the tenure by burgage. For further information about *burgage* and *boroughs*, See Brad. on Bor. Mad. Firm. Burg. Squire's Anglo-Sax. Gov. 1st. ed. tit. *Boroughs* in the index, and Wright's Ten. 205.—(2) In L. and M. and Rob. the words are *del cite* (which seems used in the same sense as *scite*) *del maner*.—(3) Instead of *en gisant ceo*, the words in L. and M. and Rob. are *gisant coarrette* & *de spreader le fyne le signour*.

Continuation of notes to 115. a. from 115. b.

(7) See further as to the statute of 32. Hen. 8. Brooke's reading upon it. Since the 32. of Hen. 8. there have been various statutes for limitation of the time for bringing actions; of which the principal and general one is the 21. of Jam. c. 16. See tit. *Temps* in Com. Dig. and tit. *Limitation* in the other abridgments.—(8) This rule about *affirmative* statutes is very common in the books. See the references in the margin of Plowd. Engl. ed. 112. In another place lord Coke lays down a like rule as to their not taking away the common law, but with more particularity; for his words are, that a *statute made in the affirmative without any negative expressed or implied, doth not take away the common law*. 2. Inst. 200. This seems to be the justest way of stating the rule both as to common law and customs. See further Plowd. 113. and the references in the margin of Engl. edit. Hatt. on Stat. 83. 4. Com. Dig. 339. 432. Elmes's case 1. And. 71. and Dy. 373. pl. 13. and Jones and Smith 2. Bullst. 36.—(9) This appears to be a good rule; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by parliament; and consequently its operation should not be extended to the destruction of prescriptions and customs, which were before allowable. As to the use of *negative* words in such a case, they may either arise from the subject, or be a *mode* of expressing what the common law is; in either of which cases, there cannot be any colour of reason for giving more effect to *negative* than belongs to *affirmative* words. In short to say, that a statute *merely declaratory* of the common law, being expressed in negative words, shall operate on subjects to which the common law is not applicable, seems to be a direct contradiction; for how can a statute be *merely declaratory*, if it is in any degree *introductive of a new law*? However there are books, in which lord Coke's distinction, in respect to negative statutes declaratory of the common law, is denied. See W. Jo. 270, 271, 289. If those, who oppose his

of the infant; but also to his hereditaments *not lying in tenure*; and even to his copyhold estates unless there is a special custom for the lord's appointing a guardian of them. Ante 87. b. and Eggleton's case, 1. Ro. Abr. 40. See also Hutt. 17. and 2. Lutw. 1181. But whether the guardian in focage is intitled to take into his custody the infant's *personal* estate, we have not yet been able to ascertain by any express authority. However we are inclined to think, that *personality* is included, except where by the custom of a particular place it happens to be liable to a different custody; our idea being, that the custody of the infant's person draws

[e] Idem. lib. 1. ca. 6. Brit. c. 31. & 66. Flet. li. 1. ca. 3.

[f] Brañ. fol. 26. 43. E. 3. 5. acc.

[g] Brañ. li. 4. fo. 208. Brit. ca. 31.

[h] Brañ. li. 1. fo. 7.

[i] Fortesc. ca. 42.

[k] Brit. ca. 31.

[l] Brañ. li. 1. ca. 6. Flet. li. 1. ca. 3. & ca. 5. Mir. cap. 2. sect. 18.

[F. N. B. 77. f.]
Brañ. li. 1. cap. 6. Britton ca. 31.
& ubi supr. Fleta lib. 1. ca. 2. & 3.
[m] Mirror cap. 2. sect. 18.

[n] Mirror cap. 2. sect. 18. Genes. 9. vers. 10, 11. &c.

Ambrose.

personam suam liberam confert villenagio; nec liberum tenementum e contrario mutat statum aut conditionem villani.

And againe, [e] villenagium vel servitium nihil detrahit libertati; habita tamen distinctione, utrum tales sint villani, & teneant in villano socagio de dominico domini regis. And againe, [f] Tenementum non mutat statum liberi non magis quam servi; poterit enim liber homo tenere purum villenagium, faciendo quicquid ad villanum pertinebit, & nihilominus liber erit, cum hoc faciat ratione villenagii, & non ratione personæ suæ: & ideo poterit, quando voluerit, villenagium deferere, & liber discedere, nisi illaqueatus sit per uxorem nativam ad hoc faciendum, ad quam ingressus fuit in villenagium, & quæ præstare poterit impedimentum, &c. And againe, [g] Purum villenagium est, à quo præstatur servitium incertum & indeterminatum, ubi scire non poterit vespere, quale servitium fieri debet mane, viz. ubi quis facere tenetur, quicquid ei præceptum fuerit. And another faith to the same intent, [h] Fuerunt in conquestu liberi homines, qui libere tenebant tenementa sua per libera servitia, vel per liberas consuetudines; & cum per potentiores ejusdem essent, postmodum reversi receperunt eadem tenementa sua tenenda in villenagio, faciendo inde opera servitia, sed certa et nominata, &c. & nihilominus liberi, quia, licet faciunt opera servitia, cum non faciunt ea ratione personarum, sed ratione tenementorum, &c.

How villenage or servitude began, and for what cause, it is said, [i] Ab homine & pro vicio introducta est servitus, sed libertas à Deo hominis est indita natura, quare ipsa ab homine sublata semper redire gliscit, ut facit omne, quod libertati naturali privatur. And another faith, [k] that the condition of villeines, from freedom unto bondage, of ancient time grew by constitutions of nations. [l] Fiant etiam servi liberi homines captivitate de jure gentium; and not by the law of nature, as from the time of Noah's flood forward, in which time all things were common to all, and free to all men alike, and lived under the law naturall, and by multiplication of people, and making proper and private those things that were common, arose battels. And then it was ordained by constitution of nations, that none should kill another; but that he, that was taken in battell, should remain bond to his taker for ever, and to doe with him, and all that should come of him, his will and pleasure, as with his beast, or any other chattell, to give, or to sell, or to kill: and after it was ordained for the cruelty of some lords, that none should kill them, and that the life and members of them, as well as of free men, were in the hands and protection of kings, and that he that killed his villeine, should have the same judgment as if he had killed a freeman. Thereupon they were called servi, quia servabantur à dominis & non occidebantur, & non à serviendo. He is called natus à nascendo, quia plerumque natus est servus; and he is called villanus, for that he doth his villeine service in villis.

Est autem libertas naturalis facultas ejus, quod cuique facere libet, nisi quod de jure, aut vi prohibetur. Servitus est constitutio de jure gentium, qua quis domino alicui contra naturam subijcitur. And againe, [m] Et tout soyt que tous creatures dussent estre franks selonque le ley de nature, per constitution nequidant, & fait de homes sont auters creatures enservies, sicome est dit beafts en parkes, pissons en servors, & oyseaux en cages.

[n] This is assured, that bondage or servitude was first inflicted for dishonouring of parents; for Cham the father of Canaan (of whom issued the Canaanites) seeing the nakednes of his father Noah, and shewing it in derision to his brethren, was therefore punished in his sonne Canaan, with bondage. And herewith agreeth the divine. Ante vini inventionem inconculsa libertas. Non esset hodie servitus, si ebrietas non fuisset.

Hors del citie ou del mannor, &c. This is false printed, for the original

his opinion, had meant only to say, that in the instances, by which he illustrates his rule, the negative words of the statutes not only import something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it; or that on other accounts the instances were not apt, there might possibly be some colour for their dissenting from lord Coke. But what is professed to be controverted is the distinction itself; which, as we understand it, seems to be perfectly unexceptionable.—(10) It is observable, that Magna Charta distinguishes between *tourns* or the *leets of sheriffs* and the *view of frank-pledge*; limiting the former to twice a year and the latter to once. In the more ordinary sense *frank-pledge* and *leet* are synonymous; as appears from the style of *tourns* and other *leets*, which in court rolls are usually denominated *curia* or *visus franci plegii*. But when *free-pledge* is used, as in Magna Charta, it should be understood in a strict and particular sense; according to which it meant only that part of the business of a court leet, which related to the taking of sureties or free pledges for every person within the jurisdiction; a practice, which had fallen into disuse long before lord Coke's time. See 8.H.7.4. and 2.Inst. 72. (11) Adjudged acc. 2. Leon. 28. But it may be doubted, whether the prescription for holding a leet oftener than twice a year, when examined into, will appear a fit example to prove the rule, that negative statutes in affirmance of the common law may be prescribed against. The only words of Magna Charta, which relate to the holding of *tourns* or *leets* are these. Nec aliquis vicecomes, vel ballivus, faciat turnum suum per hundredum, nisi bis in anno; & non nisi in loco consueto, videlicet semel post Pascha et iterum post festum Sancti Michaelis; & visus de franco plegio tunc fiat ad illud terminum sancti Michaelis sine occasione. See Blackitt. ed. of Magn. Chart. But this provision or declaration seems wholly confined to the *tourns* or *leets of sheriffs*, and not to include the *leets of private persons*; though it must be owned there are some authorities to the contrary. Acc. Bro. Abr. Leaf 23. and the opinion of Periam in 2. Leon. 74. Contra 2. Hal. Hist. Pl. C. 71. and the opinion of Rhodes 2. Leon. 74. See also 2. Hawk. Pl. C. 56. Therefore should this provision in Magna Charta be only in affirmance of the common law, which as we shall mention in the next note is a point controverted, the instance would still be liable to exception. See 2. Hawk. Pl. 56. But the

The continuation of the notes to 113. a. intended to be introduced here, is postponed to 118. b.

draws after it the custody of every species of property, for which the law hath not otherwise provided. This idea receives some countenance from the instances of *copyholds*, and of *hereditaments not lying in tenure*; for including which, it will be difficult to account by any other reason, than the one we give for including *personalty*. It is also strongly confirmed by the manner, in which the 12. of Cha. 2. c. 24. regulates the powers of the guardian, which it enables a father to appoint. After authorizing such guardian to take the custody of the infant's *personal estate*, as well as of his *lands tenements and hereditaments*, it provides, that he may bring such *action or actions in relation thereunto*, as by law a guardian in common socage might do: words almost necessarily importing,

originall is, *bors del seite del mannor*, and so would it be amended at the impressions of the booke hereafter.

Et ascuns frank homes teignont, &c. This is apparent enough, especially *Mirror* ca. 2. sect. 18. acc. upon that which hath beene said.

Ou un villeine purchase terre en fee simple. Yet the villeine may purchase some kinde of inheritances in fee simple, which the lord of the villeine cannot have. As if a villeine purchase a common *sauns nombre*, the lord shall not have it; for the lord may surcharge the same, which should be a prejudice to the terre-tenant: and the same law of a *corodie incertaine* granted to a villeine, and such like inheritances. And therefore Littleton materially said, *purchase terre*. When the villeine hath an estate of any thing certaine, the lord shall have it; as a rent granted to the villeine, commons certaine, estovers certaine, and such like. [e] But that, which lyeth in action, as a warranty made to the villeine his heires and assignes, the lord shall not take advantage of by voucher; because it is in lieu of an action. Neither shall the lord take advantage of any obligation or covenant, or other thing in action made to the villeine: because they lye in privity, and cannot be transferred to others.

[p] If a man be lessee of a villeine for life, for yeares, or at will, and the villeine purchase lands in fee; if the lessee entred into the lands, he shall hold the lands as a perquisite to him and his heires for ever. But if a bishop hath a villeine in the right of his bishopricke, and he purchase lands, and the bishop entred, the bishop shall have this perquisite to him and his successors, and not to him and his heires; for the law respecteth the quality, and not the quantity of his estate. So if executors have a villeine for yeares, and the villeine purchase lands in fee, and the executors enter, they shall have a fee simple, but it shall be affets.

Fee taile. By this it is apparant, that if lands be given to a villeine, and to the heires of his body, the lord may enter and put out the villeine and the heires of his body; for *quicquid acquiritur servo acquiritur domino* (1). And in this case the lord gaires a fee simple determinable upon the dying of the villeine without heire of his body; and the absolute fee simple remaineth still in the donor. And if the lord enter, and after infranchise the donee, and after the donee hath issue, yet that issue shall never have remedy either by *formedon* or entry, to recover this land, by force of the statute of *donis conditionalibus*; for that statute giveth remedy to the issues of the donee, that have capacity and power to take and retaine such a gift; and the title of the lord remaines, as it did at the common law, for the statute restraineth acts done only by the tenant in taile. And so it is, if lands be given to an alien, and to the heires of his body, upon office found, the land is seised for the king, afterwards the king makes the alien a denizen, who hath issue and dyeth, the king shall detain the land against the issue (3).

Mirror cap. 2. sect. 18.

22. Aff. p. 37.

[e] Doct. and Stud. ca. 43.

[3. Co. 62, 63. 2. Ro. Abr. 740. Post 120. a.)

[p] L. 5. E. 4. 61. 18. E. 3. 29. 21. H. 6. 37. Broo. tit. Vil. 70. (Plow. 235. 2. Ante 90. 2.)

15. E. 4. 9. b. Pl. Com. 555. in Walsingham's case.

Sect. 173.

ET nota, si feoffment soit fait a certaine person ou persons en fee, al use d'un villeine; ou si un villeine, ove auters persons, soient enseoffes al use le villeine; quel estate que le villeine ad en le use, en fee taile, pur terme de vie ou d'ans, le seignior del villeine poit entrer en tous ceux terres et tenements, sicome le villein ust este sole seisie del demesne. Et cest per lestatute de anno 19. H. 7. cap. 15. (2).

AND note, if a feoffment be made to a certaine person or persons in fee, to the use of a villeine; or if a villeine, with other persons, be infeoffed to the use of the villein; what estate soever that the villein hath in the use, in fee taile, for terme of life or years, the lord of the villein may enter into all those lands and tenements, as if the villein had been sole seised of the demesne. And this is given by the statute of anno 19. H. 7. cap. 15.

THIS is an addition to Littleton; and the statute of 19. H. 7. ca. 15. therein mentioned, for the cause that hath beene aforesaid, hath lost his force (3).

Sect.

the strongest objection is, that, in the same chapter of *Magna Charta*, there is a general and expresse reservation of ancient liberties; there being added this qualification, *ita scilicet quod quilibet libertates suas, quas habuit & habere consuevit tempore regis Henrici avi nostri, vel quas postea perquisivit*: which words, even in the opinion of those, who extend *Magna Charta* to all leets, suffice to save prescriptions. 2. Leon. 75. What renders lord Coke's thus applying the case of leets the more remarkable is, that he himself in his Second Institute, when commenting on this part of *Magna Charta*, agrees, that leets of private persons, so far as regards the negative words of *Magna Charta*, are not within it, and takes particular notice of the reservation of ancient liberties. 2. Inst. 72. See further 4. Com. Dig. 122. Perhaps lord Coke might intend to assert, that, notwithstanding *Magna Charta*, it is lawful to prescribe for holding a sheriff's tourn oftener than twice a year; which indeed seems to be admitted by judge Rhodes, who construed all leets to be within *Magna Charta*. But we do not observe, that the authorities, lord Coke cites, mention any such prescription — (12) Some think, that *Magna Charta*, so far as regards the time for holding tourns and leets, was introductive of a new law. See 2. Hawk. Pl. C. 56. — (13) The 34. E. 1. is not printed in the modern editions of the statutes. Indeed it seems doubtful, whether it is intitled to the denomination; for lord Coke in another of his works treats it as an ordinance, and to prove it such cites Fitzherbert's *Natura Brevium*. 4. Inst. 298. F. N. B. 167. A. See also 12. Co. 23. If it be true, that the 34. E. 1. is only an ordinance, lord Coke's case should be put on the 1. E. 3. ft. 1. c. 2. or the *Charta de Foresta* of the 9. H. 3. c. 4. both of which laws provide to the same effect as the 34. E. 1. and are certainly acts of parliament. See also a like negative provision in the *consuetudines et assisa de foresta*, printed as a statute of uncertain time in Ruffh. ed. Append. 25. and cited by Noy in W. Jo. 270. 291. — (14) Acc. Manw. Forr. L. 111. ed. 41. a. and Fitzh. Abr. *Trespas* 239. there cited.

For the remaining note to 115. a. see 118. a.

(1) This rule about *slaves* holds in some degree in respect to apprentices and servants, particularly the former; though with a great difference in point of extent and application. All acquisitions of property real and personal made by the villein, in whatever way arising, with no other exception than what is allowed of to prevent prejudice to third persons, belonged to his lord; because an incapacity to acquire any thing for his own benefit was one of the harsh characteristics of the villein's condition. But the relation of the apprentice and servant to his master is more mild and limited; for it only imports, that the master shall be intitled to their personal labour during the term stipulated, either in a particular way or generally according to the nature of the service or apprenticeship. Consequently the master cannot claim any other acquisitions, than such as are the result of that labour. What the apprentice or servant earns by his labour, whilst he remains with the master or is actually working for him, falls so clearly within this principle, that there can be no room for doubt. Nor can there be any, where the apprentice or servant is employed by another person with the knowledge and consent of the master, without any circumstances indicating a waiver of their earnings. The books contain several adjudications founded upon this latter idea. Most of them indeed relate

to

importing, that the personal estate is equally an object of the custody of guardian in socage with the infant's real property. Yet we

Sect. 174.

*APaier un fine pur
le mariage, &c.*

[9] 15. E. 3. tit. Aid. 33. Bracton, lib. 2. fo. 26. Mirror, ca. 2. sect. 18.

See more of this after in this chapter, sect. 194.
(Dr. & Stud. 66. b.)

[7] Fleta lib. 3. cap. 13. Mir. cap. 2. sect. 18.

[9] And this villeine and servile tenure is called in old bookes *marcbetum*, or *merchet*. *Marchetum* verò pro filia dare non competit libero homini, inter alia, propter liberi sanguinis privilegium, &c. And this is true de communi jure, sed medus et conventio vincunt legem. And as Littleton here saith, it is the folly of such a freeman to take such mannors, lands or tenements, to hold of the lord by such bondage. And yet this doth not make such a freeman a villeine, [r] *Quia hujusmodi prestationes sunt ratione tenementi, & non ratione persone in donatione comprehensæ & reservatæ; non enim unum & idem est, sed longe aliud, tenere libere, et per liberum servitium, &c.* for the signification of this word, vide sect. 194. 74. 441.

MES si ascun franke home voile prendre ascun terres ou tenements, a tener de son seignior per tiel villein service, f. a payer un fine a luy (1) pur le mariage de ses firs ou files, donque il paiera tiel fine pur le mariage; & nient obstant, que il est le folle de tiel frank home de prendre en tiel forme terres ou tenements a tener de le seignior per tiel bondage, uncore ceo ne fait le franke home villeine (2).

BUT if a free man wil take any lands or tenements, to hold of his lord by such villeine service, viz. to pay a fine to him for the marriage of his sonnes or daughters, then he shall pay such fine for the marriage; and notwithstanding, though it be the folly of such free man to take in such forme lands or tenements to hold of the lord by such bondage, yet this maketh not the free man a villeine.

Sect. 175.

CHescun villeine ou est villein per title de prescription, &c.

(2. Ro. Abr. 732.)
Lib. Rub. cap. 76, 77. Bracton, lib. 1. cap. 6. Bract. fol. 77.

(Post 120. a.)

[f] Bract. lib. 1. cap. 6. Fleta lib. 1. cap. 3. 8. Aff. p. 13. 11. Aff. 12. 24. Aff. 1. 73. Aff. 1. 37. E. 3. 78, 79. 27. E. 3. 89. 38. E. 4. 25. 27. H. 8. 7. b. Le statute de 17. E. 3. 17.

[r] 17. E. 3. 23. 11. H. 4. 26. 37. H. 6. 21. Dier Mich 7. & 8. Eliz. 242. Pl. Com. 79. &c.

[u] Glanvil lib. 9. cap. 8. Bracton lib. 3. fo. 156. Britton fol. 321.

[x] 6. Co. 11. & 12. in Gentleman's case.

(3. Inst. 71. F. N. B. 138. Post 328. 260. a. 4. Co. 71. a. 8. Co. 38. 1. Rol. Abr. 527. 2 Rol. Abr. 862, 863. Plow. 491. b. 1. Sid. 94. 2. Rol. Abr. 573. 376. 1. Sid. 314.)

Every villeine is, either by prescription, or confession. *Servi autem nascuntur, aut fiunt.* By prescription, either regardant to a mannor, &c. or in grosse. In gross either by prescription, or by granting away a villeine that is regardant, or by confession. [f] *Fit etiam servus liber homo per confessionem in curia regis facta* (3).

En court de record.

Record is derived of the Latine word *recordor*, that is to keep in minde as the poet saith, *Si rite audita recordor*. And therefore a record or inrolment is a memoriall or monument of so high a nature, [2] as it importeth in it selfe such an absolute verity, as if it be pleaded (4), that there is no such record, it shall not receive any triall by witnesse, jury, or otherwise, but onely by it selfe. [u] And every court of record is the king's court, albeit another may have the profit, wherein, if the judges doe erre, a writ of error doth lye. [x] But the county court, the hundred court, the court baron, and such like are no courts of record; and therefore the proceedings therein may be denied, and tried by jury, and upon their judgements a writ of error lyeth not, but a writ of false judgement.

ITEM chescun villeine, ou est un villeine per title de prescription, cestascavoir, que il & ses auncestors ont este villeins de temps dont memorie ne curt; ou il est villein per son confession demesne en court de record.

ALSO every villeine is, either a villeine by title of prescription, to wit, that hee and his ancestors have beene villeines time out of mind of man; or he is a villeine by his owne confession in a court of record.

to apprentices in the *seafaring* way; whose wages and prize money as seamen, though earned whilst in another service, have been recovered by those to whom they were bound. But the principle, which governs them, seems to apply to apprentices and servants in general. See 6. Mod. 69. 12. Mod. 415. Comberb. 450. 1. Stra. 581. 1. Barnard. Rep. 312. 1. Vef. 48. 83. Some of the cases go so far, as to give the master a right to the wages or earnings, whether the service is performed by the apprentice *with or without the master's licence*; and even though the earnings accrue in a trade or service different from that to which the apprentice is bound. 6. Mod. 69. 12. Mod. 83. 1. Vef. 83. But though the rule should be so large in respect to apprentices, it may be doubted, whether it is equally so in the case of other servants. There is a case of the reign of James the first, in which a judgment against the master appears to be principally founded on the want of his consent and privacy to the retainer. Cro. Jam. 653. 2. Rol. Rep. 269. Independently too of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action, either against the employer for loss of service if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer, than a right to the profits accruing from it. We have already mentioned, that most of the cases, which occur in the books, relate to the apprentices of watermen and seafaring persons. It may therefore be proper to add, that in 31. Geo. 2. c. 10. one object of which is to regulate the pay of seamen in the royal navy, there is a provision, that in particular cases the master shall not be intitled to the wages of his apprentice. See sect. 10. Note also the 17th. section in the 2. & 3. Anne c. 6. from which it seems, as if the framers of that law doubted, whether the master of an apprentice, who goes into the royal navy, would be intitled to his wages without an expresse provision.—(1) This section was first introduced in Redman's edition.—(3) The cause meant is, that the 27. of H. 8. transfers uses into possession. See lord Coke's note on sect. 115. fol. 84. b.

(1) In Roh. the words *per son marriage* ou come in here.—(2) This section in L. and M. stands the last in the chapter of Villenage.—(3) From our law's thus permitting a person to be a villein by *acknowledgment* in a court of record, some have argued, that it is a legal mode of creating personal bondage; with a view to prove, that there is not any thing so repugnant in our law to domestic slavery, as is generally imagined, and thence to lay a foundation for more easily inferring the lawfulness of importing slavery from our colonies. But in another place we have had occasion to object to this way of considering the acknowledgment, and to explain, why it should be deemed merely a confession of that immemorial antiquity in the villein's slavery, which was otherwise necessary to be proved. See the editor's *Argument in the Case of Somersett a Negro*, 60 to 65. and Hob. 99.—(4) The words *if it be pleaded* are material; for in evidence before a jury the copy of a record will be a sufficient proof of its existence and contents. See Law of Nif. Pri. 226. ed. 1775. Com. Dig. tit. *Certiorari*.

We must apprise the reader, that there is an expression of lord chief justice Vaughan in his reports, which conveys or seems to convey

ment, for that they are no courts of record, because they cannot hold plea of debt or trespass, (14. H. 3. 13. 1. Rol. Abr. 543.)
if the debt or damages doe amount to forty shillings, or of any trespass *vi & armis* (1).
Monumenta, quæ nos recorda vocamus, sunt veritatis & vetustatis vestigia.

Sect. 176.

MES si frank home ad divers issues, & puis il confesse luy meme estre villein a un auter en court de record; uncore les issues, que il avera devant le confession sont franks, mes les issues, que il avera apres le confession, serront villeines.

BUT if a freeman hath divers issues, and afterwards he confesseth himselfe to be a villaine to another in a court of record; yet those issues, which he hath before the confession are free, but the issues, which he shall have after the confession, shall be villaines.

This is so evident as it needeth no explication.

Sect. 177.

ITEM, si le vil- lein purchase terre, et alien la terre a un auter devant que le seignior enter, donques le seignior ne poit enter; car il sera adjudge son follie, que il n'entra pas, quant la terre fuit en le maine le villein. Et issint est dez biens. Si le villeine achate biens, et eux vend ou done a un auter, devant que le seignior seijst les biens, adonques le seignior ne poit eux seiser. Mes si le seignior, devant ascun tiel vender ou done, vient deins la ville la lou tielx biens sont, et la, overtment enter les vicines, claima les biens, et seijst parcel

AL SO, if a villaine purchase land, and alien the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villaine. And so it is of goods. If the villaine buy goods, and sell or give them to another, before the lord seiseth them, then the lord may not seise the same. But if the lord, before any such sale or gift, cometh into the towne where such goods be, and there, openly amongst the neighbors, claime the goods, and seise part of the goods, in the name of seisin

IN this case before the lord doth enter, hee hath neither *ius in re* nec *ius ad rem*, but onely a possibilitie of an estate, which estate he must gaine by his entry; and therefore if the villaine doth by way of prevention alien before the lord doth enter, the lord is barred of the possibility, which he had to the land, for ever. [a] *Si autem servus vendiderit feodum, quod sibi & hæredibus perquisiverit, antequam dominus seisinam inde ceperit, valet donatio, et dominus sibi ipsi imputet, quod tantum expectavit.* But [b] if the villaine of the king purchase land, and alieneth, before the king (upon an office found for him) doth enter, yet the king after office found shall have the land; *quia nullum tempus occurrit regi*, as Littleton himselfe saith in the next section (2). And yet, after office found, the king shall not have the meane profits; because the title is by the seisure.

(Dr. & Stud. 140. 2. Rol. Abr. 735.)

[a] Fleta lib. 3. ca. 13. Britton fol. 98. a. 19. E. 2. Dower 17.

[b] 35. E. 3. tit. Villenage 22; 9. H. 6. 21. per Babington. 12. H. 7. 12.

(8. Co. 170. 7. Co. 28. 2. Rol. Abr. 734.)

Purchase terre.

The like law is of feignories, advowsons, reversions, remainders, rents, commons certaine and such like certaine inheritances, wherein the villaine hath

(1) See post 160. a.—(2) See post 119. a.

Continuation of notes to 115. a. from 117. a.

(13) It having been denied by persons of considerable respect, that such a prescription is good, we shall give some account of the state of the arguments for and against it.—The general ground, on which lord Coke asserts the prescription to be lawful, is, first, that a statute, though expressed in negative words, yet, if it is a mere affirmation or declaration of the common law, may be prescribed against; and secondly, that the statute against cutting down trees in a forest without view of the forester, are negative statutes of this sort. As to the first of these propositions, we have endeavoured to evince it's reasonableness in a former note; in which also the reader is referred to the various authorities on the subject, for the purpose of shewing, that they greatly preponderate in favour of lord Coke. See note 13. In respect to the second proposition, the authorities not only support it, but are so uniform, that we do not find it any where controverted. See note 14. The particular argument for the prescription consists principally of various allowances of it at *eyres of the forest*, and of two express adjudications of the point on demurrers in courts of common law. The cited instances of allowances are not few; for, besides the three cases of *Henry de Percy Thomas lord Wake of Liddel and Gilbert de Alton* here mentioned by lord Coke, he in his fourth *Institute* cites another, which was in the 8th. of Edward the third on a claim by *Thomas Pickering and Margaret his wife*. See 4. Inst. 197. The cases at common law are *Sellinger's*, and *lord Hatton's*. The former is stated by lord Coke to have been before the Exchequer in the time of Elizabeth, and to have been adjudged upon argument and long advisement; and probably is the same case he here cites as one of the 16th. of Elizabeth. See 4. Inst. 197. and 12. Co. 22. The latter is taken notice of by judge Croke, who reports lord Coke to have cited it as a judgment on demurrer in the King's Bench. Cro. Jam. 155. To these authorities we may add an *extrajudicial* opinion of all the judges, on being consulted by James the first; the words of which seem to imply, that a custom for cutting wood in the king's forests without view of the forester may be good. See the third resolution of the judges in 4. Inst. 199. It is said too, that in a case of the 19. of E. 1. between the *prebend of Chichester* and the *earl of Arundel*, issue was joined on such a custom; from which it may be inferred, that in those ancient times the goodness of the custom was not doubted. W. Jo. 290.—On the other hand lord Lovelace's case, whose claim came before an eyre in the 8th of Charles the first, is a direct decision against the allowance of a prescription for cutting wood without view of the forester; and in that case lord chief justice Richardson, when this part of the Commentary upon Littleton was referred to, denied lord Coke's general doctrine about negative statutes declaratory of the common law. W. Jo. 270. Two other adjudications, to the like effect, appear to have been made at eyres in the same reign; one of which was on a claim by the tenants of the manor of Bray, who, in proof of the custom they alledged, offered in evidence an inquisition of the reign of Edward the second. W. Jo. 289, 290, 348. The principle, on which Noy attorney-general argued in these cases, was a general one, that negative statutes, such as those which occur against cutting wood in the king's forest without licence, cannot be controuled by custom or prescription. To prove this he appealed to a case from a year-book of Henry the sixth;

convey a different opinion; for, speaking of the guardian under the statute of Charles the second, he says, *this new guardian hath*

hath any estate or interest. If the villaine purchase land, either in fee simple, fee tail, or for life, if the villaine doth alien before the lord doth enter, hee doth prevent the lord. But yet the issue of the villaine shall recover the land entailed in a formedon, and then the lord may enter.

Alien la terre. Alien commeth of the verbe *alienare*, id est, *alienum facere*, vel *ex nostro dominio in alienum transferre*, sive rem aliquam in *dominium alterius transferre*.

If a freeman hath issue, and afterward by confession becommeth bond, and purchase lands in fee, and, before the lord enter, he dieth seised, and the land descends to his issue which is free; in this case the lord shall not enter upon the heire, and yet this is a descent and no alienation. The like law it is, if the land so purchased by the villaine doth escheate to the lord of the fee before any entry made by the lord of the villaine: so as the act of the law, that is, the descent or escheat may as well prevent the lord of his entry, as the act of the party by alienation.

If a villaine be disseised before the lord doth enter, the lord may enter into the land in the name of the villaine, and thereby gaine the inheritance of the land; but if there be a descent cast, so as the entry of the villaine be taken away, then the villaine must recontinue the estate of the land by judgement and execution, before the lord of the villaine can enter. And this word alien doth not onely extend to alienations of land in deed, but also to alienations in law, as if the villaine purchase land and dyeth without heire, and the land escheate, or if there be a recovery against the villaine in a *cessavit* or the like.

(2. Rol. Abr. 732. 5. Co. 119.
2. Rol. Abr. 58. Cro. Eliz. 386.)

Et issint est des biens, &c. *Biens*, *bona*, includes all chattels, as well real as personall. *Chattels* is a French word, and signifies goods, which by a word of art wee call *catalla*. Now goods, or chattels, are either personall or reall. Personall, as horse and other beasts, household stuffe, bowes, weapons, and such like, called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions. Reall, because they concerne the reality, as tearmes for years of lands or tenements, wardships, the interest of tenant by statute staple, by statute merchant, by elegit and such like.

Bona dividuntur in mobilia & immobilia. *Mobilia* rursus dividuntur in ea, quæ se movent, & quæ ab aliis moventur. But, by the common law, no estate of inheritance or freehold is comprehended under these words *bona* or *catalla* (3). And it is to be observed, that as the title of the lord to his villaine's lands beginneth by his entry, so his title to the goods beginneth by the seisure of them. And here againe it is to be observed, that where our author, in this branch concerning goods, useth these words (sell or give) that the same extendeth as well to gifts in law, as gifts in deed. And therefore if a neile hath goods, and taketh baron, by this gift in law by force of the marriage, the lord is barred. And so it is if a villaine make his executors and dieth, by this gift in law the lord is barred, as shall be said hereafter.

3. H. 4. 15. 46. E. 3. Barre
17. Doct. and Stud. cap. 43. fol.
139. 22. E. 3. 6. Baldwin
Freuil's case.
(Ante 88. Post. 145. b.)

[c] 18. H. 6. 23. b. per Afcrough.
3. H. 4. 16. 46. E. 3. Barre 217.

Et claime les biens et seijst parcel des biens. For a claime onely of the goods of the villaine is not sufficient in law, but he must seise some part in the name of all the residue, as here it appeareth; or that the goods be within the view of the lord, for the claime and his view amount to a seisure, as the clayme of a ward being present by word is a sufficient seisure, albeit the gardian layeth no hands of him. See hereafter sect. 321. And so note a diversity betweene a claime of lands or tenements, and goods. [c] In an action of trespassse or detinue brought by the villaine, a release made to the defendant by the lord is a good barre; for that amounts to a seisure and grant. If the villaine doth buy goods and make his executors, and dieth before the lord doth seize them, the executors shall detain them against the lord of the villaine.

Ad ou aver poit, &c. Here (&c.) doth imply an excellent point of learning; for that such a claime doth not onely vest the goods, which the villaine then hath, but also which he after that shall acquire and get (4). But otherwise it is of lands of freehold or inheritance; for there such a generall entry or claime extends only to the lands the villaine hath at that time

sixth; which, he considered as directly in point, and as a judgment that tithe of timber cannot be prescribed for against the statute of *sylva cadua*, though only an *affirmance* of the old law, merely because the statute is *negative*. See W. Jo. 270. 290. and 25. E. 3. c. 3. The year book reported to have been cited by Noy is the 10th. of Hen. 6. but we do not meet with any case of that year relative to the statute of *sylva cadua*, and therefore the 9. of Hen. 6. 56. which is to the point, was probably meant; though if it was, it contains no judgment, but only a query, which Brooke, in abridging the case, by mistake calls the reporter's opinion. Bro. Prescription 2. Noy also cited the earl of Arundel's case from a record of the 16. of Edward the second, as a decision, that a prescription to cut wood against the forest statutes was not good. W. Jo. 270. As to the cases urged against him, he observed, that the case between the *prebend of Chichester* and the earl of Arundel was of a *chace*, and the statutes only related to *forests*; that in *Percy's* case the forest was not in the hands of the crown when the statutes were made; and that the case of the reign of Elizabeth, which lord Coke reports from lord Popham, was of a *chace*, of which the king was seised in right of his *duchy of Lancaster*. W. Jo. 290, 291. It is observable however, that Mr. Noy leaves the two cases of lord Wake and Gilbert de Alton wholly unanswered, though they were cited against him. As to the other authorities we have stated for a prescription against the forest statutes, or those against *negative* statutes in general being declaratory, they do not appear to have been urged against Mr. Noy. But besides the authorities relied on by Noy, there is one more; for judge Croke, after taking notice of the judgment for the prescription in lord Hatton's case, reports Popham to have said, that it was adjudged otherwise about the same time in the *Exchequer*. Cro. Jam. 155. However this is irreconcilable with lord Coke's representation of the judgment of the *Exchequer* both here and elsewhere, unless we suppose him to mean a different case.—Having thus brought together and digested, what we found scattered in the books on this much litigated subject, we shall dismiss it, leaving the reader to his own judgment, with this single remark. If the greater number of authorities, which, unless the cases we have referred to are misstated or misunderstood, is in favour of the prescription, shall be thought to be of equal or nearly of equal weight with the more modern decisions on the other side; then probably, as the subject strikes us, the good sense of lord Coke's distinction as to negative statutes, together with a consideration of the multiplicity of books, which favour his general doctrine, will so strongly turn the scale in this particular instance of forest-law, as scarce to leave any doubt. Indeed it was for the sake of explaining, how far the general doctrine may be affected by the decision on this point of forest law, that we have detained the reader so long upon it.

(1) The words, *que le villein ad ou aver poit*, not in L. & M. or Roh.—(2) Instead of *les biens* it is *ley* in L. & M. and Roh.—(3) See farther as to chattels, Bro. Abr. tit. *Chattels*, Com. Dig. tit. *Biens* and *Affets*, and Vin. tit. *Executors* U—Y—Z.—(4) *Contra*, as to the goods afterwards acquired, Dr. and Stud. dial. 2. chap. 4.

Continuation of notes to 113. a. from 114. b.

—Lord Coke next takes for granted, that if there is a devise to A. for life, and that after his decease the land shall be sold by the testator's

hath the custody, not only of the lands descended or left by the father, but of lands and goods any way acquired or purchased by the testator.

Sect. 178.

BUT if the king hath a villeine, who purchaseth land, and alien it before the king enter; yet the king may enter, into whose hands soever the land shal come. Or if the villeine buyeth goods, and sell them before that the king seizeth them; yet the king may seize these goods, in whose hands soever they be. Because *nul- lum tempus occurrit re- gi* (1).

*Ou si tiel villeine
achata biens, &c. If*

the king's villaine acquire any goods or chattels, the propertie of them is in the king before any seifure or office; and it is well said of an ancient author, [*d*] *Al roy, quant al* [*d*] *Mirror cap. 3. droit de la corone ou a franchise, ne poet nul temps occurre*; and another [*e*] speaking [*e*] *Britton fol. 88. Bract. lib. in the person of the king saith, 1. que res dari possint. Nul temps nest limit quant a mes droitz.*

Sect. 179.

ALSO if a man let certaine land to another for terme of life, saving to himselfe the reversion, and a villeine purchase of the lessor the reversion; in this case it seemeth, that the lord of the villeine may presently come to the land, and claime the reversion as the lord of the said villeine, and by this claime the reversion is forthwith in him. For in other forme or manner he cannot come to the reversion. For he cannot enter upon the tenant for life. And if he should stay untill after the death of the tenant for

For he cannot claime the reverſion but upon the land, and he by his comming upon the land for that purpoſe is no trefpaſſor; becauſe the law giveth him power to claime the reverſion, leſt he ſhould be prevented, and claime he cannot unleſs he commeth to the land. So likewiſe if the villeine purchaſe a feignory, rent, common, or any other freehold or inheritance, out of any lands or tenements of another, the

(1) See Acc. 41. b. 57. b. 90. b. 118. a. 194. b. and for instances, Plowd. 243.—But the rule of *nullum tempus occurrit regi* is subject to various exceptions, both at common law and by statute.—1. There are many cases, in which the subject may make title against the king by *prescription*, as to treasure-trove, waifs, estrays, and such other things as may be seized without matter of record. Ante fol. 114. a and b.—2. In some cases the king's right necessarily fails for want of exertion in due time, either because the *subject* of his right determines before he claims it, or because it is *especially limited in point of time* by its creation. An instance of this is, where the land of tenant for life is found to be forfeited, and he dies before seizure by the king; for it is then too late to seize for the king, who, as Staundford expresses it, hath *forfeasted his time*, the estate forfeited being determined, and the right of entry being in him in reversion. Staundf. Prærog. 32. b. The law is the same, where the king is intitled to, and the right of entry being in him in reversion. Staundf. Prærog. 32. b. The law is the same, where the king is intitled to the next presentation, in which case, if another presents, and the incumbent dies, the king cannot have the second or any subsequent presentation. This was the opinion of Browne justice against Weston in Willion and Berkeley, Plowd. 243. 249. and was so adjudged in Baskerville's case 7. Co. 28. a. Lord Chancellor Egerton finds fault with the doctrine of this last case; but his objections do not appear in the least satisfactory. See his observations on lord Coke's Reports 8.—3. Sometimes lapse of time drives the king to a suit. Thus by the statute of the 13th. of Richard the 11d. and according to lord Coke by the common law, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has recovered his presentment by due process of law. 13. R. 2. ft. 1. c. 1. Staundf. Prærog. 32. b. 1. Inst. 358. Post. 344. b. See also Cro. Jam. 385. 4. H. 4. c. 22. Gibf. Cod. 1st. ed. 802.—4. There are several statutes, which wholly extinguish the king's title, if not exerted within a limited number of years. By a statute of the 14th. of Edward the third, the king lost his presentment, where he was intitled by having in his hands the temporalities of a bishoprick or the lands of a person within a year, unless he presented within three years after the voidance. But this statute was soon repealed. See 14. E. 3. ft. 3. c. 2. 25. E. 3. ft. 3. c. 2. 1. Gibf. Cod. 1st. edit. 800. The chief statutes, for limiting the king's title to a certain time, now in force, are the 21. of Jam. 1. c. 2. and the 9. of Geo. 3. c. 16. By the former the king is disabled from claiming any manors lands or hereditaments, except liberties and franchises, under a title accrued 60 years before the beginning of the then session of parliament, unless within that time there has been a possession under such title. But the efflux of time rendering this provision continually more ineffectual, the latter statute introduced one of a permanent kind, by limiting the king to sixty years before the commencement of the suit or proceeding for recovery of the estate claimed. See further a Commentary on the 21. Jam. in 3. Inst. 188. See also something relative to the rule of *nullum tempus occurrit regi*, in Hob. 153. 154. 347.

which the guardian in socage had not. Vaugh. 186.—It is superseded both as to the body and lands, if the father exercises his power

Vide 41. E. 3. tit. Audita que-
rela 18. 12. H. 4. tit. Execution.
28. F. N. B. 104. 1. H. 7.
25. b.

the lord may law-
fully come to the
land to make his
claime to the feig-
niory, rent, or other
profit out of the
land. But if the
villeine purchase a
feigniorie, or a rent,
common, or other
inheritance issuing
out of the land of
the lord himselfe, it
is said, that the
feigniorie, rent,
common, or such
other inheritance,
is extinguished in
the lord's possession
without any claime.

Grant. Here must be intended an attornment; for after the grant and before attorne-
ment the lord may not (1) claime the reversion (2).

En la vie del tenant per vie, &c. Here by (&c.) is included tenant in taile,
tenant *per auter vie*, tenant by statute marchant, staple, *elegit*, and for yeares; for dur-
ing all these estates the lord may claime the reversion, as well as in case of the tenant
for life.

de vie, donques per cas life, then perchance he
il viendra trope tarde. should come too late. For
Car peraventure le vil- peradventure the villeine
leine voile granter ou will grant or alien the
aliener le reversion a un reversion to another, in
auter, en le vie le tenant the life of the tenant for
a terme de vie, &c. life, &c.

Sect. 180.

Advowson. *Advocatio*
so called; because the
right of presenting to the
church was first gained by
such as were founders, bene-
factors, or maintainers of the
church; viz. *rationi funda-*
tionis, as where the ances-
tor was founder of the church;
or *ratione donationis*, where
he endowed the church; or
ratione fundi, as where he
gave the foile, whereupon
the church was built. And
therefore they were called
advocati. They were also
called *patroni*, and thereupon
the advowson is called *jus*
patronatus. And in one word,
advowson of a church is the
right of presentation or col-
lation to the church. *Advo-*
catus est ad quem pertinet jus
advocationis alicujus ecclesie,
ut ecclesiam nomine proprio, non
alieno, possit presentare. Every
church is either presentative,
collative, donative, or elec-
tive. Vide section 645. 648.

EN *mesme le ma-*
ner est, lou un
villein purchase un
advowson, dun esglise
plien dun incumbent,
le seignior del vil-
lein poit vener al dit
esglise, & claime le dit
advowson, & per cel
claime l'advowson est
en luy. Car sil doit
attendre tanque apres
le mort l'incumbent,
& adonque a presen-
ter son clerke a le dit
esglise, donque, en le
meane temps, le vil-
leine poit aliener le
advowson (3), & if-
sint ouster le seignior
de son presentment.

IN the same manner
it is, where a villeine
purchases an advow-
son of a church full
of an incumbent, the
lord of the villeine
may come to the said
church, and claime the
said advowson, and by
this claime the advow-
son is in him. For if
he will attend till after
the death of the in-
cumbent, and then to
present his clarke to
the sayd church, then,
in the mean time, the
villein may alien the
advowson, and so oust
the lord of his present-
ment.

23. H. 14. b.

Fleta lib. 5. cap. 140

24. E. 3. 30. 25. E. 3. 47. 38.
E. 3. 9. 44. E. 3. 3. 9. H. 6.
31. 22. H. 6. 27. 21. E. 4.
34. b. Vide sect. 648.
(Post. 344. a.)

10. H. 6. 7.

Plein dun incumbent, If the church be presentative, the church is full by admission
and institution against any common person; but against the king it is not full until
induction.

Incumbent. Commeth from the verbe *incumbo*, that is to be diligently resident, *id est*,
obnixè operam dare; and when it is written *incumbent*, it is falsely written, for it ought to be
incumbent, as Littleton doth here (4). And therefore the law doth intend him to be resident
on his benefice.

(1) This is apparently an error of the press, the sense requiring the omission of *not*. Accordingly the 1st edition is without
it. But the error appears in all the subsequent editions.

(2) But now by the 9. Ann. c. 16. f. 9. the grant of a reversion is perfect without attornment.

(3) &c. L. & M.

(4) However in L. & M. and Roh. the word is *encoment*.

power of appointing a testamentary or other guardian according to the statute of 12. Cha. 2. See chap. 24.—Regularly it ends
when the infant, whether male or female, attains fourteen; though some say, that this must be understood, only where another
guardian, either by election of the infant or otherwise, is ready to succeed, and that the guardianship in socage continues in
the mean time. Andr. 313.

As to guardianship by *nurture*, it only occurs, where the infant is without any other guardian; and none can have it, except
the father or mother. 8. E. 4. 7. b. Br. *Guard.* 70. 3. Co. 38.—It extends no further than the custody and government of the
infant's person, and determines at fourteen in the case both of males and females. Ibid.—Lord chief baron Comyns refers to
Fleta, as if according to that ancient book *grandfathers* and *great grandfathers* might be guardians by *nurture*. Com. Dig. v. 3.
p. 421. But the passage cited doth not point at this species of guardian, it describing the *patria potestas* in general, and being
apparently borrowed from the text of the Roman law; nor will it bear the least application to guardianship, as our own law
regulates it.—(14) The direct object of the 4. & 5. Ph. & M. was to prevent the taking away or marrying maidens under sixteen
against the consent of their parents. But the statute prohibited it in terms, which implied, that the custody and education of
such females should belong to the father and mother, or the person appointed by the former. It is observable on this statute,
that, though the title is confined to maidens being *inheritors*, and the preamble speaks only of such as be heirs apparent, or have
real or personal estate, yet the enacting part mentions maidens under sixteen *generally*. For other cases on this statute besides
Ratcliff's, see Poph. 204. Cro. Cha. 465. 1. Sid. 362. 2. Mod. 128. 3. Mod. 84. 168.—(15) There is now another statute in
respect to the appointment of guardians; for the 12. Cha. 2. c. 24. after taking away guardianship in chivalry, enables the
father by deed or will attested by two witnesses to appoint, who shall be guardians of his children after his decease. The
substance of this parliamentary regulation is, 1. That the father shall have the power, though under twenty-one. 2. That he
shall have it as to all his children under twenty-one and unmarried at his decease, or born after. 3. That he may appoint any
persons, except popish recusants. 4. That the appointment may be either in possession or remainder. 5. That he may appoint
the guardianship to last till twenty-one, or for any less time. 6. That the appointment shall be effectual against all claiming
as guardians in socage or otherwise. 7. That the guardian so appointed shall have ravishment of ward on trespass, and recover
damages for the ward's benefit. 8. That such guardian shall have the custody of the infant's estate both real and personal, and
have the same actions in relation to them as a guardian in socage. 9. That the statute shall not prejudice the custom of London or
any other city or corporate town.—For cases on the constitution of this statute, see tit. Guardian in Vin. Abr. and Com. Dig.
and

Le seignior del villeine poit vener al eglise & claime le dit advowson.

Note, albeit the advowson is a thing incorporeall, and not visible, yet, because the principall duty of the presentee of the patron is to be done in the church, the claime of the lord of the villeine must be made there; and by that claime the inheritance of the advowson shall be vested in the lord; for every claime or demand to develt any estate or interest must be made in that place, which is most apt for that purpose.

Après la mort del incumbent. Nota, a church presentative may become void five manner of wayes, viz. by death, whereof Littleton here speaketh. 2. By creation. 3. By resignation. 4. By deprivation. 5. By cession, as by taking a benefice incompatible. Doct. & Stud. lib. 2. ca. 31. 5. E. 3. 180. 10. E. 3. 482. 25. E. 3. 49. 9. E. 3. 462. 11. H. 4. 37. 59. & 76. 41. E. 3. 5. F. N. B. 31, 32.

Et donques a presenter son clerke al dit eglise, &c. A presentation is derived a *presentando*; quia *presentare* nihil aliud est, quam *præsto dare, seu offerre*. And Littleton here briefly expresseth the effect of a presentation; for it is the act of the patron offering his clerke to the bishop of that diocesse, to be instituted to such a church, in these or the like words directed to the bishop, *presento vobis A. B. clericum meum ad ecclesiam de Dale, &c.* This may be done as well by word, as by writing; and if it be by writing it is no deed, for the presentation is of the clerke, and the direction to the bishop, so as this writing is in nature of a letter to the bishop: and this is the reason, that the king himselfe may present by word, as elsewhere is said. A villein at this day purchaseth an advowson in fee, the church becomes void, the lord for one hundred pound given by A. B. clerke presents him to the church, and his clerke is admitted, instituted, and inducted; yet this gaineth not the advowson to the lord. [d] And so it is in that case, if any on the behalfe of A. B. had given or contracted with the lord in consideration of any valuable thing to present A. B. to the said church, albeit it had been without the consent or knowledge of A. B. yet it should not have vested the advowson in the lord. But this was not law when Littleton wrote. [e] But now by the statute of 31. Eliz. the presentation, admission, institution, and induction in both the said cases and in the like are made void (1), where before the said statute they were but voidable by deprivation (2). And if a man present by usurpation to a benefice, by reason of any corrupt contract, agreement, &c. that presentation, and the institution and induction thereupon are void; for that act extends to all patrons as well by wrong as by right. But where any presents by usurpation, the rightfull patron, and not the king, shall present; for otherwise every rightfull patron may lose his presentation. And such an incumbent, that commeth in by reason of any such corrupt agreement, is so absolutely disabled for ever after to be presented to that church, as the king himselfe, to whom the law giveth the title of presentation in that case, cannot present him againe to that church; for the act, being made for suppression of symony and such corrupt agreements, so bindes the king in that case, as he cannot present him that the law hath disabled (3), for the words of the act be, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice. [f] And the party being disabled by the act of parliament (which being an absolute and direct law) cannot be dispensed withall by any grant, &c. with a *non obstante*; as it may be, when any thing is prohibited *sub modo*, as upon a penalty given to the king (4). And the said act doth not onely extend to benefices with cure, but to dignities, prebends, and all other ecclesiasticall livings. (2. Ro. Abr. 353.) [d] Adjudge in communi banco. Mich. 41. & 42. Eliz. inter Baker & Rogers. [e] Adjudged in the King's Bench. Mich. 13. Ja. in a quar. imp. brought by the king against the bishop of Norwich, Thomas Cole and Robert Secker clerks for the vicarage of Haverell in Suffolke. (Cro. Jam. 385. Hob. 75. Hob. 165. 12. Co. 100. 73. 3. Inst. 153. 1. Ro. Abr. 370. Cro. Jam. 385. 513. Cro. Cha. 477. 7. Co. 32. Post. 234. 11. Co. 68. Cro. Cha. 331.) [f] Pl. Com. 502. 27. H. 8. 2. H. 7. 6. 11. H. 7. 11. 13. H. 7. 8. b. 11. H. 4. 76. 5. E. 3. 29. F. N. B. 211. E.

Clerke. Clericus is twofold, *ecclesiasticus* (which Littleton here intendeth) and he is either secular, or regular, so called because he is *servus & hereditas domini*; and *laicus*, and in this sense is signified a pen-man, who getteth his living in some court or otherwise by the use of his pen. 4. H. 4. ca. 12.

Note, if the church becommeth void, albeit the present avoidance be not by law grantable over, yet may the lord of the villeine present in his owne name, and thereby gaine the inheritance of the advowson to him and his heires; for albeit it be not grantable over, yet it is not meerly a chose in action; [g] for if a feme covert be seised of an advowson, and the church becommeth void, and the wife dyeth, the husband shall present to the advowson; [b] but otherwise it is of a bond made to the wife; because that is meerly in action. (Ante 117. a.) [g] 14. H. 4. 12. 38. E. 3. 35. 13. E. 3. quare imp. 57. [b] 43. E. 3. 10. 39. E. 3. 5. 4. H. 6. 5. (Post. 351. a. 1. Ro. Abr. 345)

Sect. 181.

ITEM il y ad vil- ALSO there is a vil- Villein regardant.
leine regardant, leine regardant, He is called regar-
& villeine en gros. and a villein in grosse. nour; because he hath the

(1) Though the person presented is not privy to the simony, yet the presentation is void, the statute making no distinction in this respect, but giving the turn to the king as a punishment of the patron. Adjudged 12. Co. 100. Agreed 12. Co. 73.

(2) The effect of the difference between *void* and *voidable*, in the instance of a simoniacal presentation, may be seen in Windsor's case, 5. Co. 102. and Winchcombe's case Hob. 165. the judgment in both turning upon it.

(3) Adjudged accordingly in the king against the bishop of Norwich Hob. 75. Cro. Jam. 385. In Sir Arthur Ingram's case on the 5. E. 6. against the sale of offices, there was a like decision, that the king could not dispense with a disability created by statute. Post. 234. a. Hob. 75. Cro. Jam. 385. 3. Inst. 154. When the famous case of Sir Edward Hales in the reign of James the second was argued, these two cases were urged to prove, that the king could not dispense with the disability for not taking the oaths and sacrament according to the 25. Cha. 2. usually called the test act; and lord Coke himself in his Third Institute applies them to a like case on the 5. Eliz. in respect to the oath of supremacy. 3. Inst. 154. The principal judicial authority relied on for the dispensation was the case in the year-book of 2. H. 7. 11. a. in which, notwithstanding the statutes making void a grant of the office of sheriff for more than a year, the judges are represented to have held a grant for life with a *non obstante* to be good. But trusting to such an authority only exposed the weakness of the cause it was intended to sustain. The book cited, so far from containing any judgment of the point, ends with an adjournment of the case, accompanied with this remarkable declaration, that both judges and counsel agreed, what they had then said *should be taken for nothing*. As far too as appears, the grant in question might have been adjudged good on the ground of being within an exception of the statutes. The king also had been specially enabled by the 9. H. 5. c. 5. to dispense with the statutes for four years on account of the wars and a pestilence. But, lastly and principally, it was an insuperable objection to the authority of this case, that the 23. H. 6. to remove all doubts, provides, that the king's grant for more than a year should be void notwithstanding any *non obstante*. What respect could be due to a judicial opinion, declaring a dispensation good, which the legislature itself had positively enacted should be void? Yet it is not to be concealed, that in the report of Calvin's case, Lord Coke justifies the king's dispensation in this instance on the principle of its being beyond the power of parliament to take away his right to the service of his subjects. Calvin's case 7. Co. 15. This strange language is the more unaccountable; as it is inconsistent with his own doctrine here, and in the case on the statute against the sale of offices.

(4) But by the bill of rights, 1. W. & M. it was declared, that, from the then session of parliament, no dispensation with any statute should be valid, unless such statute allows it, and except in such cases as should be specially provided for the then session. 1. W. & M. sess. 2. c. 2. f. 12. The occasion of this excellent provision was the equally extravagant and unwarrantable exercise of

and the continuation of the latter book. The nature of this new kind of guardianship, which the statute professedly models after

Bract. li. 2. fo. 26. Mir. ca. 2. sect. 18.

Vide sect. 84.

[1] 20. E. 3. tit. Issue 30.

charge to do all base or villenous services within the same, and to gard and keep the same from all filthie or loathsome things that might annoy it: and his service is not certaine, but he must have regard to that which is commanded unto him. And thereupon he is called regardant, a quo praestandum servitium incertum & indeterminatum, ubi scire non poterit vespere, quale servitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei praeceptum fuerit, as before hath bene observed. And Littleton sayth hereafter, that no other thing is said to be regardant, but onely a villeine: [1] yet in old bookes it was sometimes applyed to services.

In grosse: Is that which belongs to the person of the lord, and belongeth not to any mannor, lands, &c.

Villein regardant est, siccome, home est seisi dun mannor, a que un villein est regardant, & celui, que est seisi del dit mannor, ou ceux, que estate il ad en mesme le mannor, ont este seisis de le dit villein & de ses auncestors, come villeins & niefs (1) regardants a mesme le mannor, de temps dont memorie ne curt. Et villeine en grosse est, lou un home seisi dun mannor, a que un villeine est regardant, & il graunt mesme le villein per son fait a un autre, donques il est villein en grosse, & nemy regardant.

A villein regardant is, as if a man be seised of a mannor, to w ich a villeine is regardant, and he which is seised of the said mannor, or they whose estate he hath in the same mannor, have bene seised of the villein and of his ancestors as villeins and niefs regardant to the same mannor time out of memory of man. And villein in grosse is, where a man is seised of a mannor wherunto a villein is regardant, and granteth the same villein by his deed to another, then he is a villein in grosse and not regardant.

Sect. 182.

Mir. ca. 2. sect. 18.

THIS needeth no explanation, but to adde the saying of an ancient author. *Servage de home est subjection, issuant de cy grand antiquite, que nul franke cep poet estre troye per humane remembrance.*

ITEM si un home & sez auncestors, que heire il est, ont este seisis dun villeine et de ses auncestors, come des villeins en grosse, de temps, dont memorie ne curt, tiels sont villeines en grosse.

ALSO if a man and his auncestours, whose heire he is, have bene seised of a villeine, and of his auncestors as of villeines in grosse, time out of memorie of man, these are villeines in grosse.

Sect. 183.

Vid. sect. 441. 194. 174. 74. [1] Bract. li. 5. tract. 5. c. 28. (Post. 262. a.)

[2] Glan. li. 8. ca. 1.

OU fine. In Latine, finis. [1] Ideo dicitur finalis concordia; quia imponit finem litibus, & est exceptio peremptoria. [2] Finis est amicabile compositio & finalis concordia, ex consensu & licentia

ET hic nota, que tiels choses, que ne poient estre grants, ne alienees, sans fait ou fine, home, que voile aver tiels choses per

AND heere note, that such things, which cannot be granted, nor aliened, without deed or fine, a man, which will have pre-

(1) Et niefs not in L. & M.

of the dispensing power by James the second, who, having procured the sanction of a judicial opinion to a dispensation with the test act in favour of Sir Edward Hales, madly proceeded to a suspension of the principal laws for the support of the established religion; an excess, in which, monstrous as it was, several of the judges, to the great scandal of Westminster hall, gave him countenance, the priests of the temple of justice treacherously aiding to pollute it, instead of manfully opposing the sacrilege. Till the time of this prince the doctrine of dispensation was received with very important qualifications, of which the principal were these.—1. It was said, that the king could not dispense with the common law; though lord chief justice Vaughan seems to deny this position. Dav. 75. 3. Inst. 154. Vaugh. 334.—2. It appears to have been generally agreed, that the king could not dispense with a statute, which prohibited what was *malum in se*.—3. *Malum prohibitum* was not deemed universally dispensable with; for some held, the king could not dispense with a statute, if the prohibition was *absolute*, and not *sub modo*, as under a penalty to the king, or as others express it, where the statute was made for the *general* good, and not with a view merely to the king's profit and interest.—4. None contended, that the royal dispensation could diminish or prejudice the property or private right of the subject.—5. It was understood, that the king could dispense, *not generally*, but only in favour of *particular persons*, and, according to some, for these only in *particular instances*.—But some of these distinctions had great uncertainty and subtlety in them, and were so open to controversy, that they only tended to create embarrassment; and though the others greatly restricted the largeness of the claimed prerogative, yet they were far from obviating the chief objection to so formidable a pretension. Had the boundary of the dispensing power been ever so clearly marked, still it was wise and prudent to annihilate it. So far as it resembled the power of repealing laws, it was an intolerable corruption, wholly irreconcilable with the first principle of our constitution, by which the power of legislation cannot be exercised by the king without the two houses of parliament. So far as it did not fall within this idea, it was unnecessary; for, those acts, which were the fruits of it, might have derived their force from other acknowledged powers of the crown, such as the right of waiving penalties and forfeitures belonging to itself, and the prerogative of pardoning.—It is worthy notice, that, the *declaration of rights*, which the lords and commons made on tendering the crown to William and Mary, distinguishes between *suspending* laws by regal authority, and *dispensing* with them. The former, being a *general* and *absolute* abrogation for a time, is condemned without any exception; but the latter, being only a *special exemption* of certain individuals, is merely declared illegal, as it had been exercised of late. Also the *bill of rights*, though it declares against the future exercise of a dispensing power in any case, except where the king is specially authorized by act of parliament, yet contains a proviso saving from prejudice all prior charters grants and pardons. 1. W. & M. sess. 2. ch. 2. sect. 12. & 13. If the condemnation of the dispensing power for the *time past* had been unqualified, it might have destroyed the titles under numberless subsisting grants from the crown, the validity of which it was deemed most equitable to leave to the decision of the courts of justice in the ordinary way.—Such as wish to go more deeply into the controversy about the dispensing power, may

after that in focage except as to duration, is particularly discussed in Bedell and Constable. Vaugh. 177. and in Lord Shaftesbury's case

prescription, ne poet
auterment prescriber
forsque en luy, & en
ses auncestors, que
heire il est, & nemy
per ceux parols, en luy
& en ceux que estate il
ad; pur ceo que il ne
poet aver lour estate
sans fait ou auter es-
cripture, le quel covi-
ent destre monstre a le
court, si il voile aver
escun advantage de
ceo. Et pur ceo que le
grant et alienation dun
villeine en gros (3) ne
gist sans fait ou autre
escripture, home ne po-
ut prescriber en un vil-
lein en gros sans mon-
strans d'escripture, si-
non en soy mesme que
clame le villeine, et en
ses auncestors que heire
il est. Mes de tiels
choses, que sont regar-
dants ou appendants
a un mannor ou a au-
ters terres et tene-
ments, home poet pre-
scriber, que il, et ceux
que estate il ad, queux
fueront seises de le
manner, ou de tiels
terres et tenements,
&c. ont este seises de
tiels choses come re-
gardants ou appen-
dants a le mannor, ou
a tiels terres et tene-
ments (4) de temps
dont memorie, &c. (5)
Et la cause est pur
ceo que tiel manor,

such things by pre-
scription, cannot other-
wise prescribe, but in
him and in his aunces-
tors, whose heire he
is, and not by these
words, In him and them
whose estate he hath;
for that he cannot have
their estate without
deed or other writ-
ing, the which ought
to be shewed to the
court, if he will take
any advantage of it.
And because the grant
and alienation of a vil-
leine in grosse lyeth
not without deed, or
other writing, a man
cannot prescribe in a
villein in grosse, with-
out shewing forth a
writing, but in him-
selfe which claims the
villeine, and in his
auncestours whose heire
he is. But if such
things, which are re-
gardant or append-
ing to a mannour,
or to other lands and
tenements, a man may
prescribe, that he and
they whose estate he
hath, who were seised
of the mannor, or of
such lands and tene-
ments, &c. have been
seised of those things,
as regardant or ap-
pendant to the manor,
or to such lands and
tenements time out of
mind of man. And the

domini regis, vel ejus justiciarii (1). [2] *Talis con-* [3] 9. Co. cap. 3. Statut. de mo-
cordia finalis dicitur, eo quod do levandi fines. Pl. Com. 357.
finem imponit negotio, adeo ut
neutra pars litigantium ab eo
de cetero poterit recedere (2).
Of the severall parts of a fine,
and many incidents to the
same, you shall reade in my
(3. Co. 84. 8. Co. 51.)
Reports. 5. Co. fol. 38. Teye's case.

Que estate, &c.

Quorum statum, as much as to
say, whose estate he hath.
Here Littleton declareth one
excellent rule, [6] that a man
cannot prescribe in any thing
by a *que estate*, that lyeth in
grant, and cannot passe with-
out deed or fine; but in him
and his auncestors he may,
because he comes in by de-
scend without any conveyance.
Neither can a man plead a
que estate in himselfe, of any
thing, that cannot passe with-
out deed; [p] but in an-
other he may, as, in barre of
an avowry, the plaintife may
plead a *que estate* in the fei-
niory in the avowant. But
Littleton's words are to be
observed, (*home que voile*
aver tiels choses per prescrip-
tion). Therefore [q] when a
thing, that lyeth in grant,
is but a conveyance to the thing
claimed by prescription, there
a *que estate* may be alledged
of a thing that lyeth in grant,
as a man may prescribe, that
he and his auncestors, and all
those whose estate he hath in
an hundred, have time out of
minde, &c. had a leet, &c.
this is good, &c.

[r] Regularly the plain-
tife shall not intitle him by a
que estate, but he must shew
how he came by it; but after
avowry made, the plaintife
shall plead a *que estate*, be-
cause he is now become as a
defendant.

[s] A man may plead a
que estate of a tenancy in taile
or of an estate for life, so as
he averreth the life of them;
but he cannot plead a *que*
estate of a lease for yeares (6),
or at will.

[t] A disseisor, abatour, [7] 22 H. 6. 74. 6. E. 4. 12.
intruder, recoveror, or any
other that cometh in the *possi-*
shall H. 6. 14. 9. H. 6. Estop. 25.

may find the following references useful.—For the history of dispensations, see Dav. 69. b. Pryn. on 4. Infl. 128. to 133. Atkyns on power of dispens. with pen. stat.—For the cases on the subject, see the case of the merchants of Waterford in 2. R. 3. 11. 1. H. 7. 2. the sheriff's case in 2. H. 7. 6. b. the doctrine in 11. H. 7. 11. b. 12. a. Grendon and the bishop of Lincoln Plowd. 502. case of the aulnager Dy. 303. Calvin's case 7. Co. 15. the Prince's case 8. Co. 29. b. case of the taylors of Ipswich 11. Co. 53. case of monopolies ibid. 84. Irish case of commendam Dav. 68. case of customs 12. Co. 18. the cases cited ante note 3. Colt and Glover v. the bishop of Litchfield, or English case of commendam Mo. 898. 1. Rol. Rep. 151. Hob. 146. Evans and Kiffins v. Alkwith, W. Jo. 158. Palm. 457. Latch 31. 233. Noy 93. 2. Rol. Rep. 430. case of clerk of the court of wards Hob. 214. Needler and the bishop of Winchester Hob. 230. Lord Wentworth's case Mo. 713. case of dispensation with 3. Jam. 1. c. 5. against a recusant's holding an office Hardr. 110. cases of dispensation with statutes against retailing wine without licence; namely, Young and Wright 1. Sid. 6. Thomas and Waters Hardr. 443. 2. Keb. 425. Thomas and Boys, Hardr. 464. Thomas and Sorrell Vaugh. 330. 1. Lev. 217. 1. Freem. 85. 115. 128. 137. 2. Keb. 245. 280. 322. 372. 416. 790. 3. Keb. 76. 119. 143. 155. 184. 223. 233. 264. Sir Edward Hales's case on the test act of 25. Ch. 2. in 2. Show. 475. Comberb. 21. State tri. v. 7. p. 612. 4. Bac. Abr. 179. and case of the seven bishops in the reign of Jam. 2. State tr. 4th. ed. v. 5. p. 303. Of these cases, Thomas and Sorrell and Sir Edward Hales's are the principal. The former was argued with the greatest solemnity in the Exchequer-chamber, the delivery of the opinion of the judges, of whom the majority was for the dispensation, taking up a day in four several terms. The latter was treated with less form; but gave occasion to some considerable publications on the subject; particularly lord chief-justice Herbert's account of the authorities on which the judgment was given in Sir Edward Hales's case, Mr. Atwood's answer to it, and a tract by lord chief-baron Atkyns against the king's power of dispensing with penal statutes. In a manuscript report of Sir Edward Hales's case, Sir Bartholomew Shower is mentioned to have replied to lord chief-baron Atkyns. But we have not yet met with any such piece. Mr. Hume's state of the arguments for and against the dispensing power, though written with an evident bias in favour of the crown's prerogative, is worth consulting. Hume's Hist. 8vo. ed. v. 8. p. 242. 254. See also Tyr. Bibliothec. Politic. 589. to 597.—For the proceedings in parliament after the Revolution, in respect to Sir Edward Hales's case and the dispensing power, see Gray's Deb. v. 9. p. 297. to 307. 314. to 332. 336. to 344. 396. Chandl. Deb. of the Lords, v. 1. p. 394.

(1) This, though a just description of fines, considered according to their original and still apparent import, yet gives a very inadequate idea of them in their modern application. In Glanville's time they were really amicable compositions of *actual* suits. But for several centuries past, fines have been only so in name, being in *fact* *fictional* proceedings, in order to transfer or secure real property, by a mode more efficacious than ordinary conveyances. What the superiority of a fine in this respect consists of will best appear, by stating the chief uses to which it is applied.—One use of a fine is *extinguishing dormant titles*, by shortening the usual time of limitation. Fines, being agreements concerning lands or tenements solemnly made in the king's courts, were deemed

case. 1. P. Wms. 102. Gilb. 172.—(16) Another species of customary guardianship is, where by the special custom of a manor the lord

[u] 11. H. 4. 81. 27. H. 6. 32.
9. E. 4. 3. 2. E. 6. tit. Que
estate 8. 1. E. 6. Que estate Br.
49. (Cro. Cha. 54. 1. Lev. 190.)

shall plead a *que estate*.

[u] A *que estate* must be
alleged in the tenant or de-
fendant himselfe, and not
in one in the meane convey-
ance, from whom he claimeth;
and yet some bookes be to the
contrary.

*ou terres et (1) tene-
ments poyent passer
per alienation sans
fait, &c.*

reason is, for that such
manor or lands and
tenements may passe
by alienation without
deed, &c.

Le quel covient destre monstre al court. The reason wherefore a deed, that is
pleaded, ought to be shewed to the court is; because every deed must prove itselfe to have suf-
ficient words in law, whereof the court must adjudge, and also to be proved by others, as by
witnesses or other prooffe if the deed be denied, which is matter of fact.

Per alienation sans fait, &c. Here by (&c.) is implied, that whatsoever
passeth by livery of seisin, either in deed or in law, may passe without deed; and not only
the rents and services parcell of the manor shall with the demeanes, as the more principall and
worthy, passe by livery without deed, but all things regardant, appendant, and appurtenant to
the manor, as incidents or adjuncts to the same, shall, together with the manor, passe
without deed, all which, as here it appeareth, and elsewhere is said, shall passe, without say-
ing *cum pertinentiis* (2).

Sect. 184.

*REgardant : Vide sect.
181.*

Appendants. Appen-
dant is any inheritance be-
longing to another, that is
superior or more worthy.
In law it is called *pertin-
ens, quasi invicem tenens*,
holding one another, a word
indifferent both to things
appendant, and things ap-
purtenant. The quality and
nature of the things do make
the difference. But regardant
(as our author faith) is only
applied to a villeine. (*) Ap-

*ET est ascavoir,
que nul chose est
nosme regardant a
un mannor, &c. for-
que villeine. Mes
certeine auters cho-
ses come advowson et
common de pasture,
&c. sont nosmes ap-
pendants al man-
nor ou al terres et (3)
tenements, &c.*

AND it is to be un-
derstood, that no-
thing is named regar-
dant to a mannor, &c.
but a villeine. But cer-
taine other things, as
an advowson and com-
mon of pasture, &c.
are named appendant
to the mannor, or to
the lands and tene-
ments, &c.

Vide sect. 1.

(*) 5. Aff. 9. 8. H. 7. 4. 5. 28.
H. 8. Dier 30. b. Pl. Com. 381.
F. N. B. fol. 181. (2. Ro. Abr.
60. 5. Co. 17. b.)

[x] 43. Aff. p. 10. 42. E. 3. 22.
(10. Co. 64. 65. 2. Ro. Abr.
185.)

[y] Hill and Grange's case. Pl.
Com. 168.

(1. Rol. Abr. 230.)

[z] 1. H. 7. 24. Pl. Com. 169.

[a] 5. Aff. 9. (1. Sid. 354.)

[b] 10. E. 3. 5. 37. H. 6. 34.

26. H. 8. 4. 4. Co. 36. 37. in
Tirringham's case.

pendants are ever by prescription (4); but appurtenances may be created in some cases at this day.
(5) As if a man at this day grant to a man and his heires common in such a moore for his beas
leaving or couchant upon his mannor, or if he grant, to another, common of estovers, or tur-
bary in fee simple, to be burnt or spent within his mannor; by these grants these commons are
appurtenant to the mannor, and shall passe by the grant thereof. In the civill law it is called
adjunctum (6).

[x] If A. be seised of a mannor, whereunto the franchise of waife and stray and such like
are appendant, and the king purchaseth the mannor with the appurtenances, now are the
royall franchises reunited to the crowne, and not appendant to the mannor. But if he grant
the mannor in as large and ample manner as A. had, &c. it is said, that the franchises shall be
appendant (or rather appurtenant) to the mannor.

Concerning things appendant and appurtenant, two things are implied [y],

First, that prescription (which regularly is the mother thereof) doth not make any thing
appendant or appurtenant, unlesse the thing appendant or appurtenant agree in quality and
nature to the thing, whereunto it is appendant or appurtenant; as a thing corporeall cannot prop-
erly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall (7). But
things incorporeall, which lye in grant, as advowsons, villeins, commons, and the like, may be
appendant to things corporeall, as a mannor house or lands; or things corporeall to things incor-
poreall, as lands to an office. [z] But yet (as hath been said) they must agree in nature and
quality; for [a] common of turbary or of estovers cannot be appendant or appurtenant to land,
but to a house to be spent there. [b] Nor a leet, that is temporall, to a church or chappell, which
is ecclesiasticall. Neither can a nobleman, esquire, &c. claime a seat in a church by prescrip-
tion

For notes to this side of fol. 121. b. see 126. a.

deemed to be of equal notoriety with judgments in writs of right; and therefore the common law allowed them to have the same
quality of barring all, who should not claim within a year and a day. See Plowd. 357. Hence we may probably date the origin
and frequent use of fines as feigned proceedings. But this puissance of a fine was taken away by the 24. E. 3. and this statute con-
tinued in force till the 1. R. 3. and 4. H. 7. which revived the ancient law, though with some change, proclamations being required
to make fines more notorious, and the time for claiming being enlarged from a year and a day to five years. See 24. E. 3. c. 16. 1. R.
3. c. 7. 4. H. 7. c. 24. The force of fines on the rights of strangers being thus regulated, it has been ever since a common prac-
tice to levy them merely for better guarding a title against claims, which, under the common statutes of limitation, might sub-
sist, with a right of entry for twenty years, and with a right of action for a much longer time.—Another use or effect of fines is bar-
ring estates tail, where the more extensively operative mode by common recovery is either unnecessary or impracticable. The
former may be the case when one is tenant in tail with an immediate reversion or remainder in fee; for then none can derive
a title to the estate except as his *privies* or *heirs*, in which character his fine is an immediate bar to them. The latter occurs, when
one has only a remainder in tail, and the person, having the freehold in possession, refuses to make a tenant to the precise for a
common recovery, which would bar all remainders and reversions; for, under such circumstances, all which the party can do is
to bar those claiming under himself by a fine. How this power of a fine over estates tail commenced, has been *vexata quaestio*. The
statute *de donis*, after converting fees conditional into estates tail, concludes with protecting them from fines, there being ex-
press words for that purpose. But the doubt is, when this protection was withdrawn, whether by the 4. H. 7. or the 32.
H. 8. It is a common notion, into which some of our most respectable historians have fallen, that the 4. H. 7. was the statute
which first loosened entails; and thus opening the door for a free alienation of landed property has been attributed to the deep
policy of the prince then on the throne. See Hume's History 8vo. ed. v. 3. p. 400. But this is an error proceeding from a strange
inattention to the real history of the subject. Common recoveries had been sanctified by a judicial opinion in Taltarum's case,
as early as the twelfth of Edward the fourth: and from them it was, that entails received their death wound; for, by this fic-
tion of common recoveries, into the origin of which we mean to scrutinize in some other place, every tenant in tail in possession
was enabled to bar intails in the most perfect and absolute manner; whereas fines, even now, being only a *partial* bar of the
issue of the persons who levy them, must in general be an inefficacious mode. In respect to the 4. H. 7. it was scarce more than
a repetition of the 1. R. 3. the only object of which indisputably was to repeal the statute made the 32. E. 3. in favour of non
claims, and against them to revive the ancient force of fines, but with some abatement of the rigor in point of time and other
improvements, as we have already hinted; a provision of the utmost consequence to the security of titles. Accordingly lord
Bacon, whose discernment none will question, in his life of Henry the seventh, commends the statute of the 4th of his reign,
merely as if aimed at non claims. Bac. Hen. 7. in Ken. Comp. Hist. 2d. ed. v. 1. p. 596. Nor indeed could there have been the
least

lord names, or is himself the guardian of an infant copyholder. See 2. Com. Dig. 399. The nature of this guardianship de-
pends wholly on the custom of the particular manor; and though it is not expressly saved by the 12. Cha. 2. yet it has been held,
that

tion as appendant or belonging to land, but to a house; for that such a seat belongeth to the house in respect of the inhabitancy thereof; and therefore, if the house be part of a manor, yet in that case he may claime the seat as appendant to the house for the reason aforesaid.

Secondly, that nothing can be properly appendant or appurtenant to any thing, unlesse the principall or superior thing be of perpetuall subsistence or continuance. For example, an advowson, that is said to be appendant to a manor, is *in rei veritate* appendant to the demesnes of the manor, which are of perpetuall subsistence and continuance, and not to rents or services, which are subject to extinguishment and destruction (1).

An advowson is appendant to the manor of Dale, of which manor the manor of Sale is holden, the manor of Sale is made parcel of the manor of Dale by way of escheat, the advowson is only appendant to the manor of Dale.

And where it is said, that a chamber may be parcell of a corody, and passe by the name of the corody, which may be extinguished, there he, that hath the corody, hath but his habitation in the chamber; as a fellow of Trinity colledge in Cambridge hath in his chamber, or as one, that had a corody and a chamber in an house of religion, he had but his habitation only. As for offices of fee, whereunto land may appertain, they are of perpetuall subsistence, either being *in esse*, or in that they are grantable over.

Note that an advowson at one turne may be appendant, and at another turne in grosse. As if the manor be divided betweene coparceners, and every one hath a part of the manor without saying any thing of the advowson appendant, the advowson remains in coparcenary, and yet, in every of their turnes, it is appendant to that part, which they have; and so it is, if they make composition to present against common right, yet it remains appendant. But if upon such a partition an expresse exception be made of the advowson, then the advowson remains in coparcenary and in grosse, and so are the bookes reconciled.

Common de pasture. [c] *Communia*, it cometh of the English word common, because it is common to many; and thereupon and accordingly is here called by Littleton common of pasture, for that the feeding of beasts in the land wherein the common is to be had belongs to many.

[d] There be foure kinds of common of pasture, *viz.* common appendant, which is of common right, (and therefore a man need not prescribe for it) (2) for beasts commonable (that is) that serve for the maintenance of the plough, as horse and oxen to plough the land, and for kine and sheepe to competer the land, and is appendant to arable land (3).

[e] The second is common appurtenant, that is, for beasts not commonable; as swine, goats, and the like. [f] If a man purchase part of the land, wherein common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of a common appurtenant, or of any other common of what nature soever. But both common appendant and appurtenant shall be apportioned, by alienation of part of the land, to which common is appendant or appurtenant; and for common appurtenant one must prescribe (4).

[g] The third is *common per cause de vicinage*, which differeth from both the other commons; for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity, in which case one may inclose against the other, though it hath beene so used time out of mind, for that it is but an excuse for trespass.

The last is common in grosse, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of common appendant, appurtenant, and in grosse, some be certaine, that is, for a certaine number of beasts; some certaine by consequent, *viz.* for such as be levant and couchant upon the land; and some be more incertaine, as common *sauns* number in grosse, and yet the tenant of the land must common or feed there also (5).

There be also [h] divers other commons, as of estovers, of turbary, of piscary, of digging for coles, minerals and the like. [i] If common appendant be claymed to a manor, yet *in rei veritate* it is appendant to the demesnes, and not to the services; and therefore if a tenancy escheate, the lord shall not encrease his common by reason of that.

[k] If a man claime by prescription any manner of common in another man's land, and that the owner of the land shall be excluded to have pasture, estovers or the like, this is a prescription or custome against the law, to exclude the owner of the foyle; for it is against the nature of this word common, and it was implied in the first grant, that the owner of the foyle should take his reasonable profit there, as it hath beene adjudged. * [l] But a man may prescribe or alledge a custome to have and enjoy *solam vesturam terræ*, from such a day till such a day, and hereby the owner of the foyle shall be excluded to pasture or feed there (6); and so he may prescribe to have *separalem pasturam*, and exclude the owner of the foyle from feeding there. *Nota diversitatem.* [m] So a man may prescribe to have *separalem piscariam* in such a water, and the owner of the foyle shall not fish there; but if he claim to have *communiam piscariam*, or *liberam piscariam*, the owner of the foyle shall fish there (7). And all this hath beene

For the notes to this side of fol. 122. a. see 126. b.

least pretence to extend the meaning of the law further, if it had not been for some ambiguous expressions in the latter end of it. Like the 1. R. 3. after declaring a fine with proclamation to be an universal bar, it saves to all, except parties, five years to claim after the proclamations of it. But this saving did not suit the case of the issue in tail, or of those in remainder or reversion; because during the life of the immediate tenant in tail, these could have no right to the possession, and it was possible, that he might live more than five years from the proclamation of the fine. The framers of the 4. H. 7. foresaw this; and therefore like the 1. R. 3. it contains an additional saving of five years for all persons, to whom any title should come after the proclamation of the fine by force of any intail subsisting before; words, which as strongly apply to the issue of the tenant in tail levying a fine, as to those in remainder or reversion. Had therefore the 4. H. 7. stopped here, what the learned and instructive observer on our ancient statutes writes would be strictly just, that, instead of destroying estates tail, the statute expressly saves them. Barringt. on. Ant. Stat. 2d. ed. p. 337. But a subsequent part of the statute, in declaring how a fine shall operate on such as have five years allowed, if they do not claim within that time, expresses, that they shall be concluded in like form as parties and privies; and another clause, in regulating, who should be at liberty to aver against a fine *quod partes nihil habuerunt*, saves this plea for all persons, with an exception of privies as well as parties. From these two clauses, though the former of them was copied from the 1. R. 3. grew a doubt, whether the statute did not enable tenant in tail to bar his issue by a fine. The arguments for it were, that the issue were privies both in blood and estate; and that if the statute meant to bind them, when the tenant in tail had not any estate in the land at the time of the fine, it was highly improbable, there should be a different intention, when he really had one. 2. Show. 114. On the other hand it might be said, that, as the word privies in the statute *de modo levandi fines* and in the 1. R. 3. was not deemed sufficient to reach heirs in tail, and to control the statute *de donis*, why then should the same word in the 4. H. 7. include them; more especially, when it was considered, that it was as much the professed scope of the 4. H. 7. as it was of the 1. R. 3. to revive the operation of fines against non claims, and that both contained the same express saving for persons claiming under intails? 2. Inst. 317. Pollexf. 502. By such contrariety of reasoning, the judges in the 19. H. 8. became divided in opinion; three holding, that the 4. H. 7. was not a bar to the issue, and four that it was. See 19. H. 8. 6. b. Dy. 2. b. pl. 1. Br. Abr. Fines, 1. 121. 123. Bro. N. C. 144. Pollexf. 502. To remove the doubt the legislature passed the 32. H. 8. by which the heirs in tail are expressly bound. 32. H. 8. c. 26. But the last named statute, though entitled an exposition of the 4. H. 7. and though made to operate retrospectively, contained several exceptions, particularly one of fines of lands, of which the reversion is in the crown. Consequently room was still left for contesting the effect of the 4. H. 7. independently of the 32. H. 8. and in the reign of Charles the second a case arose, which made a discussion of the point almost unavoidable. It was the case of the earl of Derby against one claiming under a fine by the earl's father, who was tenant in tail with reversion in the crown, and so within an exception in the 32. H. 8. Two points were made, of which the first was whether this fine, thus depending wholly on the 4. H. 7. was a bar to the issue in tail; and on adjournment of the case into the Exchequer-chamber, eight judges against three held, that the fine of tenant in tail was a bar to the

that the father's appointment of the custody of his child under that statute will not extend to copyhold estates. Church and Cudmore, 2. Lutw. 1181. 3. Lev. 395. and Comberb. 253.—But besides the several kinds of guardians enumerated by lord Coke, and

Lib. 2. Cap. 11. Of Villenage. Sect. 185, 186.

(*) Inter Chiner and Fishen in le Corn. Banke in repievin & Mich. 29. & 30. Eliz. inter Shirland and White in com. Oxon. Et inter Foiston & Craeh. rode eodem termino in Essex. (2. Rol. Abr. 267.)
[u] 19. H. 6. 33.
[e] Vide sect. 541.
(4. Co. 31. a. Post. 307. 349. b. 363. b.)

beene resolved. (*) And therefore it is necessary for every man by learned advice to plead according to the truth of his case; for *parols font plea*.
[u] A man seised of land, whereunto common is appendant, and is disseised, the disseisee cannot use the common, untill he entreteth into the land whereunto it is appendant. [o] But if a man be disseised of a manner, whereunto an advowson is appendant, he may present unto the advowson, before he enters into the manor; and the reason of this diversitie is, because in the case of the common it should be a prejudice to the tenant of the soile, for if the disseisee might do it, the disseisor also might put on his cattle, which should be a double charge to the tenant, but not so of the advowson.

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Bract. lib. 1. cap. 6. Britton fol. 78. Fleta li. 1. c. 3. 43. E. 3. 4. b. 19. E. 2. tit. Vill. 34. 18. E. 4. 29.
[p] 19. H. 6. 32. 26. Aff 63. 37. Aff 17. 11. H. 4. 16. in appeale. (2. Ro. Abr. 732.)

THIS is intended in some action brought against him that made such confession, [p] or where he is brought into court by course of law; for if he commeth into the court extrajudicially and not by any due course of law, such confession is without warrant of law, and bindeth not the partie, because the court had no warrant to take it. But if a *præcipe* be brought against one, he may confesse himselfe villeine to an estranger, and that he holds the land in villenage of him, and this is good and shall bind him. And if in that case the demandant reply, that he the day of his writ purchased was a freeman (2), and thereupon issue is taken, and he is tryed to be free, yet he shall remaine villeine to the stranger in respect of his confession.

ITEM si home voile en court de record soy conufter desire villeine, que ne fuit villein adevant, tiel est villeine en grosse.

ALSO if a man will acknowledge him selfe in a court of record to be a villeine, who was not a villein before, such a one is a villeine in grosse (1).

If a writ of *namore habendo* be brought against one, and the plaintiffe, as he ought, offereth in his count to prove the villenage by the cousins and kindred of the defendant, and therupon produceth the uncles of the defendant, who upon examination confesse themselves to be villeines to the demandant, this confession, being entred of record, doth so bind, that, albeit they were so free before, they and the heires of their bodies are by this confession bond and villeines for ever, for the uncles came in by due course of law in an action depending in court.

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Niese. Or *naife* is in Latine *naturalis*, seu *nativa*, because for the most part nieces are bond by nativitie.

Feme que est ut-lage est dit waive.

Waive, *waviata*, and not *utlagata* or *exlex*; for that women are not sworne in leets, or tornes, as men, which be of the age of twelve yeares or more be; and therefore men may be called *utlagati*, *id est*, *extra legem positi*, but women are *waviatae*, *id est*, *derelictæ*, left out or not regarded, because they were not sworne to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law, that was not sworne to the law, which is intended of the oath of allegiance in the leet (4).
And the outlawrie of a woman is legally called *waviataria mulieris*.

ITEM home que est villein est appelle villeine (3), et feme que est villein est appelle niese: si come home que est ut-lage est dit utlage, et feme que est utlage est dit waive.

ALSO a man which is a villeine is called a villeine, and a woman which is villein is called a niese: as a man which is outlawed is called outlawed, and a woman, which is outlawed is called waived.

F. N. B. 161. a. Regist. 132. & 277. Britton fol. 20. Bract. 1. 3. tract. 2. ca. 12. 13. Fleta lib. 1. cap. 28. 3. H. 5. tit. Utlawry Statutum.

Regist. orig. 132. (2. Rol. Abr. 804.)

Sect.

For notes to this file of fol. 122. a. see 126. b.

the issue before the 32. H. 8. great streis however being laid by those of this opinion on the exposition of the former by the latter. See Murrey on the demise of the earl of Derby against Eyton and Price, Patch. 31. Ch. 2. in Scacc. T. Raym. 260. 286. 319. 318. Pollexf. 491. Skinn. 95. 2. Show. 104. T. Jo. 137. It is observable, that both lord keeper North and lord chief-justice Saunders, the lateness of whose promotions prevented their publicly giving their opinions, concurred with the majority of the judges in the construction of the 4. H. 7. and further, that Pollexten, who as counsel argued most ably for the earl of Derby the issue in tail, afterwards declared his private sentiments to be against the earl on that statute. But it should be adverted to, that, though the majority of the judges were against lord Derby on this point, they gave judgment for him on a secondary one, which was, that the entail, being of the gift of the crown, fell within the protection of the 34. H. 8. Therefore their opinion on the 4. H. 7. finally proved to be wholly extrajudicial. But we do not know of any case, in which the controversy has been again agitated.—A third effect of fines is passing the estates and interests of married women in the inheritance or freehold of lands and tenements. Our common law bountifully invests the husband with a right over the whole of the wife's personality, and entitles him to the rents and profits of her real estate during the coverture. It further gives him an estate for his own life in her inheritance, if the husband is actually in possession, and there is born any issue of the marriage capable of inheriting. But the same law, which confers so much on the husband, will not allow her, whilst a feme-covert, to enlarge the provision for him out of her property, or to strip herself of any claims which the law gives her on his. On the contrary, jealous of his great authority over her, and fearful of his using compulsion, it creates a disability in her to give her consent to any thing, which may affect her right or claims after the coverture, and makes all acts of such a tendency absolute nullities. By the rigour of the ancient law, we take this rule to have been so universally applicable, that a married woman could in no case bind herself or her heirs by any direct mode of alienation. But accident gave birth to two indirect modes, namely, by fines and common recoveries. Though it might be proper to incapacitate the wife, from being influenced by the husband to prejudice herself by any conveyances or agreements during the coverture, yet justice to others required, that such, as might have any claim on the wife's freehold or inheritance, should not be forced to postpone their suits till the marriage was determined; for if they should, then, to use the words of Bracton, in explaining why the husband's infancy would not warrant the parol to demur in a suit for the wife's land, *mulier implacitata de jure suo si propter minorem ætatem viri posset differre judicium, ita posset qualibet mulier in fraudem nubere*. Bract. lib. 5. tract. 5. c. 21. fo. 423. a. Probably it was on this principle, the common law allowed a judgment against husband and wife in a suit for her land to be as conclusive, as if given against a feme sole; which was carried so far, that, till the statute of Westminster the second, even judgment against them, on default in a *possessory* action for the wife's freehold, drove the wife after the husband's death to a writ of right to recover her land. 2. Inst. 342. From enabling the husband and wife to defend her title, and making the judgment on such defence to be conclusive, permitting them to compound the suit by a final agreement of record, in the same manner as other suitors, was no great or difficult transition; more especially when its considered, that in the case of femes covert fines are never allowed to pass, without the court's secret examination of them apart from their husbands, to know, whether their consent is the result of a free choice, or of the husband's compulsive influence. Such, we conceive is the true source, whence may be derived the present force of fines and common recoveries as against the wife, who joins in them; for, whatever in point of bar and conclusion was their effect, when in suits really adverse, of course attended them, when they were feigned, and in that form gradually rose into modes of alienation, or, as the more usual phrase is, *common assurances*. The con-

and those we have already mentioned in addition, there are four others which still remain to be noticed.
The first of these is guardian by election of the infant himself. But the right of making such an election only arises, when from

Sect. 187.

ITEM si un vil-
lein prent frank
feme a feme, et ad
issue enter eux, lis-
sues ferront villeines.
Mes si niese prent
franke home a sa ba-
ron, lour issues serra
franke.

* Et cest contrarie
a le ley civil; car la
est dit, partus sequi-
tur ventrem * (1).

ALSO if a villeine
taketh a free wo-
man to wife, and have
issue betweene them,
the issues shall be vil-
leines. But if a niese
taketh a freeman to
her husband, their is-
sue shall be free.

* This is contrarie
to the civill law; for
there it is said, *partus*
sequitur ventrem *.

man is enfranchised during the coverture (3); and therefore by
the issue is free (4).

[1] Si mulier serva copulata sit libero, &c. quod partus habebit hereditatem, & mater nullam
dotem, quia mortuo viro suo libero redit in pristinum statum servitutis, nisi haeres ei dotem fecerit de
gratia (5). And when a bondman marieth a free woman, they are all one person in law, and
duae animae in carne una, and uxor subiecta est viro, & sub potestate viri (6).

[2] Observatur in com' Cornubiae de tali consuetudine, quae talis est, quod si liber homo ducat na-
tivam aliquam in uxorem ad liberum tenementum & liberum thorum, si ex ea duae procreantur filiae,
una erit libera & altera villana, quia ibi partiti sunt pueri inter liberum patrem & dominum ux-
oris villanae.

[3] Qui vero procreantur ex nativa unius & nativo alterius, proportionabiliter inter dominos
sunt dividendi. [x] Glanvill lib. 5. cap. 6.

Et ceo est contrarie al ley civil. (7) For true it is, that by that law *partus sequitur*
ventrem, as well where a free man takes a bond woman to wife, as where a bondman takes a free
woman to wife. In the first case the issue is by the civill law bond, and in the other free; both
which cases are contrarie to the law of England. But this is no part of Littleton; and there-
fore we in this manner pass it over.

Sect. 188.

ITEM nul bas-
tard poit estre
villein, si non que il
voile sey conuster es-
tre villeine en court
de record; car il est
en ley quasi nullius
filius, pur ceo que il ne
poit enheriter a nulluy.

ALSO no bastard
may be a villeine,
unless he will ac-
knowledge himselfe to
be a villeine in a court
of record; for he is in
law *quasi nullius filius*,
because he cannot be
heir to any.

Nullius [a] *filius*. [a] Vide sect. 399. 13. E. 1. tit.
Cui pater est populus,
pater est sibi nullus &
omnis.

Cui pater est populus, non
habet ille patrem.

[b] Some hold that the [b] Bract. lib. 1. fo. 5. a. Fleta
bastard of a niese shall be a lib. 1. cap. 3. Britton fol. 78.
villeine. [c] And others hold, [c] 39. E. 3. 34. 43. E. 3. 4.
that if a villeine hath a bas-
tard by a woman, and after
marieth the woman, that this
bastard is a villeine. But the
common law is a bastard,

law is contrary in both cases; for in both cases, the issue by the common law is a bastard,
and consequently, *quasi nullius filius*, as Littleton here saith. [d] Though a bastard be a [d] 23. Eliz. Dyer 374.
reputed sonne, yet is he not such a sonne, in consideration whereof an use can be raysed, for the
reason that Littleton here yeelds; because in judgment of law he is *nullius filius*. [e] (8) And, [e] 13. Eliz. Dier 296.
for

(1) The sentence between the stars is not in L. & M. Roh. or P.—(2) *Siens*, or, according to the modern spelling, *cion*, sig-
nifies the shoot of a tree, and is derived from the French word *seion*, which is the same as *furculus* in Latin.—(3) According to
Fitzherbert, the marriage enfranchises the woman for ever; and he cites as an authority Britton, who considers it as a negli-
gence in the lord not to have prevented the marriage. F. N. B. 78. G. Brit. 79. b. But Bracton, in the passage cited by lord
Coke two or three lines further, confines the enfranchisement to the coverture; and there are several authorities, which concur
with him. Bro. Villenage 23. Pasch. 33. E. 3. Statham tit. Villenage. Fitzh. Abr. Villenage 21. 30. 46. Lord Coke was aware of
this contrariety in the books; for in a subsequent part he takes notice of it, but calls the opinion, that the enfranchisement
ceases with the coverture, the better one. Polt. 136. b. 137. b. However he inclines to except the case of the nief's marrying
with her own lord. But even this is denied by Perkins. Perk. sect. 314. It is a strong argument against this latter writer,
that, in other cases of *constructive* manumissions, though in some the ground of inference was not so strong as the lord's marriage
with his nief, the enfranchisement was *perpetual*. It is a still more forcible reason, that reviving the slavery on the lord's death,
if he left an heir by his nief, would have necessarily induced the *unnatural* consequence of making the mother the slave of her
own issue.—(4) It was unnecessary to resort to this reason to prove the issue of such a marriage free. The rule of our law being,
that the child shall follow the father's condition, consequently, whether the nief was *free* or *bond* during the coverture, made no
difference to her issue.—(5) In the chapter of Dower lord Coke represents a nief marrying a free-man to be dowable. Ante 31.
a. But this passage from Bracton is direct to the contrary. Perkins distinguishes, allowing dower to the nief from a *stranger*,
but not from her lord. Perk. sect. 314.—(6) Here lord Coke omits explaining what effect the marriage of a villein with a free
woman has on his condition. As Britton writes, if the villein marries his own *lady*, it enfranchises him for ever. Brit. 78. b.
If the marriage is with any other woman, it is clear from Littleton's declaring the issue villeins, that the father remained a slave
as before.—(7) This difference between our and the civil law is the subject of the chapter in Fortesc. de Laud. Leg. Angl.
cited in the margin. See also Mr. Selden's and Mr. Gregor's notes in the 8vo. ed. of 1775.—(8) This point was so held in
Worfeley's case of 23. Eliz. in Dyer, which lord Coke refers to in the margin. According to Dyer judge Periam was of a
contrary opinion. But Anderson, who reports the same case, informs us, that the judges were agreed. 1. And. 75.
In the queen against an illegitimate son of sir John Perrot, and in Frampton against Gerrard, two subsequent cases
of the same reign, the judges recognized the doctrine. 2. Rol. Abr. 785. 791. and Mo. 735. However it should be
observed, that, though a bastard is not a *son*, for whom the consideration of blood will raise an use, yet, on an estate other-
wise effectually passed, an use may be as well declared to a bastard being *in esse* and sufficiently described as to another person;
and so Rolle in his Abridgment, states the law to be, but at the same time cites the case of Frampton and Gerrard as determined
to the contrary. 1. Ro. Abr. 791. Gilb. on Uses 207. The reason, why the use to the bastard is good in the first instance and
bad in the second, depends on the common, but perhaps obscure, distinction, between uses raised by transmutation of the posses-
sion, as on a feoffment grant fine or common recovery, and those raised without, as a covenant to stand seised or bargain and
sale; or, to express it in more intelligible terms, between declaring uses on a possession or estate actually transferred to a third
person, and declaring them on a possession or estate retained in the party himself. In the former case the estate is passed com-
pletely

Continuation of notes to 121. a.

jecture we have thus hazarded to illustrate, how it happens, that a married woman may alienate her real rights by fine, though
not

from a defect of the law, the infant finds himself wholly unprovided with a guardian. This may happen to be the case, either
from

14. Eliz. Dier 313. 18. Eliz. Dier 345.

[f] Trin. 18. E. 1. rot. 61. Bedf. coram rege. (Cro. Jam. 541. 1. Rol. Abr. 536. Godb. 281. Palm. 9.)

4. Eldras 4 41. Vide Panciroll, Nova report, pag. 485. &c.

for the same reason, where the statute of 32. H. 8. of wills, speaketh of children, bastard children are not within that statute, and the bastard of a woman is no child within that statute, where the mother conveys lands unto him.

[f] It was found by verdict, that Henry the sonne of Beatrice, which was the wife of Robert Radwell deceased, was borne *per undecim dies post ultimum tempus legitimum mulieribus constitutum*. And thereupon it was adjudged, *quod dictus Henricus dici non debet filius prædicti Roberti secundum legem & consuetudinem Angliæ constitut* (1). Now *legitimum tempus* in that case appointed by law at the furthest is nine moneths, or forty weeks (2); but she may be delivered before that time, which judgement I thought good to mention. And this agreeth with that in Eldras. *Vade & interroga prægnantem, si quando impleverit novem menses suos, adhuc poterit matris ejus retinere partum in semetipsa? & dixi, non potest, domine.*

Sect. 189.

CHescun villeine est able & franke

[g] Bract. lib. 4. fol. 196. Britton cap. 49. fo. 125.

[h] 14. E. 4. 6. b. 15. E. 4. 32. 20. E. 3. tit. Villein 10. 38. E. 3. 21.

[i] Fleta lib. 2. cap. 4.

de fuer, &c. [g] In an action brought by a villeine, *versus non dominum, non valebit ei exceptio, quia est servus alienus, ex quo nihil ad ipsum utrum liber sit an servus.* [h] And it is to be observed, that he, that hath but a particular estate in a villeine, as tenant for life or for years, shall disable the villeine, if he brings an action against him; but the lessor shall not (as it is said) disable him. [i] *Examinatio villenagii non tenet, nisi ex ore veri domini fuerit pronunciata.*

Appeale. Appellum commeth of the French word *appeller*, that signifieth to accuse or appeach. An appeach. [k] An appeale is an accusation of one upon another; with a purpose to attain him of felonie by words ordained for it.

(1. Inst. 131.) [k] Brit. cap. 22. fo. 38. Bracton lib. 1. fo. 6.

[l] 18. E. 3. 32. 11. H. 4. 93. 1. H. 4. 6. 29. H. 6. tit. Coron. 17. [m] Fleta li. 1. c. 5. 1. H. 4. 6

De mort [l] for a villeine shall not have an appeale of robbery against his lord; for that he may lawfully take the goods of the villein as his own. [m] And if in an appeale of death it be found for the plaintife, he is enfranchised for ever. *Hinc enim est, quod eo ipso sunt hujusmodi domini servos suos amitturi, cum de injuriis fuerint convicti.* And there is no difference herein, whether he be a villein regardant, or in grosse, although some have said the contrary.

Sect. 190.

R A P E. [n] *Raptus* is, when a man hath carnall knowledge of a woman by force and against her will.

Appeale de rape. By the generall purview of the statutes, (*) that give the appeale of rape, the niese shall have an appeale of rape against the lord. [o] And it seemeth by the ancient authors of the law, that this so heinous an offence was severely punished by losse of eyes, and privy members; but of old time it was felony, which you may reade at large in the second part of the Institutes W. 1. ca. 13.

[n] Mirror ca. 1. sect. 12. cap. 3. de Rape & cap. 4. de Homicide. (3. Inst. 60.)

(*) W. 1. ca. 13. W. 2. ca. 35. 6. R. 2. ca. 6. 11. H. 4. cap. 13. 1. E. 4. cap. 1. [o] 29. H. 6. tit. Coron. 17. Bract. lib. 3. fol. 147.

A U X Y *un niese, que est ravie per sa seignior, poit aver un appeale de rape envers luy.*

ALSO a niese, that is ravished by her lord, may have an appeale of rape against him.

[p] And

pletely from the grantor or donor, without the aid of a court of equity; and therefore it is immaterial, whether the use declared on the estate is gratuitous or not, it being sufficient, that the grantee or donee receives it coupled with a trust or use. But in the latter case, the transaction rests in covenant or agreement between the covenantor or bargainer and the cestuique use; and if the covenant or agreement was not founded on the consideration of blood or a valuable consideration, such as marriage or money, our courts of equity, which till the 27. of H. 8. had the sole cognizance of uses, would not interpose to compel the performance. In fewer words, Chancery would enforce uses annexed to a perfect gift, however gratuitous they might be, but not those resting only on a naked contract, without even so much as the consideration of blood to maintain them. The authorities in proof of this distinction are abundant; nor do we know of any seeming to impeach it, except the single case of Frampton and Gerrard already cited from Rolle, which, if it did turn on such a point, is sufficiently controlled by other cases to make the doctrine indisputable. Mo. 102. Ow. 40. 1. Leon. 197. 1. Co. 176. b. W. Jo. 346. Cart. 143. 12. Mod. 161. Gilb. on Uses 113. 207. Add to this the disfavour of our law to bastardy, in not recognizing any but legitimate blood to be a good consideration, and the whole secret of the rule as to uses to bastards will be disclosed. On a covenant to stand seized, an use will not rise to a bastard; because, the use depending on contract, some consideration is requisite, and lawful blood and marriage are the two considerations peculiar to such a covenant, which necessarily excludes bastardy. But on bargains and sales of land, in which the essential consideration to raising an use is money or a price, or on any conveyances, on which, the estate being passed out of the grantor and therefore not depending on his contract, uses may be declared without any consideration, bastards stand precisely on the same footing with other persons, and are equally capable of having uses limited to them. To give the sum of this elucidation in one sentence, where the use will not rise without the consideration of blood, if derived through any but the pure channel of marriage, however near the blood may be, it will not avail.

(1) Lord Hale, in a note on a passage about legitimacy in fol. 8. a. gives a fuller extract of this case from the record, than is here expressed. His words are these:

Trin. 18. E. 1. Coram rege, rot. 13. Bedford, et M. 23. 23. E. 1. rot. 2. In assise by John Radwell against Henry son of Beatrice,

Continuation of notes to 121. a.

not by any instrument or act strictly and nominally a conveyance, leads to proving, that the common notion of a fine's binding femes covert merely by reason of the secret examination of them by the judges is incorrect. If the secret examination of itself was so operative, the law would provide the means of effectually adding that form to ordinary conveyances, and so make them conclusive to femes covert equally with a fine. But it is clearly otherwise; and, except in the case of conveyances by custom, there must be a suit depending for the freehold or inheritance, or the examination being extrajudicial is ineffectual. In the second Institute

before fourteen, when the infant has no property such as attracts a guardianship by tenure, and the father is dead without having

[p] And this word *rape*, which our author here useth, is so appropriated by law to this case, [p] 9. E. 4. 26. *Mirror* ca. 2. as without this word (*rapuit*) it cannot be expressed by any periphrasis or circumlocution; for *sect.* 13. carnaliter cognovit eam or the like, will not serve.

Sect. 191.

AUXY si un vill soit fait executor a un autre, & le seignior del villeine fuit en dette a le testator en un certeine somme dargent, que nest my paie, en ceo case, le villeine, come executor de le testator, avera action de det envers son seignior; pur ceo que il ne recovers le det a son use demesne, mes al use le testator.

ALSO if a villeine be made executor to another, and the lord of the villeine was indebted to the testator in a certeine sum of mony, which is not paid, in this case, the villein, as executor of the testator, shall have an action of debt against his lord; because he shall not recover the debt to his owne use, but to the use of the testator.

OF this matter (Doc. Plac. 388.) sufficient hath been spoken in this chapter before. The villein shall have an action as executor against his lord, and it is no plea for the lord, to say, that the plaintife is his villeine; for he shall not be enfranchised by the user of this action; because he hath it by a gift in law to the use of the testator, and not to his owne use.

Sect. 192.

ITEM le seignior ne poist prendre hors del possession de tiel villein, que est executor, les biens le mort; et sil face, le villeine come executor avera action de trespassse de mesmes les biens issint prises envers son seignior, & recoupera damages al use le testator. Mes en tous tielx cases il covient, que le seignior, que est defendant en tielx actions, face protestation, que le plaintife est son villein; ou autrement le villeine sera enfranchise, co-

ALSO the lord may not take out of the possession of such villeine, who is executor, the goods of the deceased; and if he doth, the villeine as executor shall have an action for the same goods so taken against his lord, and shall recover damages to the use of the testator. But in all such cases, it behoveth, that the lord, which is defendant in such actions, maketh protestation, that the plaintife is his villein; or otherwise the villeine shall be infran-

LE seignior ne poist prendre hors del possession, &c. Of this also sufficient hath been said before.

Et recoupera damages al use del testator.

[g] Note damages recovered by the executor in an action of trespassse shall be assents; and yet they were never in the testator. And so it is in other like cases, as by our bookes it appeareth.

[r] If an executor hath a villeine for yeares, and the villein purchases land in fee, the executor entreteth, he shall have the whole fee simple; but because he had the villein in autre droit, viz. as executor to the use of the dead, it shall be assents in his hands. Note a diversity between the quantity of the estate, and the quality of it; for the law respecteth not the quantity of the estate, for not onely

[s] tenant

who was wife of Robert Radwell, quia compertum est, quod dictus Henricus fuit natus per 11 dies post 40 septimanas, quod tempus est utatum mulieribus pariendi, ex quo predictus Robertus non habuit accessum ad predictam Beatricem per unum mensem ante mortem suam, presumitur dictum Henricum esse bastardum, ideo judgment for the plaintiff. Hal. MSS.

If this state of the case is correct, lord Coke's is erroneous in several particulars of consequence. 1. He is short in not expressing, that the record mentions *forty weeks*, and so leaving it to be deemed an inference of his own, as which it has been accordingly treated. 2. He exceeds the record, by representing it to stile *that time the latest* for a woman's going with child, when the record only calls it the *usual* period. 3. He wholly omits the husband's having had no access to the wife for one month before his death; a fact very material, it being very easy to allow *eleven days* after the *usual* time, but requiring a strong case to warrant

Continuation of notes to 121. a.

Institute lord Coke represents this to be the general law, and, amongst many authorities cited to prove it, refers to a case of Hen. 7. reported by Keilwey, in which, whether the examination of a feme covert, on the inrolment of a bargain and sale to the king, sufficed to bind her, was largely debated. 2. Inst. 673. Keilw. 4. a. to 20. a. The just explanation therefore of the subject is, that the pendency of a real action for the freehold of the land, in consequence of previously taking out an original writ, without which preliminary even at this day a fine is a nullity, should be deemed the primary cause of the fine's binding a feme covert; and that the secret examination of her, on taking the acknowledgment of the fine, is only a secondary cause of this operation.

Such are the three chief effects, by reason of which, fines, no longer used, according to their original, as recorded agreements for conclusion of actual suits, have been changed into, and are still retained as feigned proceedings; and being thus accommodated to answer purposes, to which ordinary conveyances cannot be applied, it is no wonder, that they should not only be considered as a species of conveyance, but also be deemed a principal guard to the titles to real property, and as such be ranked amongst the most valuable of the common assurances of the realm.

In this digression on the properties of a fine, we have purposely omitted to consider its operation, either as an *stoppel*, except so far as it may be said to be one to the issue in tail by force of the 4. H. 7. and 32. H. 8. or as a *discontinuance*, or lastly in respect of the consor's warranty, which is always inserted in it. The virtues of a fine, in the three points of view we have examined it, namely to extinguish dormant titles, to bar the issue in tail, and to pass the interests of femes covert; these constitute the more peculiar qualities, on account of which it is most usually, if not always, resorted to. As to the three other effects, it may be enough to observe here, that they are equally incident to feoffments, or any other deeds having warranties annexed. The distinct consideration of them is reserved for another occasion.—(1) If binding the parties, or even privies, exclusive of heirs in tail, was the only effect of a fine, it would scarce be preferable to less solemn agreements; for, without doubt they also are so far binding. The most distinguishable properties of a fine are barring strangers unless they claim within five years, barring the issue in tail immediately, and binding femes covert, as we have explained in the foregoing note.—(2) *En gros* not in L. and M. or R. h.—(4) &c. in L. and M. and Rob.—(5) Court instead of &c. in L. and M. and Rob.—(6) But see 1. Lev. 100. and 1. Sid. 298.

ing executed his power of appointing a guardian for his child; or after fourteen, when the custody of the guardian by force terminates

[s] L. 5. E. 4. 61.

[s] 21. H. 3. 6. 37.
(Ante 117. a.)

[u] 41. E. 3. 21.

[x] 18. E. 3. 29.

Vide sect. 193.

[y] Pl. Com. 276. b. In Greif-
brook's case.

[s] tenant in taile, and tenant for life of a villeine, shall have the perquisite of the villeine in fee, but [s] tenant for yeares, and tenant at will also shall have it in fee.

But the law respecteth the quality, for in what right he hath the villeine, in the same right shall he have the perquisite; as in the case of the executor abovesaid, and in the case of the bishop [u] that hath the villeine in right of his church, he shall have the perquisite in the same right.

[x] So if a man hath a villeine in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the baron shall have the perquisite to him and his heires; because by the issue he is intituled to be tenant by the curtesie in his owne right.

Protestation. [y] *Protestatio* is an exclusion of a conclusion that a party to an action may by pleading incur; or it is a safeguard to the party, which keepeth him from being concluded by the plea he is to make, if the issue be found for him. But in this case without a protestation, albeit the issue be found for the lord, the villeine shall be enfranchised, as it appeareth hereafter in this section.

Sect. 193.

Brit. fol. 79. 125. b. 126. a.

CEO serra trie en le countie, &c.

Be tryed, that is, as it is intended by the verdict of twelve men, that is called in law a triall *triatio*.

[a] 7. E. 50. 26. E. 3. 73. 38. E. 3. 34. 40. E. 3. 36. 43. E. 3. 4. 31. 44. E. 3. 36. 47. E. 3. 26. 22. H. 6. 52. 35. H. 6. 12. 39. H. 6. 24. Vide sect. 534.

[a] In this case the law doth favour the villein in the issue; for otherwise by the rule of law in like cases he ought to answer to the speciall matter, viz. to the regardancy; but in favour of liberty he may reply, that he is free and of free estate, and consequently this issue concerning the person shall be tryed where the writ is brought. [b] The like law it is, if issue be joyned upon the ideocy of the plaintife or defendant, it shall be tryed where the writ is brought; because it concerneth the person.

In favorem libertatis.

It is commonly said, that three things be favoured in law; life, liberty, dower.

[c] *Impius & crudelis iudicandus est, qui libertati non favet. Anglia jura in omni casu libertati dant favorem.*

Tryall is to finde out by due examination the truth of the point in issue or question betweene the parties, where-

(F. N. B. 77. f.)

[c] Fortescue cap. 42.

(1) &c. in L. and M. and Roh.

rant extending such liberality to nearly six weeks. 4. The word *presumitur*, which lord Coke passes over, is of importance; for it indicates, that, notwithstanding the great excess of time, it was conceived to create only a *presumption* for the bastardy, and consequently, if very cogent circumstances, to account for the protraction of the birth, and in favour of the wife's chastity, had occurred, the judgment might have been for the legitimacy.

So far we had advanced, when on looking into Rolle's Abridgment, we found this same ancient case of Radwell more at large, than either in lord Coke or lord Hale. But Rolle agrees with the former as well in respect to the record's not mentioning the forty weeks, as to its stating the birth to be eleven days after the latest time in law for a woman's going with child; and as from Rolle's particularity he seems to have most minutely attended to the record, his authority, till the whole record appears, seems most decisive. However the two last particulars, in which lord Coke differs from lord Hale, still remain, to which Rolle adds these further circumstances, that the husband languished of a fever a long time before his death; that on the taking of an inquisition afterwards in the court of a lord, of whom he held lands by knight's service, the wife swore she was not pregnant, and to prove it uncovered herself in open court; and that, in consequence of all this, the lord received a collateral relation as heir. The words describing the wife's exposure of her person are remarkable; for the record states, that she, being interrogated, *juramento asseribat, se non esse pręnantem; et, ut hoc omnibus manifeste liqueret, vestes suas ad tunicam exuebat, et in plena curia sic se videri permisit.* 1. Ro. Abr. 356. pl. 3. and 18. E. 1. rot. 13. in B. R. there cited. It reflects great discredit on the lord's court, which permitted such a gross indecency; and still more on the king's judges, who suffered it to be recorded as one of the grounds for a verdict before them. How laudably contrariant is the proceeding on the writ *de ventre inspiciendo*. This remedy for the heir against the pretence of pregnancy, so well known to be of earlier date than the reign of Edward the first, as it was framed in the times of Bracton Britton and Fleta, delicately requires the widow to be inspected by a jury of her own sex; and though in subsequent times the sheriff was ordered to summon a jury composed both of men and women, yet still the search was to be made by the latter only. Bract. 69. a. Brit. 165. b. Flet. lib. 1. c. 15. Reg. Br. Orig. 227. a. What harsh ideas of the times might we be led to adopt, if the early introduction of the writ *de ventre inspiciendo* did not demonstrate, that the unseemly record we are observing upon was a singularity, and so many other testimonies of a more advanced refinement in judicial proceedings did not concur, to rescue the age of our English Justinian, from the suspicion of a general practice of such barbarism.

Let us then suppose the record to be as it is in Rolle, which is the more probable to be the truth; because a contemporary judge, who reports its having been produced on a trial of legitimacy, represents it much in the same way. Cro. Jam. 541. But still it will not warrant lord Coke's inferring from it, that forty weeks constitute the latest time our law allows for a woman's going with child. On the contrary no particular time being mentioned, what period was meant, must be found out through some other medium; and as the record states other unfavourable circumstances besides the excess of time, and that the jury pre-

sumed

terminates, and from the want of the father's appointment there is no other ready to succeed to the trust and to take care of the infant

ment que le matter chifed, although the soit trove pour le seignior, & encounter the lord, and against le villein, come est dit. the villein, as it is said.

ITEM si villeine fust un action de trespasse, ou un autre action envers son seignior en un county; et le seignior dit, que il ne serra respondus, pur ceo que il est son villein regardant a son manor en autre county (1); & le plaintife dit, que il est franke et de franke estate, et nemy villeine; ceo serra trie en le county lou le plaintife avoit conceive son action, et nemy en le county lou le manor est: et ceo est in favorem libertatis. Et pur cel cause un estatute fuit fait an. 9. R. 2. cap. 2. le tenor de quel ensuist en tiel forme. Item pur la ou plusors villeins; et neises, sibien des graundes seigni-

ALSO if a villeine sueth an action of trespasse, or any other action, against his lord in one county; and the lord saith, that he shall not be answered, because he is his villeine regardant to his mannour in another county; and the plaintife saith that he is free, and of a free estate, and not a villein; this shall be tryed in the county where the plaintife hath conceived his action, and not in the county where the mannour is: and this is in favour of liberty. And for this cause a statute was made anno 9. R. 2. ca. 2. the tenor whereof followeth in this forme. Also for that where manyvilleins and neises,

ors, come des auters gentes, sibi en spiri-
tuals come temporals,
s'enjuent, deins cities,
villes, & lieux en-
franchise, come en la
citie de Londres, &
autres semblables, &
seignont divers suits
envers leur seigniors,
a cause de eux faire
franks per le respons
de leur seigniors: ac-
corde est et assentus,
que les seigniors, ne
autres, ne soyent my
forbarres de leur
villeines per cause
de leur respons en
ley. Per force de quel
estatute, si ascun vil-
leine voylloit fuer
ascun maner de acti-
on a son use demesne
en ascun county, ou
il est fort a trier en-
vers son seignior, le
seignior, poyt eslyer de
pleader, que le plain-
tife est son villeine, ou
de faire protestation,
que il est son villeine,
& de pleder son auter
matter en barre. Et
si ils sont a issue, &
l'issue soit trove pur le
seignior, dunque le vil-
lein est villein, come il
fuit devant per force
de mesme lestatute.
Mes si le issue soit
trove pur le villeine,
dunque le villeine est
franke; pur ceo que le

aswell of great lords as
of other men, aswell
of spirituall and tem-
porall, flye and go in-
to cities, townes, and
places franchised, as
into the city of Lon-
don and other like
places, and feine di-
vers suits against their
lords, because they
would make them-
selves free by the an-
swer of their lords: it
is accorded and assent-
ed, that lords nor
others shall not be fore-
barred of their villeins
by reason of their an-
swer in law. By force
of which statute, if any
villeine will sue any
manner of action to
his own use in any
countie, where it is
hard to try against his
lord, the lord may
chuse whether he will
plead, that the plain-
tife is his villeine, or
make protestation that
he is his villeine, and
plead his other matter
in bar. And if they be
at issue, and the issue
be found for the lord,
then the villeine is a
villeine, as he was be-
fore by force of the
same statute. But if the
issue be found for the
villeine, then the vil-
leine is free; because
that the lord tooke

upon judgement may be gi-
ven. And as the question be-
twene the parties is two-
fold, so is the triall thereof:
for either it is *questio juris*, *Vide sect. 234.*
(and that shall be tried by the
judges either upon a de-
murrer, special verdict or ex-
ception, for *cuiuslibet sua arte
perito est credendum; Et quod
quisque norit in hoc se exerce-
at*; and it is commonly and
truly said, *ad questionem juris
non respondent juratores*) or it
is *questio facti* (1). And the
triall of the fact is in divers
sorts, whereof a light touch is
given before, *sect. 10.* Of these *Vide sect. 102.*
a triall by xii. men (here in-
tended by Littleton) is the
most frequent and common.
And some few rules of law,
are necessary here to be re-
membred (for the better un-
derstanding of the bookes of
law hereafter) where and
from what place, *viz. de quo* *Vide sect. 234.* more of this mat-
vicinito, out of what neigh-
bourhood the jury shall come,
a necessarie poynt to be
knowne; for if there be a (6. Co. 47. 5. Co. 36. b. Cro.
mis-triall, (that is) if the Cha. 480.)
jury commeth out of a wrong
place, or returned by a wrong
officer and give a verdict,
judgement ought not to be
given upon such a verdict.
[d] Wherein the most general
rule is, that every tryall shall
be out of that towne, pa-
rish, or hamlet, or place
known out of the towne, &c. (2. Rol. Abr. 618. Cro. Jam.
150. 326. 513. 676. Hob. 76.
9. Co. 66. b. 11. Co. 25. b. 6.
Co. 14.)
within the record, within
which the matter of fact is-
suable is alledged, which is
most certaine and neere
thereunto, the inhabitants
whereof may have the better
and more certaine knowledge
of the fact (2). As if the fact
be alledged in *quadam platea
vocat' King-street in civitate
Westm. in com' Midd.* In this
case the visne cannot come out
of platea; because it is neither
town, parish, hamlet, nor
place out of the neighbour-
hood whereof a jury may
come by law. But in this case
it shall not come out of West-
minster, but out of the parish
of St. Margaret, because that
is the most certaine. But
therein

sumed against the child's being the issue of the deceased husband, it seems fair to suppose, that the law was understood, not to be so strict in the time alluded to, whatever that time might be, as indiscriminately to condemn as illegitimate all children not born within it, but rather to consider every excess, unless very extraordinary indeed, as only raising a presumption against them. This construction is clearly most consistent with the terms of the record in question. In the next note, we shall attempt to satisfy the reader, that the rule resulting from it is most conformable to other precedents and authorities, as well as to the reason of the thing.

After the case of Radwell from the record of E. 1. lord Hale gives the four following cases.—Rot. Parl. 9. E. 2. m. 4. Gilbert de Clare comes Glouc. obit 30. Junii 7. E. 2. in parlamento tent. quindena, Hil. 9. E. 2. the sisters and coheirs pray livery. Matilda, quæ fuit uxor comitis, pretends to be big by the earl, which was accordingly found per inquisitionem. The coheirs reply, that, si comitissa prægnans esset, tantum tempus elapsum est, ut secundum cursum pariendi non potest dici imprægnari a comite. Yet they could not obtain livery till Pasch. 10. E. 2. but the question hung in deliberation.—Note 18. R. 2. where a woman in such a case immediately after the death of the first husband took a second husband, and had issue born forty weeks and eleven days after the death of the first husband, and it was held to be the issue of the second husband.—M. 17. Jac. B. R. Allop and Stacey. Andrews dies of the plague. His wife, who was a lewd woman, is delivered of a child forty weeks and ten days after the death of the husband. Yet the child was adjudged legitimate and heir to Andrews; for partus potest protrahi ten days ex accidente.—M. 4. Car. in Cur. Ward. and afterwards P. 5. Car. B. R. Thecar marries a lewd woman, but she doth not cohabit with him, and is suspected of incontinency with Duncomb; Thecar dies; Duncomb within three weeks after the death of Thecar marries her; two hundred and eighty-one days and sixteen hours after his death she is delivered of a son. Here it was agreed, 1. If she had not married Duncomb, without question the issue should not be bastard, but should be adjudged the son of Thecar. 2. No averment shall be received that Thecar did not cohabit with the wife. 3. Though it is possible, that the son might be begotten after the husband's death, yet, being a question of fact, it was tried by a jury, and the son was found to be the issue of Thecar. Hal. MSS.

Lord Hale's case of E. 2. appears very extraordinary, the time from 30. June 7. E. 2. when the earl of Gloucester died, to the quindena of Hilary, or 29. Jan. 9. E. 2. when the livery to his sister was further postponed in parliament, being within one day of a year and seven months; which is a much later date for the delivery of a live child, than the most liberal in their calculations have hitherto assigned. However, on reading the printed copy of the original record, in the rolls of parliament lately published, we find lord Hale's note quite accurate. See Rot. Parl. v. 1. p. 353. As to the case of R. 2. it confirms the doubt we have elsewhere stated of the opinion, that, if a widow marries again and has a child within nine months after the death of the first husband, the child may choose his father; and is an authority for deciding according to the proof of the woman's condition when her first husband died. Ante fo. 8. a. note 7. Terms of the Law, first edit. tit. Bastard, and Cowel Inst. lib. 1. t. 9. Lord Hale's two other cases are reported in several books, Allop and Stacey being in Cro. Jam. 341. Godb. 281. Palm. 9. 1. Ro. Abr. 356. and Thecar's in Cro. Jam. 685. Winch. 71. Litt. Rep. 177.

For the remainder of the notes to 123. b. see 129. a.

(1) See Post. 155. b. 328. a. (2) Both in civil and criminal suits the common law is very nice in requiring every issuable fact to be alledged, not only within a county, but also within a parish, town, or hamlet, or, for want of either of these, some other known place of the same county, not being a hundred, which probably was excluded as too large a division; and if this rule was not observed, it might be pleaded in abatement, or otherwise taken advantage of, by either party, according to the stage of the suit. Cro. Eliz. 260. Thel. Dig. Br. lib. 2. c. 15. to 18. Com. Dig. Abatement H. 13. Pleader C. 20. The necessity of having the county

infant or his property. Lord Coke only takes notice of such an election, where the infant is under fourteen, and as to this omits

(7. Co. 1. 1. Sid. 9. 88. Hob. 89. 1. Sid. 10. 2. Ro. Abr. 609. 1. Roll. Rep. 369. Cro. Eliz. 818.)

[c] 4. E. 3. 30. 8. E. 3. 68. 39. H. 6. 13. Brooke Pleading 61.

[f] 4. E. 4. 41. 5. E. 4. 20. 22. E. 4. 2. 35. H. 6. 30. 22. H. 6. 47. 1. Co. 162. Digges case 11. Co. 25. 6. Co. 14.

(Hob. 190. 2. Rol. Abr. 616.)

[g] 1. E. 3. 8. 7. H. 6. 38.

[h] 22. E. 4. tit. Visne f. 27. 6. H. 7. 3. b. 11. H. 7. 22. b.

E. 4. 3. a. 3. E. 4. 26. 39. H. 6. Treip 93. 4. E. 3. 30.

(Hob. 89. 266. 6. Co. 65. b. 1. Leon. 109. Cro. Car. 17. Cro.

Jac. 302, 303. 308.)

[*] 6. Co. 14. Arundel's case.

[i] 45. E. 2. 5. a. 46. E. 3. 6. &

7. Gernon's case. 18. E. 3. 58.

11. H. 4. 56. b. 57. 17. E. 3.

36. b. 39. Aff. 10. 38. Aff. 30.

35. Aff. 7. (Cro. Jac. 239.)

[k] Mich. 31. & 32. Eliz. Ro.

365. in the King's Bench, inter

Edan & Frankline, adjudge 3.

Mar. Dier 129. 18. Eliz. Dier

353. 17. Eliz. Dier 342.

(1. Rol. Abr. 604. Plowd. 232.

Cro. Jam. 239. 9. Co. 47. a.)

[l] 8. E. 4. 24. 9. H. 6. 46. 47.

21. H. 6. 4. 18. Aff. 7. 30. E. 3.

16. 17. 7. E. 4. 31. 27. H. 8. 30.

11. H. 4. 68.

[m] 15. E. 4. 25. b. 9. H. 6. 46.

26. E. 3. 7. E. 4. 31. 39. E. 3.

16. 17. (Cro. Jac. 134. 1.

Sid. 76. Hob. 54. 66. Noy 144.

2. Rol. Abr. 103.)

[n] 9. H. 6. 46. 39. E. 3. 16, 17.

[o] 10. Co. 54. and the bookes

there cited.

[p] Mich. 21 & 22. Eliz. Dier

367. 5. Co. 36. b. Binham's

case. 39. E. 3. 2. b. 44. E. 3. 6.

11. H. 6. 13. 5. Co. 40. Dor-

ner's case. (5. Co. 36. b. Hob.

5. 1. Sid. 193. 2. Rol. 625. 1. Sid.

339.)

county named is very obvious; as otherwise it could not be known, whether the court had jurisdiction, who was the proper

officer to direct the process of the court to, or whence the jury was to come, and consequently the cause could not go on. Nor

is it difficult to account for stating a particular place in the county. One reason might be, that, if there was no other explana-

tion of the case where the cause of action or ground of defence arose, than by reference to the extensive limits of a county, the

allegation might fail in that certainty so essential to its being either well understood or properly controverted; and the rule, so

far as it may have this foundation, still continues unchanged. But the other and principal reason was, that, if issue was taken

on the fact alleged, it might be tried by a jury of the visne or neighbourhood, which our ancestors conceived to be more likely

to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction. For this

purpose the *venire facias* always directed the sheriff to summon a jury from the neighbourhood of the parish or place, within

which the fact to be tried was alleged; and this was not mere form; for it was the sheriff's duty to attend to the direction; and

if at least four of the hundred, in which the place was situate, were not included in the panel returned by him, it was a good

cause of challenge to the array or whole panel; or if four such persons did not attend to be sworn, the *polls*, or particular jurors,

might be challenged for the same default. Post. 157. a. 48. E. 3. 30. 48. Aff. 5. 7. H. 4. 46. 21. E. 4. 59. b. Nay, so very essential

did the common law deem the having some of the neighbours on the jury, that, if the visne appeared on the record to be from

a wrong place, whether in consequence of the party's alleging the fact in a place not proper for a visne, or of the court's mis-

awarding it, in both cases it was equally a mis-trial, and a good ground for a motion to arrest the judgment or for reverting it

by error. Cro. Eliz. 260. Hob. 5. But thus restricting every visne to a particular part of the county, though well intended, was

followed with great inconveniences. It encouraged the losing party after a trial, to make trivial objections to the visne, in

order to disappoint his adversary of the fruits of a just verdict; and either because the rules for laying the visne were in them-

selves vague, or because they were perverted by an over curious interpretation, such objections not only became very common,

but often succeeded, as appears from the profusion of cases and learning to be met with on the subject in our reports. See Roll.

Abr. and Vin. Abr. tit. Trial. At length the grievance became so intolerable to suitors, that parliament interposed to relieve

them; for which purpose several statutes were made. The 21. Jam. c. 13. gives aid after verdict, where the visne is partly wrong,

that is, where it is awarded out of too many or too few places in the county named. The 16. & 17. Cha. 2. c. 8. goes further;

and cures the defect of the visne wholly, so that the cause was tried by a jury of the proper county, without any regard to the

part of the county from which the jury came. Still, however, either party was at liberty to object to the default of hundredors

at the trial, which was found to be very troublesome on account of the difficulty of always having four jurors so qualified. The

4. & 5. An. c. 16. therefore directs, that every *venire facias* shall be awarded from the body of the county, in which the action is

triable. But these statutes do not extend to indictments or other criminal suits; nor has any act been yet made to include any

such, except the 24. G. 2. c. 18. which only applies to actions on penal statutes. Why a regulation so convenient should be thus

confined principally to civil cases, seems unaccountable. However, though the ancient law continues in force as to trials for

therein also it is to be noted, that if it had been alleged in Kingstreet in the parish of St. Margaret in the county of Middlesex, then should it have come out of Kingstreet, for then should Kingstreet have been esteemed in law a

towne[*e*]; for whensoever a

place is alleged generally in

case it is) it shall be taken for a towne. [f] And albeit *parochia* generally alleged is a place

incertaine, and may (as we see by experience) include divers townes; yet, if a matter be

alleged in *parochia*, it shall be intended in law, that it containeth no more townes than one, un-

less the party doth shew the contrary. [g] But when a parish is alleged within a city, there

without question the visne shall come out of the parish, for that is more certaine then the city.

[h] If a trespassse be alleged in D, and *nul tiel ville* is pleaded, the jury shall come out de

corpore comitatus; but if it be alleged in S and D and *nul tiel ville de D* is pleaded, the jury

shall come out de *vicineto de S*, for that is the more certaine. So if a matter be alleged within

a mannor, the jury shall come de *vicineto manerii*; but if the mannor be alleged within a

towne, it shall come out of the towne, because that is most certaine, for the mannor may ex-

tend into divers townes. And all these points were resolved by all the judges of England upon

conference betweene them in the case of John Arundel esquire indited for the death of William

Parker *.

[i] In a reall action, where the demandant demands land in one county, as heire to his

father, and alleges his birth in another county, if it be denied that he is heire, it shall not be

tryed where the birth was alleged, but where the land lyeth, for there the law presumes it

shall be best knowne who is heire. But if the defendant make himself heire to a woman, for

that is the surer and more certaine side, and the mother is certaine, when perhaps the father is

incertaine, and therefore there it shall be tryed, where the birth is alleged; because they have

more certaine conuance then where the land lyeth. And so it is where generally bastardy is

alleged, the tryall shall be in like case *mutatis mutandis*. [k] If a man plead the king's letters

patents, and the other party plead *non concessit*, it shall not be tryed where the letters patents

bear date, for they cannot be denied, but where the land lyeth.

Every tryall must come out of the neighbourhood of a castle, mannor, town or hamlet, or

place known out of a castle, mannor, town or hamlet, as some forrests and the like, as before

and by the authorities thereupon quoted appeareth.

Every plea concerning the person of the plaintife, &c. shall be tryed where the writ is

brought, as it appeareth before.

When the matter alleged extendeth into a place at the common law, and a place within a

franchise, it shall be tryed at the common law.

[l] In an action against two, the one pleads to the writ, the other to the action, the plea to

the writ shall be first tryed; for, if that be found, all the whole writ shall abate, and make an

end of the businesse.

[m] In a plea personall against divers defendants, the one defendant pleads in barre to par-

cell, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth

to the whole, the plea, that goeth to the the whole, (that is) to both defendants, shall be first

tryed; and of this opinion was Littleton in our bookes, for the tryall of that goeth to the whole;

and the other defendant shall have advantage thereof, for in a personall action the discharge of

one is the discharge of both. As for example, if one of the defendants in trespassse pleade a

release to himselfe, (which in law extends to both) and the other pleads not guilty (which ex-

tends but to himselfe) or if one pleads a plea which excuses himselfe onely, and the other plead

another plea which goeth to the whole, the plea, which goeth to the whole, shall be first

tryed; for, if that be found, it maketh an end of all, and the other defendant shall take ad-

vantage hereof, because the discharge of one is the discharge of both. But in a plea reall it is

otherwise; for every tenant may lose his part of the lands. [n] As if a *præcipe* be brought as

heire to his father against two, and one plead a plea which extendeth but to himselfe, and the

other pleads a plea which extends to both, as bastardy in the demandant, and it is found for

him, yet the other issue shall be tryed, for he shall not take advantage of the plea of the other,

because one joyntenant may lose his part by his misplea. [o] But where an issue is joyned for

part, and a demurrer for the residue, the court may direct the tryall of the issue, or judge the

demurrer first at their pleasure.

[p] If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the

visne commeth out of a wrong place, yet if it be *per assensum partium*, and so entered of record,

it

seignior ne prist al not at the beginning
commencement pur son for his plee, that the
plee, que le villeine villeine was his vil-
fuit son villeine, mes leine, but tooke this
ceo prist per protesta- by protestation, &c.
tion, &c.

place is alleged generally in pleading (without some addition to declare the contrary, as in this

case it is) it shall be taken for a towne. [f] And albeit *parochia* generally alleged is a place

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cell, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth

to the whole, the plea, that goeth to the the whole, (that is) to both defendants, shall be first

tryed; and of this opinion was Littleton in our bookes, for the tryall of that goeth to the whole;

and the other defendant shall have advantage thereof, for in a personall action the discharge of

one is the discharge of both. As for example, if one of the defendants in trespassse pleade a

release to himselfe, (which in law extends to both) and the other pleads not guilty (which ex-

tends but to himselfe) or if one pleads a plea which excuses himselfe onely, and the other plead

another plea which goeth to the whole, the plea, which goeth to the whole, shall be first

tryed; for, if that be found, it maketh an end of all, and the other defendant shall take ad-

vantage hereof, because the discharge of one is the discharge of both. But in a plea reall it is

otherwise; for every tenant may lose his part of the lands. [n] As if a *præcipe* be brought as

heire to his father against two, and one plead a plea which extendeth but to himselfe, and the

other pleads a plea which extends to both, as bastardy in the demandant, and it is found for

him, yet the other issue shall be tryed, for he shall not take advantage of the plea of the other,

because one joyntenant may lose his part by his misplea. [o] But where an issue is joyned for

part, and a demurrer for the residue, the court may direct the tryall of the issue, or judge the

demurrer first at their pleasure.

[p] If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the

visne commeth out of a wrong place, yet if it be *per assensum partium*, and so entered of record,

it

to state how and before whom it should be made, nor have we yet met with any prior or cotemporary writer who, supplies the defect

it shall stand; *for omnis consensu tollit errorem*. (1) And thus much of these excellent points of learning: and if you desire to know the institution and right use of this trial by twelve men, and of the antiquities thereof, and more of this matter, read the 234. section hereafter, which is worthy of your observation.

Esstatute. Or statute. This cometh of the Latine word *statutum*, which is taken for an act of parliament made by the king, the lords and commons, and is divided into two branches generall and speciall. This statute here mentioned is a generall statute, and darkely and obscurely penned.

Et filis sont a issue. [9] Issue, *exitus*, a single, certaine, and materiall point issuing out of the allegations or pleas of the plaintife and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold, a speciall issue, as here in the case of Littleton; or generall, as in trespassse, not guilty, in assise, *nil tort nil disseisin*, &c. And as an issue naturall cometh of two severall persons, so an issue legal issueth out of two severall allegations of advers parties.

And to make our bookes more easie to be understood concerning this point, it is good to set downe some necessary rules (among many other) concerning joyning of issues. An issue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of T; the defendant pleaderth, that he was never his receiver in manner and forme, &c. this shall referre to the count, so as he cannot be charged but by the receipt of the hands of T.

[r] A speciall issue must be taken in one certain materiall point, which may be best understood, and best tried.

[s] An issue shall not be taken upon a negative pregnant, which implyeth another sufficient matter, but upon that, which is single and simple. As *ne dona pas per le fait* imply a gift by parol; therefore the issue must be *de dona pas modo & forma*.

[t] An issue joyned upon an *absque hoc*, &c. ought to have an affirmative after it. Two affirmatives shall not make an issue unlesse it be, lest the issue should not be tried.

[u] Some issues be good upon matter affirmative and negative, albeit the affirmative and negative be not in precise words. As in debt for rent upon a lease for yeares, the defendant pleades, that the plaintife had nothing at the time of the lease made; the plaintife replyeth that he was seised in fee, &c. this is a good issue.

[w] Where the issue is joyned of the part of the defendant, the entry is *et de hoc ponit se super patriam*; but if it be of part of the plaintife, the entry is *et hoc petit quod inquiratur per patriam*.

[x] There be some negative pleas, that be issues of themselves, whereunto the demandant, or plaintife, cannot reply, no more than to a generall issue, which is, *et prædictus A. similiter*. As if the tenant do vouch, and the demandant counterplead that the vouchee or any of his auncestors had any thing, &c. whereof he might make a feoffment, he shall conclude, *et hoc petit quod inquiratur per patriam, & prædictus tenens similiter*. So in a fine pleaded by the tenant, &c. the demandant may say, *quod partes finis nihil habuerunt, & hoc petit quod inquiratur per patriam, & prædictus tenens similiter*. And so in a writ of dower, the tenant pleades *unques seise que dower*, he shall conclude, *et de hoc ponit se super patriam, et prædictus petens similiter*; and so in many other cases; and of this opinion was Littleton in our bookes.

[y] A man leaves his wife enseint with a child, issue shall not be taken, that she was not enseint by her husband on the day of his death, for *filiatio non potest probari*; but the issue must be, whether she was enseint the day of his death (2).

[z] A protestation availeth not the partie that taketh it, if the issue be found against him; and therefore if the issue be found for the villeine, he is enfranchised for ever. And yet in some special case, albeit the issue be found against him that maketh the protestation, yet he shall take benefit by his protestation. (*) As if a man entreteth into warrantie, and taketh by protestation the value of the land, albeit the plea be found against him, yet the protestation shall serve him for the value.

Sect. 194.

ITEM le seignior ne poet mayhemer son villeine; *car fil maihema son villein*, mayme his villeine,

ALSO the lord *mayhemer*, [a] or *mebaigner*, a French word, of which cometh *mayhim*, *mabemium* (*id est*) *membri mutilatio*, and

[a] *Stamf. lib. 1. ca. 42. Glab. vil. lib. 14. ca. 7. Bract. lib. 3. fol. 144. 145. Brit. cap. 25. fol. 48. 49. Flet. lib. 1. ca. 38. (Post. 288. 1. Sid. 215.)*

serves to create delay and embarrassment in the distribution of criminal justice, whenever an accused person may chuse captiously to exert his right of challenging for default of hundredors.

(1) The cases to this point disagree; but the most modern are with lord Coke. See Vin. Abr. Trial S. a. 2.—(2) The case cited from the Year Book of 41. E. 3. is a direct authority to this purpose. However it may be doubted, whether the doctrine continues to be law. At least it fails in principle, if it is founded on the notion that the presumption of the husband's being the father of every child, the wife bears or conceives during the marriage, cannot be repelled by evidence to the contrary. Such a position indeed is asserted more than once by lord Coke in the present work, and may be met with in other books. Post. 244. a. 373. a. Vin. Abr. Bastard A. 2. & B. But it never was a universal rule, lord Coke and all the authorities agreeing, that, if the husband is beyond sea during the whole time of the wife's going with child, the issue is a bastard. Nor is the position in any degree true at present; for ever since Pendrell's case in the 5. G. 2. it has been settled, that not only proof of being out of the kingdom, but also every other kind of evidence, tending to prove the impossibility or even improbability of the husband's being the father, is admissible. 1. Blackst. Comment. 5. edit. 457. 2. Stra. 925. 3. P. Wms. 365. Bott's Poor Laws, 2d. ed. 105. Our books do not state on what grounds Pendrell's case was determined. But very ancient authorities are not wanting to justify overruling the doctrine, which prevailed in lord Coke's time. Bracton taking notice of the presumption, that marriage proves legitimacy, adds, *et semper statitur huic presumptioni, donec probetur contrarium, ut, ecce, maritus probatur non concubuisse aliquamdiu cum uxore, infirmitate vel alia causa impeditus, vel erat in ea in valetudine ut generare non possit*. Bract. fo. 6. a. In another place the same author is still more explicit, for he states it to be a violent presumption against the child's legitimacy, if the husband is proved, *propter aliquam infirmitatem, vel frigiditatem, vel aliam impotentiam coeundi, per multum tempus non concubuisse cum uxore, or si probetur, quod extra regnum vel provinciam per biennium & ultra longe extiterit, quod vehementer presumi possit, quod ad uxorem accessum habere non potuit*. Bract. fo. 63. b. There are also other passages to a like effect both in Bracton and Fleta. Bract. fo. 70. b. 278. a. Flet. lib. 1. c. 15. It is worthy remark too, that not only these limitations of the rule of *pater est quem nuptia demonstrant*, but even the words of them are in a great degree borrowed from the text of Justinian. See Dig. lib. 1. tit. 6. l. 6. But this by no means ought to lessen their value with our common lawyers. On the contrary, it should be deemed an additional reason for deferring to them; because the trial of general bastardy belongs to the ecclesiastical courts, and these, in this instance, as well as in others, are much swayed by the authority of the Roman law. See further on this subject Godolph. Repertor. Canon. 477. Bryd. Law of Bastard. 83. Voet ad Pandect. lib. 1. tit. 6. sect. 6. Ayl. Parerg. tit. Bastardy, and same title in the Abridgments.

Notes to fol. 121. b.

(1) Or instead of *et in L. and M.*—(2) But by the 17. E. 2. *de prerogativa regis*, the king's grant of a manor will not pass an advowson appendant without express mention of it. Yet there are some cases, which have been deemed not within the reason of the statute; such as the crown's restitution of lands to wards at their full age and to the heirs of idiots, or of temporalities to new bishops. Staundf. Prærog. 43. a. Doder. Advowls. 36. Even words of *reservatio* have been held sufficient; as where the king granted a manor with all its appurtenances, as fully as the same came to and were possessed by the crown, and an advowson was appendant to the manor. Adjudged in Whistler's case, 10. Co. 63. 2.—It is agreed in our old books, that before the statute *de prerogativa regis*, the king's grant of a manor would pass an advowson appendant, without naming it, or so much as using the word *appurtenances*. Staundf. Prærog. 43. a. 10. Co. 64. a. But in the History of Westmorland, lately published by Mr. Nichol-

son

defect. Ante 87. b. As to a guardian after fourteen, it appears from the ending of guardianship in socage at that age, as if the common

Mirror cap. 1. sect. 9.

Vide sect. 1. (4. Co. 39. b.)

[b] Lamb. Just. of Peace.

[c] Vide 1. H. 4. 6. b.

(4. Co. 43.)

[d] Fleta lib. 1. cap. 40. Britt. cap. 25. Bract. 145. Mirror cap. 3.

[e] Regist. Judic. 25. 8. Co. 59. Beecher's case. (8. Co. 38.)

[f] Vide sect. 74. 174. 441. (11. Co. 42.)

[g] 8. Co. 59. Beecher's case. F. N. B. 76.

(1. Ro. Abr. 238.)

[h] Glanvil. lib. 9. cap. 11. Magna Charta cap. 14. Fleta lib. 2. cap. 43. & 60. & lib. 1. cap. 43. Bract. lib. 3. fol. 116.

[i] 22. E. 3. 1. & 2. 14. E. 3. Amerciam. 16. 8. R. 2. ibid. 26. &c.

[k] Pl. Com. 401. Cole's case. 37. H. 6. 21. 5. Co. 49. Vaughan's case.

[l] Vaughan's case ubi supra. Beecher's case ubi supra. (1. Roll. Rep. 11.)

son and Dr. Burn, the record of a case of *darrein presentment* of the 15. E. 1. is cited, in which the court adjudged, that a grant of the manor of Burgh, with its *appurtenances*, being from the crown, would not pass the advowson of the chapel though appendant to the manor; and thence the 17. E. 2. is concluded to be only declaratory of the common law. See vol. i. p. 564, 565. The case appealed to seems full in point. But then there is a strong current of authorities the other way; for the case of 43. E. 3. 23. is to the contrary, and so are the instances of things appendant not within the statute. Staundf. Prærog. 43. a. 10. Co. 64. a.—(3) *Ou for et in L. and M.*—(4) See note 1. to 122. a.—(5) Acc. 1. Ventr. 407.—(6) *Adjunctum* is rather a term of the logicians. The *accessorium* of the civil law answers best to our terms of *regardant*, *appendant*, *appurtenant*, and *incident*. How these differ from that, which is *part* or *parcel* of a thing, is explained in judge Doderidge's Treatise on Advowsons. See p. 38.—(7) This position is not universally true. It sometimes fails as to things appurtenant. *Return of writs or a let* may be appurtenant to an *hundred*; so may *waif and stray* to a *leet*; and yet in these instances both subjects are *incorporeal*. Ante 121. a. 8. H. 7. 1. a. 3. Rast. Entr. 128. The true test seems to be the propriety of relation between the *principal* and the *adjunct*; which may be found out, by considering, whether they so agree in nature and quality, as to be capable of union without any incongruity. See 1. Ventr. 386.

Notes to 122. a.

(1) Acc. Dy. 70. b. and two adjudged cases in marg. of ed. 1688. Acc. also by Dyer in 2. Leon. 222. The same point was agitated in *Long and Heming*, 31. Eliz. of which case the reports differ so much, that it is difficult to say, what was decided by the court. But it rather seems to have ended with an opinion consonant to lord Coke's. Sav. 103. Cro. Eliz. 209. 1. Leon. 207. 4. Leon. 216. Doder. Advowf. 42.—(2) This may at first seem to clash with the doctrine before, that *appendants are ever by prescription*. Ante 121. b. n. 4. But they may be reconciled; for, as appendancy cannot be without prescription, the former always implies the latter; and therefore if one pleads common appendant, it is unnecessary to add the usual form of prescribing.—(3) See Fulb. Prepar. 68. b. and 1. Saund. 351.—(4) But not if there is a *grant* to shew; common appurtenant being claimable by *grant*, as well as by *prescription*. Adj. Cro. Cha. 483.—(5) It has been denied, that common in *gross* can be *sans nombre*. 1. Saund. 346. But see Fulb. Prepar. 70. a. and the books there cited.—(6) For the cases about *sola vestura* see ante 4. b. n. 1. As to *several pastura*, whether a prescription for it can be made against the owner of the soil, has been the subject of argument in three different cases since lord Coke's time. In the first the court of Common Pleas was equally divided. North and Cox, Mich. 20. Cha. 2. Vaugh. 251. 1. Lev. 253. In the second the court of King's Bench inclined to think such a prescription good; but the demurrer, on which the point arose, being over-ruled by consent, in order to try the fact, and a verdict being found against it, a decision of the question of law became unnecessary. Potter and North, Easter 21. Cha. 2. 1. Ventr. 383. 1. Saund. 347. 1. Lev. 268. But in the third case, which was on a motion to arrest judgment, the whole court of King's Bench adjudged for the prescription. Hopkins and Robinson, East. 23. Cha. 2. Pollexf. 13. 1. Mod. 74. a. Saund. 314. 2. Leon. 2. Since this last case lord Coke's doctrine seems to have been generally acquiesced in.—(7) According to this passage, ownership of the soil is not necessarily included in a *several fishery*, and *common of fishery* and *free fishery* are the same thing. But one, whose works will be admired, as long as a good taste for literary compositions or gratitude for the pleasure and instruction derived from them shall

Notes to 122. b. are postponed to 127. b.

common law deemed a guardian afterwards unnecessary. However, since the 12. of Cha. 2. enabling the father to appoint a guardian

and *membrum est pars corporis habens destinatum operationem in corpore*. Mayhemum vero dici poterit, ubi aliquis in aliqua parte sui corporis effectus sit inutilis ad pugnandum. And the law hath so appropriated this word *mayhem*, which our author here useth, to this offence, as *mayhemavit* cannot be expressed by any other word, as, *mutavit*, *truncavit*, or *datruncavit*, or the like.

Il ferra indite, or rather *endite*, and so is the original; for it commeth of the French word *enditer*, and signifieth in law an accusation found by an enquest of 12 or more upon their oath; and the accusation is called *indictamentum*. And, as the appeale is ever the suit of the partie, so the inditement is alwaies the suite of the king, and as it were his declaration.

[b] Some derive it from the Greeke word *indiximus* to accuse.

[c] *Navera &c. appeale de mayhem*. Be-

cause in that appeale he shall recover but damages, which the lord after execution might take againe, and so the judgement *inutile* and *illusory*, and *sapiens incipit à fine*. And the law never giveth an action, where the end of it can bring no profit or benefit to the plaintife. But here it is to be observed, that, albeit the party grieved can have no action for the mayhem, yet at the king's suite he shall be punished therefore, for the reason hereafter expressed in this section. [d] And in ancient time there were appeales *de plagis & de imprisonment*; but they are out of use and turned to actions of trespass.

Fine, finis. Here fine signifieth a pecuniarie punishment for an offence, or a contempt committed against the king, and regularly to it imprisonment appertaineth. And it is called *finis*; because it is an end for that offence. [e] And in this case a man is said *facere finem de transgressionem*, &c. *cum rege*, to make an end, or fine with the king for such a transgression. It is also taken for a summe given by the tenant to the lord for concord, and an end to be made.

[f] It is also taken for the highest and best assurance of lands, &c.

Here it is good to see, what a fine differeth from an amerciamment. [g] Amerciamment in Latine is called *miseriordia*; for that it ought to be assessed mercifully. And this ought to be moderated by assereement of his equals, or else a writ *de moderata misericordia* doth lie. And thereof Glanvill saith thus. [h] *Est autem misericordia domini regis, qua quis per juramentum legalium hominum de vicineto catenus amercandus est, ne aliquid de suo honorabili contentamento amittat*.

[i] The cause of an amerciamment in plea reall, personall or mixt (where the king is to have no fine) is, for that the tenant or defendant ought to render the demand (as he is commanded by the king's writ) the first day: which, if he do, he shall not be amerced. So as for the delay, that the tenant or defendant doth use, he shall be amerced. [k] And albeit the amerciamment cannot be imposed, nor the king fully intitled thereunto, untill judgement be given, because by the judgement the wrong is discerned; yet a pardon before judgement, after judgement given, shall discharge the party, because the originall cause, *viz.* the delay, &c. is pardoned. [l] What then if a *præcipe* be brought against an infant, and, hanging the plea, he commeth of full age?

He

he shall be amerced for the delay after his full age. So likewise if the demandant or plaintiff be nonsuit or judgement given against him, hee shall be likewise amerced *pro falso clamore*. (5. Co. 49. a. Cro. Cha. 410. S. Co. 62. b.)

[m] And for the payment of this amercement the defendant or plaintiffe, &c. shall finde pledges; and those demandants or plaintiffes, that shall find no pledges, (as the king, the queene, an infant, &c.) shall not be amerced. And therefore when such are demandant or plaintiffe, the writ shall not say, *Si rex, &c. fecerit te secum de clamore suo prosiquendo*.

[n] If a writ doe abate by the act of the demandant or plaintiffe, or for matter of forme, the demandant or plaintiffe shall be amerced; but if it abate by the act of God, as by the death of one, where there is two or the like, there shall be no amercement. And to an amercement, imprisonment belongeth not, as it doth to a fine or ranfome. If you desire to read more of fines and amercements, Vide 8. Co. 38. 39. &c. Grellye's case. & 11. Co. 43. 44. Godfrey's case (1).

[o] It is to be knowne that *wit*, *wit*, is an old Saxon word, and signifieth an amercement, as *fledwite* an amercement for fleeing or being a fugitive, and so is *flemiswite*, *blockwite* an amercement for drawing of blood, *ferdwite* concerning warfare, and so *lethberwite*, *chilkwite*, *swardwite*, and the like. Sometime it signifieth forfeiture, sometime freedom, or acquittall.

[p] And *bote* is also an ancient Saxon word, and sometime signifieth amercement, or compensation, as *theftbote*, *manbote*; or freedome from the same, as *brigbote*, *castlebote*, *burghbote*.

Wera or *were* [q] sometime signifieth amercement or compensation, but properly *Wera Anglice idem est in Saxonis lingua viz. pretium vite hominis appetitum*; which and the like words you shall often reade in ancient charters.

Ranfome. [r] *Redemptio* is here taken for a grand summe of money for redeeming of a great delinquent from some heynous crime, who is to be captivate in prison untill he payeth it. Some hold it to amount to his whole estate, and others hold that ranfome is a treble fine. [s] But in legall understanding a fine and ranfome are all one; for, upon the statute of Merlebridge, cap. 3. upon these words *Non ideo puniatur dominus per redemptionem*, the tenant shall not have (where the lord distraineth within his fee where nothing is behind) an action of trespass *quare vi & armis* against his lord; for therein the lord should be punished by redemption, that is, by fine, and in that action the fine is very small. And this is manifest by many authorities in all succession of ages: and this appeareth by our author in this place, for he saith, *Il ferra pur ceo un grievous fine & ranfome*, where fine and ranfome must of necessity, in his opinion, be taken for all one; for if the fine and ranfome were divers, then should the party, that mahemed the villeine, pay two summes, one for a fine, and another for a ranfome, which never was done. And aptly a redemption and a fine is taken to be all one; for, by the payment of the fine, he redeemeth himself from imprisonment, that attendeth the fine, and then there is an end of the businesse.

It signifieth properly a summe of money paid for the redemption of a captive, and is compounded of *re* and *emo*, that is to redeeme or buy again. And it is to be knowne, that [u] by the ancient law of England, if the defendant in an appeale of mayhem had been found guilty, the judgement against the defendant had beene, that he should lose the like member, that the plaintiffe lost by his means; as if the plaintiffe had lost an hand, the defendant also should lose one, & sic de ceteris, in respect whereof the writ saith, [w] *felonice mahemavit*, for that the defendant should lose a member.

Alwaies at the common law, when the defendant should lose life or member, the writ saith *felonice*, &c. And now albeit the law be changed (for at this day, the plaintiffe shall, as our author saith, recover but damages) yet the writ of appeale saith still *felonice*.

Note the life and members of every subject are under the safeguard and protection of the king, for, as Bracton [x] saith, *Vita & membra sunt in potestate regis*. And therewith agreeth a notable record, Pasch. 19. E. 1. coram rege Rot. 36. Northt. *vita & membra sunt in manu regis*, to the end that they may serve the king and their countrie, when occasion shall be offered. Nay, the lord of the villeine, for the cause aforesaid, cannot mayheme the villeine, but the king shall punish him for mayheming of his subject (for that hereby he hath disabled him to do the king service) by fine, ranfome, and imprisonment untill the fine and ranfome be paid. So as there is a manifest diversity between a ranfome and an amercement; for ranfome is ever when the law inflicted a corporal punishment by imprisonment, (and so is also a fine) but otherwise it is of an amercement, as hath bin said. And [y] ancients have said, that *ranfome nest forfque redemption de paine corporel per fine des deniers*. This offence of mayhem is under all felonies deserving death, and above all other inferior offences; so as it may be truly said of it, that it is, *Inter crimina majora minimum, & inter minora maximum* (2). And in my circuit in anno 11. Jacobi regis, in the county of Leicester, one Wright, a young strong and lustie

rogue, shall have any influence, gives a very opposite explanation; for, according to him, ownership of soil is essential to a several fishery; and a free fishery differs both from several fishery and common of fishery, from the former by being confined to a public river and not necessarily comprehending the soil, from the latter by being exclusive. 2. Blackst. Com. 8. ed. 39. But we doubt, whether this distinction may not be in a great degree questionable.—1. In respect to a several fishery, where is the inconsistency in granting the sole right of fishing with a reservation of the soil and its other profits? Bracton expressly takes notice of such a grant; for his words are, that one may *servitutem imponere fundo suo, quod quis possit piscari cum eo, et ita in communi, vel quod alius per se ex toto*. Bract. fo. 208. b. There are also numerous other authorities for it; the old books of entries agreeing, that one may prescribe for a several fishery against the owner of the soil, to which should be added the three cases of Elizabeth cited by lord Coke. See Lib. Intrat. 162. b. 163. a. Rast. Entr. 597. b. and the books cited under the letter d in fol. 4. b. and under m here, and the cases referred to under the * on the other side. Nor do we understand, why a several piscary should not exist without the soil, as well as a several piscary, as to which latter we have already shewn the doctrine to be settled. Supra note 6. The chief reasons, which occur against lord Coke, seem to be these.—Several writs, never applicable except to the soil, lie for a piscary; such as a *præcipe quod reddat, monstraverunt de rationabilibus divisis, and trespass*, which latter writ is particularly insisted upon by lord chief justice Holt. Dav. 55. b. Hugh. Comm. Orig. Wr. 11. W. Jo. 440. 1. Ventr. 122. 2. Salk. 637. Skinn. 677. *Suum liberum tenementum* is a good plea to trespass for fishing in a several piscary. 17. E. 4. 6. 18. E. 4. 10. H. 7. 24. 26. 28. The soil will pass, as it is said, by the grant of a piscary. Plowd. 154.—But all these objections may be repelled.—The writs relied on will not always lie for a piscary. Thus if a *præcipe quod reddat* is brought of a piscary in the water of another person, the writ is bad, and a *quod permittat* is the proper remedy. Fitz. Abr. Briefe 861. F. N. B. 23. i. and note b. of the 4to. ed. Besides, in the cases of actions for trespass in a several piscary, or at least in some of them, the writ seems in effect to state a several piscary in the plaintiff's own soil, which therefore proves nothing as to the sense of several piscary without further explanation. Reg. Br. Orig. 95. b. Carth. 285. Skin. 677. The plea *liberum tenementum* may be replied to by prescribing for a several piscary. See the books before cited as to such a prescription. Though the grant of a piscary generally may, perhaps, pass the soil, yet it will not, if there are any words to denote a different intention; as where one seized of a river grants a several fishery in it, which is the case put by lord Coke in another place; and much less will the soil pass, when there is an express reservation of it. Ante 4. b. & n. 2. there.—Hence, as it should seem, the arguments are short of the purpose; for at the utmost they only prove, that a several piscary is presumed to comprehend the soil, till the contrary appears, which is perfectly consistent with lord Coke's position, that they may be in different persons, and indeed

For notes to this side of fol. 127. see 127. b.

guardian to his children till twenty-one, it has been usual for want of such a guardian to allow the infant to elect one for himself; and according to one book, this practice seems to have prevailed in some degree before the Restoration. Phil. Tenend. non Tollend. 199. Such election is said to be frequently made before a judge on the circuit. 1. Vef. 375. But we do not conceive this form to be essential. The last lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for some special purposes relative to his proprietary government of Maryland, named a guardian

rogue, to make himselfe impotent, thereby to have the more colour to begge or to be relieved without putting himselfe to any labour, caused his companion to strike off his left hand; and both of them were indited, fined, and ransomed therefore, and that by the opinion of the rest of the justices for the cause aforesaid.

Voyde, &c. Here by (&c.) is implied a maxime in law, *quod inutilis labor & sine fructu non est effectus legis*. And againe, *Non licet, quod dispendio licet*. And *sapiens incipit à fine*, and *lex non præcipit inutilia*. [z] Therefore the law forbiddeth such recoveries, whose ends are vaine, chargeable, and unprofitable.

Section 195.

DEmaundant, *petens*, is hee which is actor in a reall action, because hee demandeth lands, &c. And *plaintife, querens* in actions personals and mixt, *quia queritur de injuria, &c.* Tenant, *tenens* in reall actions, and *defendant, defendens* in actions personall and mixt.

Defence. (2) Cometh of the word *defendo*, so called of the manner of the pleading, *viz. prædict. A. B. defendit vim & injuriam, &c.*

For example, in a personall action brought by A. B. against C. D. the defence is, *& prædictus C. D. defendit vim & injuriam quando, &c. & damna, & quicquid quod ipse defendere debet, &c.*

In this defence there be three parts to be considered. First, when he defendeth

the wrong and the force, this hath a double effect, viz. to make himselfe partie to the matter, and this is the reason, that the defendant in this and the like actions can plead no plea at all, before he makes himselfe partie by this part of the defence, as it appeareth here by Littleton, that [a] if the defendant will plead in disability of the person of the plaintiffe, he must first make himselfe partie by this first part of the defence. Neither can he plead to the jurisdiction of the court without this part of the defence (3). Secondly [b] by the defence of the damages, he affirmeth that the plaintiffe is able to sue, and (upon just cause) to recover damages. (4) Thirdly, and by the last part, viz. and all that which he ought defend, when and where he ought, he affirmeth the jurisdiction of the court, *& sic de similibus*. And of such necessitie it is for the tenant or defendant to make a lawfull defence, as [c] albeit he appeareth and pleads a sufficient barre without making defence, yet judgement shall be given against him.

[d] If villenage be pleaded by the lord in an action reall, mixt or personal, and it is found that he is no villaine, the bringing of a writ of error is no enfranchisement; because thereby he is to defeat the former judgement; and if, in the mean time, the plaintiffe or demandant bring an action against the lord, he need make no protestation, so long as the record remains in force, for at that time he is free, but the lord shall be restored to all by a writ of error.

Sect. 196.

[e] Bract. lib. 5 fol. 421. Bait. ton. cap. 49. fol. 125. Minor. cap. 2. Sect. 18.

UN est lou vil-
leine suist acti-
on, &c. Littleton here

ITEM 6 maners
de homes y sont,
(5) queux, s'ils suont ac-

ALSO there are fixe
manner of men, who,
if they sue judgement

indeed appears to us the true doctrine on the subject.—2. Both parts of the description of a *free fishery* seem disputable. Though, for the sake of distinction, it might be more convenient to appropriate *free fishery* to the franchise of fishing in public rivers by derivation from the crown; and though in other countries, it may be so considered; yet, from the language of our books, it seems, as if in our law practice had extended this kind of fishery to all streams whether *private* or *public*, neither the Register, nor other books, professing any discrimination. Ro. 95 b. Fitzh. N. B. 88. Fitzh. Abr. Aff. 222. 4. E. 4. 28. 17. E. 4. 6. b. 7. a. 7. H. 7. 13. b. Cro. Cha. 554. 1. Ventr. 122. 3. Mod. 97. Carth. 285. Skinn. 677. Again, it is true, that in one case the court held *free fishery* to import an *exclusive* right equally with *several* fishery, chiefly relying on the writs in the Reg. 95. b. and the 41. E. 3. 24. But then this was only the opinion of two judges against one, who strenuously insisted, that the word *libera*, *ex in termini*, implied *common*, and that many judgments and precedents were founded on lord Coke's so construing it. 1 Salk. 637. Carth. 285. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question. See *Upton and Darwkins* 3. Mod. 9. and *Peake and Tucker* cited in Carth. 286. in marg. We may add to this the three cases cited by lord Coke as of his own time; and that there are passages in other books, which favour his distinction. See Cro. Cha. 554. 17. E. 4. 6. b. 7. a. 7. H. 7. 13. b.—These remarks on *several* and *free fishery* may serve the student as a notice of the doubts on the subject, and also assist in any future discussion for removing them; which, in truth, is the whole scope of the annotation.

(1) It should be *full*.—(2) It has been well observed, that *defence*, as applied in our law pleadings, means, not a *justification*, which is the ordinary signification, but a *denial*. 3. Blackst. Comm. 8th. ed. 296. Had this occurred to the author of the book on real actions, he would not have been at a loss for the reason of the tenant's defending the demandant's right in a writ of right. Booth on Real Actions 112.—(3) Held *contra* by three judges against Holt chief justice. Carth. 220.—(4) Adjudged Acc. on Demurrer, Carth. 229.—(5) In L. & M.—Roh.—P.—& Red. the reading is *contre queux*.

Notes to 127. a.

(1) In very ancient times amercements were a considerable object in our law, as appears by the Great Charter's prohibiting their exorbitancy, and the writ of *moderata misericordia* for relieving against excessive amercements in courts not being of record. F. N. B. 75. a. But so far as regards amercements on judgments in civil suits in the king's courts of record, they have long been *mere form*. Yet in lord Coke's time it was error to omit the entry of them. 5. Co. 49. a. Now indeed by the 16. & 17. Ch. 2. c. 8. such an error is amendable.—(2) Since lord Coke's time, *premeditated* maiming, accompanied with *laying in wait*, has been made a capital felony. See 22. & 23. Ch. 2. c. 1. commonly titled the *Coventry* act.

Notes to 122. b.

(1) See ante 117. b. n. 3.—(2) This replication was given by the 37. E. 3. c. 16. before which statute the plea of being a villein to a stranger to the writ could not be denied.—(3) *Et nief* in L. & M.—& Roh.—(4) See ante 68. b. n. 1. 2. to which add Post. 172. b. Spelm. Gloss. voc. *fidelitas* 2. Init. 73. Britt. cap. 29. Cow. Inst. 1. 2. t. 3. f. 14. Flet. 1. 2. c. 52. l. 3. c. 16. Mirr. c. 3. sect. 35. 7. Co. 6. b. 7. a. Calvin's case 1 yrr. Biblioth. Polit. 4th. ed. 907. Ellesmere's argument in Calvin's case 76.

a guardian by deed. This mode was adopted by the advice of two eminent barristers; for though one of them at first doubted, whether

tion, judgement poit
estre demand, sils fer-
ront respondus, &c.
Un est, lou villeine
suist action envers son
seignior, come en le
cas avantdit.

may be demanded, if
they shall be answered,
&c. One is, where a
villeine sueth an action
against his lord, as in
the case aforesaid.

rehearseth six kind of disabi-
lities of the person, disabling
him to sue any action reall,
personall, or mixt.

Sils ferront respon-

us. This is the legall (Post. 352. b.)
conclusion of the plea, when
the plea is in disability of the
person. And of the verbe re-
spondere came *responsalis* often

used in the ancient authors of the law. [f] *Responsalis* was he, that was appointed by the
tenant or defendant, in case of extremity and necessity, to alleage the cause of the parties
absence, and to certify the court upon what tryall he will put himselfe, viz. the combat or
the country. So as his power was more than the essoinor, which casteth an essoine only
to excuse the absence of the party, as an estranger, which casteth a protection, doth. For
by the common law, the plaintife or defendant, demandant, or tenant, could not appeare by
attorne without the king's special warrant by writ or letters patent, but ought to follow
his suite in his owne proper person (by reason whereof there were but few suites.) [g] *Abu-*
son est a retener attorney sans breve de la chancerie. And therefore Bracton saith truly, [h] *Abu-*
attornatus hac omnia facere potest (that is, plead all manner of pleas). *Est igitur magna dif-*
ferentia inter attornatum & responsalem. So as the statutes, that give the making of attorneyes,
have worne out *responsales*. Now what manner of men attorneyes ought to be, or rather
what they ought not to be, heare what antiquity hath said, [i] *attorneyes poient estre tous*
ceux, aux queux ley voile suffer. Feme ne poient estre attorneyes, ne enfans, ne serfs, ne nul que
est en garde ou autrement fait de foy, ne nul crimineux, ne nul essoine, ne nul que n'est a le foy le
roy, ne nul que ne poest estre counteur, &c.

Section 197.

LE 2. est, lou un
home est utlage
sur action de det, ou
trespas, ou sur au-
tre action, ou indiet-
ment, le tenant, ou
defendant, poit mon-
strer tout le matter de
record, & lutlagarie,
& demaunder judge-
ment, sil serra respon-
due; pur ceo que il est
hors de la ley de suer
ascun action durant
le temps que il soit
utlage.

THE 2. is, where
a man is outlawed
upon an action of debt
or trespass, or upon
any other action or
indictment, the tenant,
or the defendant may
shew all the matter
of record, and the out-
lawry, and demand
judgement if he shall
be answered; because
he is out of the law
to sue an action during
the time that he is out-
lawed.

LE 2. est [k] lou un
home est utlage,
&c. But these generall

words receive a distinction,
viz. [l] if an executor or an
administrator sueth any ac-
tion, utlary in the plain-
tife shall not disable him:
because the suit is *in auter*
droit, that is, in the right of
the testator, and not in his
owne right. And for the same
reason, [m] a maior and
communalty shall have an
action, though the maior be
outlawed. [n] In a writ of
error to reverse an utlary,
utlawry in that suit, or at any
strangers suite, shall not dis-
able the plaintife, because if he
in that action should be dis-
abled, if he were outlawed at

[k] Bracton. l. b. 5. fol. 421.
Britton ca. 22. fol. 39. Mirr. ca.
3. de exceptions a provors ca. 4.
defaults punishable.

[l] 21. E. 4. 49. b. 21. H. 6.
30. b. 14. H. 6. 15.

[m] 12 E. 4. fol. 12.

[n] 7. H. 4. 40.

[o] 23. H. 8. c. 3. 2. H. 7. 7.
(1. Sid. 43. Cro. Jam. 425. 616.)
[p] Mirr. ca. 3. acc. 12. E. 4.
16. 33. H. 6. ca. 2.
[q] Bract. lib. 3. fo. 125. 3. H.
5. Utlary 11. 38. E. 3. 5.
[r] Britton fo. 39.
[s] 20. E. 2. Coron. 232. 19.
Aff. p. 10. 3. H. 6. 15. b. 37. H.
6. 23. 5. H. 7. 6. Eliz. Dyer
228. F. N. B. 244. Stanf. Pl.
Coro. 105.
shew (Noy. 74. 143.)

several mens suits, he should never reverse any of them. [o] In an attain outlary in the
plaintife cannot be pleaded in disability of the person (1). [p] Outlary in Chester or Durham
shall not disable the plaintife in any court at Westminster, &c. [q] *Minor vero, & qui infra*
atatem 12 annorum fuerit, utlagari non potest, nec extra legem poni; quia ante talem atatem non
est sub lege aliqua nec in decemna. [r] He that is abjured the realme may be disabled; for that
he is *extra legem*; and yet he is not properly outlawed.

Monstrer tout le matter de record. Here note two things first by this word,
(monstrer) that, [s] when any man pleads an utlary in disability of the person, hee must

(1) Rot. Parl. 20. H. 6. n. 18. c. 2. Hal. MSS.

whether the administration of the government of the province was not devolved upon the crown during the infancy, yet he
afterwards retracted this idea, and concurred in thinking, that the guardian named by the infant might act as lord proprietor.
Indeed it seems, as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is
before; and therefore election by *parol* might perhaps be sufficient, though it would be wrong to trust to a mode so unsolemn.
But we do not wonder at the deficiency; because guardianship by election of the infant is of very late origin, it being, we
believe, not only unnoticed by any writer before lord Coke, except Swinburn, but there still being no cases in print to explain
the powers incident to it, or whether the infant may change a guardian so constituted by himself. Swinb. Testam. ed. 1590. fol.
97. b. Even lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before
mentioned this latter one, omits it here; whence it may be probably conjectured, that, in his time, it was in strictness scarcely
recognized as legal.

The second is guardian by appointment of the lord chancellor. How this jurisdiction was acquired by him is not easy to state.
The usual manner of accounting for it appears to us quite unsatisfactory. See Gilb. Eq. Rep. 172. Saying, that his jurisdiction
over idiots and lunatics is undoubted, furnishes an argument against his having any over infants; for he derives the former
from a *separate commission* under the sign manual, but there is not any such to warrant the latter. The writs of *ravishment of*
seard and *de recte de custodia* prove as little: for were not these returnable in the courts of common law; or, though they had
not

(5 Co 142. b.)

[1] 28 Aff. 49. 12. E. 3. Utlaw-
 record; and the judgement after the *quinto exactus* given by the coroners in the county court,
 227. 38. E. 3. 13.
 (Post. 283. b. 3. Co. 111.)

shew forth the record of the outlawrie *maintenant sub pede sigilli*, (because the plea is but dilatorie) unlesse the record be in the same court. But if he plead an outlawrie in barre, if it be denied, he shall have a day to bring it in.

Secondly [1] before the defendant can disable the plaintife, the outlawrie must appeare of record; and the judgement after the *quinto exactus* given by the coroners in the county court, is not sufficient, untill the writ of *exigent* be returned, and the outlawrie appeare of record: which is manifest by Littleton's owne words, (viz.) *matter de record*, whereof see more hereafter, sect. 503.

[2] Tr. 44. El. in Com. Banc.
 inter Mare & Dolbure. 33. H.
 6. 1. 11. H. 4. 34. Dyer 3. El.
 192. 5. El. 223. 4. H. 4. le 1.
 case. 8. H. 4. 1. 7. 37. H. 6. 17.
 33. E. 3. Err. 77. 21. H. 6. 20.
 (Mo 77.)
 [3] 33. H. 6. 19. b. &c.

[4] 41. E. 3. 27.
 (D. Ctr. Plac. 162. 396.)

It is to be observed, that there be two kind of appearances before the *quinto exactus*, to avoid the outlawry, viz. an apparence in deed, that is, to render himselfe, &c. And the other is by an apparence in law, [u] that is, by purchasing a *superfedeas* out of the court where the record is, which is an apparence of record: and therefore, though it be not delivered to the sherife before the *quinto exactus*, yet it shall avoid the outlawrie; and so are the bookes, that speake hereof, to be intended.

[20] If a man be outlawed at the suit of one man, all men shall take advantage of this personall disability. And so it is in case of *alien uce*, and of *excommungement*. But otherwise it is in case of villenage; for that disability is onely given to the lord.

Durant le temps que il est utlage. [x] If the defendant plead an outlawrie in the plaintife, in disability of his person, and the plaintife after that plea pleaded purchase a charter of pardon; because the charter hath restored him to the law, the defendant shall answer. So note, the disability abateth not the writ, but disinableth the plaintife, untill he obtaineth a charter of pardon, and so it appeareth here by Littleton.

[5] 9 El. Dyer 262. 7. H. 4. 4.
 b. 5. aff. Pl. Coron. 188. 5. Co.
 109. in Foxley's case. 28. E. 3.
 12. 29. Aff. p. 47. 63. 30. H.
 6. 5.
 (Doct. Plac. 305.)
 [6] Mir. c. 1. f. cl. 7. & c. 3. &
 4. hope cap. 5. Sect. 1.

Judgement fil ferra respondue. [y] If the ground or cause of the action bee forfeited by the outlawry, then may the outlawry bee pleaded in barre of the action; as in an action of debt, detinue, &c. But in reall actions, or in personall, where dammages be incertaine, (as in trespass of batterie, of goods, of breaking his clofe, and the like) and are not forfeited by the outlawry, there outlawry must be pleaded in disability of the person.

[z] And it is to be observed, that, in the reign of king Ælfred, and untill a good while after the conquest, no man could have been outlawed but for felonie, the punishment whereof was death. But now the law is changed, as it appeareth by that which hath beene sayd. And hereby you shall understand old bookes and records, which say, that an outlawed man had *caput lupinum*; because he might be put to death by any man, as a wolfe that hateful beast might.

[7] Fleta lib. 1. ca. 27. Bract.
 li. 5. fol. 421. Britton fol. 30. b.

[8] Mir. ca. 4. f. cl. 4. defaults
 punishable.

[9] Lamb. fol. 128.

[10] 2. Aff. Pl. 3. 2. E. 3. tr. Co.
 100. 148.

[*] *Utlagatus & waiviata capita gerunt lupina, que ab omnibus impune poterunt amputari; merito enim sine lege perire debent, qui secundum legem vivere recusant.* And another faith, [a] *utlage pur felonie teigne leu pur loup, & est criable woolfesbered, pur ces que loutre est beaft bay de tous gents, & de ceo en avant list al ascun de le occider al foer del loup, dont chascun soloit estre de porter les testes al chiefe lieu del county, ou de la franchise, & soloit la avoir avec mark del countie pur chescun teste de utlage & de loupe.* And this agreeth with the law before the conquest, [b] *utlagus lupinum gerit caput, quod Anglice woolfeshead dicitur; & hec est lex communis & generalis de omnibus utlagatis.* [c] But, in the beginning of the raigne of king Edward the third, it was resolved by the judges, for avoyding of inhumanity, and of effusion of Christian blood, that it should not be lawfull for any man, but the sherife onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for felonie; and if he did, he should undergoe such punishments and paines of death, as if he had killed any other man; and so from thenceforth the law continued untill this day. (Nota, woolfeshead, and swulfesfol is all one). [*] And after in Bracton's time, and somewhat before, procelle of outlawry was ordained to lie in all actions, that were *quare vi & armis*, which Bracton calleth *delicta*; for there the king shall have a fine (1). But since, by divers statutes, procelle of outlawry doth lie in account, debt, detinue, annuity, covenant, *action sur le statute de 5. Rich. 2. action sur le case*, and in divers other common or civill actions. But now let us heare what Littleton will say unto us.

[11] Bracton. lib. 5. fo. 421. 8.
 li. 6. 9. b. 40. E. 3. 5. 35. li.
 6. 6. 40. E. 3. 2.

Section 198.

[12] Bract. li. 5. fol. 415. 427.
 Mir. c. 1. f. cl. 3. c. 5. sect 1. &
 ca. 3. except a p. ovors. Fleta. li.
 6. c. 47. Brit. fo. 29. 13. E. 3.
 Bre. 677. 25. E. 3. de N. tis ut
 tra mare. 31. E. 3. Collage 5.
 42. E. 3. 2. 9. E. 4. 7.

ALIEN. [a] *Alieni-*
gena is derived
 from the Latine
 word *alienus*, and according

LE 3. est un a- **THE** third is an a-
lien, que est née **lien**, which is born
hors de la ligeance out of the ligeance of
nostre

(1) Whether the common law gives procelle of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in a late case before the King's Bench on a *libel*. But the chief justice, in delivering the court's judgment, spoke at large to prove, that such procelle lies against crimes *universally*. Mr. Wilkes's case 4. Burr. v. 2. page 2537. However, the reasoning, on which this opinion is grounded, stands opposed by a former judgment of the Common Pleas on a prior case relative to the same gentleman. 2. Willf. 151. But it was adopted by both houses of parliament, when, in his case, they resolved, that privilege of parliament doth not extend to *libels*. See Annual Reg. for 1764. The arguments for the contrary opinion are forcibly expressed in a protest by some of the lords, who were against making such a resolution. Journ. Dom. Proc. 29. Nov. 1763.—(2) *Ubi natus in partibus transmarinis shall not be an alien, see Hill. 13. E. 1. rot. 1. Hal. MSS.*

not been so, how doth a jurisdiction, to decide between contending competitors for the right of guardianship, prove a power of appointing a guardian, where it happens, that one is wanting? The writs *de custode admittendo*, in the Register, only relate to guardians *ad litem*. Reg. Br. Orig. 198. a. The assertion, that the appointment of guardians belonged to the chancellor before the erection of the Court of Wards, remains to be proved; or at least we, after a diligent search, do not find any authority in print. The passage referred to in *Fleta* and the doctrine in *Beverley's case* 4 Co. by no means warrant the use made of them; for in neither is any notice taken of *infants*. Though the case of infants, as well as of ideots and lunatics, should be admitted to belong

nostre seignior le roy, si tiel alien voile suer un action reall ou personall, le tenant ou defendant poit dire, que il fuit née en tiel pais, que est hors de la ligeance le roy, & demaunder judgement si il serra respondue.

our soveraigne lord the king, if such alien will sue an action reall or personal, the tenant or defendant may say, that he was borne in such a country, which is out of the king's allegiance, and aske judgement if he shall be answered.

to the etymologie of the word, it signifieth one borne in a strange country, under the obedience of a strange prince or country, (and therefore Bracton saith, that this exception, *propter defectum nationis*, should rather be *propter defectum subjectionis*) or as Littleton saith, (which is the surest) out of the liegeance of the king. Note, here Littleton saith not *Hors del realme*, but *hors de ligeance*; for he may be borne out of the realme of England, yet within the

11. H. 4. 26. 14. H. 4. 19, 20. 3. H. 6. 55. 22. H. 6. 38. Stanf. Pl. Cor. 197. a. 7. Co. 1. Calvin's case. Pl. Com. 268. per Sanders. Vid. sect. 1. 439. 440. 441.

liegeance. And he that is borne within the king's liegeance is called sometime a *denizen*, *quasi deus née*, borne within, and thereupon in Latine called *indigena*, the king's liegeman; for *ligens* is ever taken for a naturall borne subject. But many times in acts of Parliament, *denizen* is taken for an alien borne, that is enfranchised or denized by letters patent, where- by the king doth grant unto him, [b] *quod ille in omnibus tractetur, reputetur, habeatur, te- neatur, & gubernetur, tanquam ligens noster, infra dictum regnum nostrum Angliæ oriundus, & non aliter, nec alio modo.* But the king may make a particular denization: [c] as he may grant to an alien, *quod in quibusdam curiis suis Angliæ audiat ut Anglus, & quod non repe- latur per illam exceptionem, quod sit alienigena & natus in partibus transmarinis*, to enable him to sue onely. The severall senses of which word must be gathered, *ex antecedentibus, adjunctis, & consequentibus*; and they that take him in that sense, derive the word from *donaison* (i. e.) *donatio*, because his freedome is given unto him by the king.

(2. Inst. 741.) [d] 9. E. 4. f. 8. Pl. Com. 130. b. [e] Rot. Parl. 22. E. 1. Elias de Daubenie.

There is another kind, and that is an alien naturalized, and that must be by act of Parli- ment. And this alien naturalized to all intents and purposes, is as a naturall borne sub- ject (1), and differeth much from denization by letters patent; for if he had issue in England before his denization, that issue is not inheritable to his father; but if his father be natural- ized by parliament, such issue shall inherite. So if an issue of an Englishman be borne be- yond sea, if the issue be naturalized by act of Parliament (2), he shall inherit his father's lands; but if he be made denizen by letters patent, he shall not; and many other differences there be betweene them.

(Cro. Cha. 60r.)

Ligeance. *A ligando*, being the highest and greatest obligation of dutie and obe- dience that can be. Ligeance is the true and faithfull obedience of a liegeman or subject, to his liege lord, or soveraigne. *Ligeantia est vinculum fidei, ligeantia est legis essentia.*

Vide Calvin's case ubi supra.

Ligeantia domi- no regi debita est duplex.

Perpetua.

1. *Originaria, sive naturalis, sive nata*, [d] and this is al- ways absolute and incident inseparably. *Nemo patriam, in qua natus est, exure, nec ligeantia debitum ejurare possit.*
2. *Data, aut per denizationem, aut per naturalizationem* (ut supradictum est) & ista ligeantia per denizationem potest esse sub conditione.

[d] 13. El. Dierfo. 300. b. Doc- tor Storie's case.

Temporanea aut

- Localis, quia quilibet alienigena, qui in hoc regno sub pro- tectione regis degit, domino regi ligeantiam debet.* And if he be indicted of high treason, the indictment shall say, [e] *contra ligeantia sue debitum*; & ideo dicitur tem- poranea & localis, quia non durat, nisi quousque infra regnum moratur.
- Limitata*, as when one is made denizen for life, or in taile. [f] But one cannot be naturalized, either with li- mitation for life, or in taile, or upon condition: for that is against the absoluteness, puritie, and indebilty of na- turall allegiance.

(Hob. 271.)

[e] 3. & 4. P. & M. Di. 144. 7. Co. 6. &c. Calvin's case.

[f] 9. E. 4. 7. Calvin's case ubi supra.

(Cro. Jam. 539. 2. Ro. Rep. 95.)

[*] 13. E. 3. Br. 264. 20. E. 3. Annuity 24. 17. E. 3. 21. 40. E. 3. 10. 27. Aff. 48. 14. H. 4. 37. 22. E. 4. 44. 21. H. 7. 7. Stanf. Præf. 54. L'estat. de Carlisle. but 35. E. 1.

[*] An abbot, prior, or prioress alien, shall have actions reall, personall, or mixt, for any thing concerning the possessions or goods of his monastery here in England, though hee bee an alien borne out of the king's liegeance; because hee bringeth it, not in his owne right,

(1) But now by the 12. & 13. W. 3. c. 2. naturalized persons are incapacitated from being of the privy council, members of either house of parliament, or enjoying any office or place of trust, civil or military, or from having any grant of lands or other hereditaments. The 1 G. 1. goes still further; for it enacts, that no bill of naturalization shall be received without a clause to this effect. 1. G. 1. ft. 2. c. 4. f. 2. But when any foreigner, distinguished by eminence of rank or services, is naturalized, it is usual, first to pass an act for the repeal of these statutes in his favour, and then to pass an act of naturalization without any exception.—(2) This imports a special act of parliament to be necessary. But, whatever the law might be in lord Coke's time, now, by several modern statutes, persons born beyond sea, if their fathers, or paternal grandfathers, were natural born sub- jects, are likewise made so, though with an exclusion of some unfavoured persons. 7. Ann c. 3. 4. G. 2. c. 21. 13. G. 3. c. 21. See ante fo. 8. a. note 1.

Continuation of notes to 123. b. from 125. a.

(2) If our law was really as strict in point of time, as is here represented, it would not sufficiently conform to the course of nature. The physicians, it is true, generally call nine months, each being of thirty days, the usual period for a woman's going with child. But then they allow, that, as a delivery may be accelerated by accidental causes, so it is frequently protracted, not only for ten days beyond the nine months, but to the end of the tenth month, and sometimes for a considerably longer time. See Zacch. Quæst. Medico legal. lib. 1. tit. 2. Justice therefore requires, that, in the case of posthumous children, an excess of the usual time should not operate further, than by raising a proportional presumption against the legitimacy. The Roman law was very liberal in this respect; for the *decemviri* allowed, that a child may be born in the tenth month; and though a law of the Digest excludes the eleventh, yet the emperor Adrian, after consulting with the philosophers and physicians, decreed even for this, where the mother was of good and chaste manners. See Dig. 1. 4. 12. Paul. Sentent. lib. 4. t. 9. f. 3. Nov. 39. c. 2. t. 1. with

belong to the crown, yet something further is necessary to prove, that the chancellor is the person constitutionally delegated to act

X x x

but in the right of his monastery, and not in his naturall but in his politique capacity (1).

(Doctr. Plac. 8. Dy. 2. b.)

[4] Bracton 426. 427. 430. 8. E. 3. 51. 5. E. 2. Aiel 8. 13. E. 3. Bre. 677. 22. E. 3. 14. 20. 21. E. 3. Cufinage 5. 42. E. 3. 2. 13. E. 4. 9. 11. H. 4. 26. 9. E. 4. 7. 10. E. 4. 7. 20. E. 4. 6. 13. E. 4. 6. 10. 32. H. 6. 23. 33. H. 8. Br. Denizen 10. 1. E. 6. Nonhab. Br. 13. & 62. Vid. 4. H. 3. Dower 179. 6. E. 3. 263. 31. H. 6. ca. 4. Livre de Entries in c. 67. 7. 6. H. 8. Dier 2. 6. H. 7. 15. [*] 29. E. 3. Br. Denizen 15. Vid. Stanf. Pl. Co. 197. a.

[i] Livre d' Entries Alien r. (Doctr. Plac. 89. Dy. 2. b.)

Reall ou personall.

[b] In this case the law doth distinguish between an alien, that is a subject to one that is an enemy to the king, and one that is subject to one that is in league with the king; (2) and true it is that an alien enemy, shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is untill both nations be in peace (3); but an alien, that is in league, shall maintaine personall actions, for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions. An alien, that is condemned in an information, shall have a writ of error to relieve himselfe, *et sic de similibus*.

[*] If an alien be made a prior or abbot, the plea of *alien née* shall not disable him to bring any reall or mixt action concerning his house; because he is *in auter droit*, as before is said (4).

Hors del ligeance nostre seignior le roy.

Here Littleton doth not say, out of the realme or beyond the sea, (5) (as he doth sect. 437. 440. 441. 677.) but out of ligeance; for (as hath beene said before) a man may be borne out of the realme, viz. of England, as in Ireland, Jersey, and Gernsey, &c. (6) and yet seeing he is not borne out of the ligeance of the king, as Littleton here speaketh, he is no alien. But hereof there is so much, and so plentifully spoken in our bookes, and especially in the case of Calvin *ubi supra*, as this shall suffice.

Et demaunder judgement sil serra respondue.

So as the tenant or defendant shall neither plead alien *née* to the writ or to the action, but in disability of the person, as in case of villenage and outlawrie before. [i] And Littleton is to be intended of an alien in league; for if hee be an alien enemy, the defendant may conclude to the action.

Sect. 199.

(3. Inst. 119.)

For Statutes.

Vid. 35. E. 1. stat. de Carlisle. 25. E. 3. c. 22. 25. E. 3. stat. de Provitors. 27. E. 3. c. 1. 38. E. 4. c. 3. 2. R. 2. c. 12. 3. R. 2. c. 3. 12. R. 2. c. 5. 16. R. 2. c. 5. 2. H. 4. c. 3. & 4. 6. H. 4. c. 1. 24. H. 8. c. 12. 25. H. 8. ca. 19. 20. 26. H. 8. c. 16. 1. Eliz. ca. 1. 5. Eliz. c. 1. 13. Eliz. ca. 1. 2. 8. 27. Eliz. ca. 2. 39. Eliz. ca. 18.

For Presidents.

Vide Mich. 29. E. 3. coram Rege in Thesaur. Pasch. 44. E. 3. ibid. Melbourne's case, Mich. 38. H. 6. ibid. The case of Rich. Beauchamp and others, Hil. 25. H. 8. Coram rege. The case of Nic. Bishop of Norwich, Trin. 36. H. 8. Rot. 9. coram Rege. The case of the Bishop of Bangor, Mich. 26. & 27. Eliz. coram Rege, Perrot against D. Bevan and other, booke of Entries, fo. 429. & 430. & ibid. Mich. 9. H. 7. f. 23.

Booke cases.

21. E. 3. 40. B. 18. H. 6. 6. 9. E. 4. 2. 35. E. 3. 7. 24. H. 8. 11. Præmunire 19. 10. H. 4. 12. 27. E. 3. 84. 6. H. 7. 14. 44. E. 3. 36.

PRæmunire.

Some hold an opinion that the writ is called a *præmunire*; because it doth fortifie *jurisdictionem* *jurium* *regiorum* *coronæ* *sue* of the kingly lawes of the crown against fo-reine jurisdiction, and against the usurpers upon them, as by divers acts of Parliaments appeare. But in truth it is so called of a word in the writ; for the words of the writ be *præmunire facias præfatum A. B. &c. quod tunc sit coram nobis*, &c. where *præmunire* is used for *præmonere*, and so doe divers interpreters of the civill and canon law use it; for they are *præmuniti* that are *præmoniti*. By the statutes before quoted in the margin you shall perceive what statutes were made before Littleton wrote, and what have beene ordained since to make offences in danger of a *præmunire*.

Hors del protection

le Roy. The judgement in a *præmunire* is, that the defendant shall bee from thence forth out of the king's protection, and his lands and tenements, goods and chattels

LE 4. est un home,

que per judgment done envers luy sur un brieve de præmunire facias, &c. est hors de protection le roy. Si il fuist ascun action, & le tenant oule def. monstra tout le record envers luy, il poit demaunder judgement sil serra respondue; car la ley le roy, & les briefs le roy sont les choses, per queux home est protect & aide, et issint, durant le temps que home en tiel cas est hors de la protection le roy, il est hors de estre aide ou protect per la ley le roy, ou per brief le roy.

THE 4. is a man,

who by judgement given against him upon a writ of *præmunire facias*, &c. is out of the king's protection. If he sue any action, and the tenant or defendant shew all the record against him, he may aske judgement if he shall be answered; for the law and the king's writs be the things, by which a man is protected and holpen; and so, during the time, that a man in such case is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ.

(1) Here, as also generally where lord Coke mentions *professed* persons, he must, we conceive, be understood to write, as of the law before the dissolution of monasteries, and the consequent establishment of the protestant faith. See ante 3. b. note 7 — (2) Et nota it shall be tried by the record, if he be in amity or not, viz. a proclamation of war. But a proclamation prohibiting commerce, as anciently between the emperor and the queen, doth not disable a German in a personal action. Trin. 41. Eliz. C. B. — Hal. MSS. — (3) But now, on declaring war, the king usually, in the proclamation of war, qualifies it, by permitting the subjects of the enemy resident here, to continue so long as they peaceably demean themselves; and, without doubt, such persons are to be deemed alien friends in effect. — (4) A feme alien shall have dower. Rot. Parl. 8. H. 5. n. 15. 9. H. 5. n. — pro comitissa Arundell. Hal. MSS. — See ante 31. b. note 9. — (5) See ante 107. a. n. 6. there and post. 244. a. — (6) Rot. Parl. 9. H. 6. n. 20. *indulgentia* of one born in Wales. Simile Rot. Parl. 23. H. 6. n. 26. Co. 2. Inst. 741. on stat. 2. H. 4. — Hal. MSS.

with Gothofred's learned notes on those two texts of the Roman law. Cod. lib. 6. t. 29. leg. 7. Aul. Gell. lib. 3. cap. 16. Huber. Prælect. in Dig. lib. 1. tit. 6. A like liberal discretion probably prevails in most countries of Europe; for an instance of which, we appeal to a writer of great authority, who reports a decision by a majority of judges in the supreme court of Frieland, by which a child was admitted to the succession, though not born till three hundred and thirty-three days from the day of the husband's death, which period wants only three days of twelve lunar months. Sand. Decis. lib. 4. tit. 8. Definit. 10. Nor will our own law, notwithstanding what lord Coke advances, if the authorities are duly collected and considered, be found deficient on this interesting subject. Indeed there is a passage in Britton, which gives countenance to lord Coke's limitation of forty weeks; for this writer excludes from

act for the king. It is no wonder therefore, that lord chancellor Hardwicke took occasion to disapprove of comparing the court's jurisdiction over infants with that over idiots and lunatics. 2 Atk. 315. As to the writs relative to the appointment and removal of guardians in the Regifter, they merely relate to *suits*; which is of very different consideration from *general* guardians. See Index to Reg. Brev. Orig. tit. *Custodes*. Nor will it answer the purpose, to attempt including guardianship in the idea of *trusts*, which are the peculiar objects of equitable jurisdiction, as it must be seen, that this is an overstrained refinement; for, though

forfeited to the king, and that his body shall remaine in prison at the king's pleasure. So odious was this offence of *præmunire*, that a man, that was attainted of the same, might have bin slaine by any man, without danger of law; because [k] it was provided by law, that a man might doe to him as to the king's enemy, and any man may lawfully kill an enemy. But queene Elizabeth and her parliament [*], liking not the extreme and inhumane rigor of the law in that point, did provide, that it should not be lawfull for any person to slay any person in any manner attainted in or upon any *præmunire*, &c. Tenant in taile is attainted in a *præmunire*, he shall forfeit the land but during his life; for albeit the statute of 16. R. 2. ca. 5. enacteth, that in that case their lands and tenements, goods and chattels, shall be forfeit to the king, that must bee understood of such an estate as he may lawfully forfeite, and that is during his owne life. And these generall words doe not take away the force of the statute *de donis conditionalibus*, but hee shall forfeit all his fee simple lands, states for life, goods and chattels; and so was it resolved in Trudgin's case.

Car la ley le roy & les briefes le roy, &c. There be three things, as here it appeareth, whereby every subject is protected, viz. *rex, lex, & rescripta regis*, the king, the law, and the king's writs. The law is the rule, but it is mute. The king judgeth by his judges, and they are the speaking law, *lex loquens*. The processe and the execution, which is the life of the law, consisteth in the king's writs. So as he, that is out of the protection of the king, cannot be aided or protected by the king's law, or the king's writ. *Rex tuetur legem, & lex tuetur jus.* [1] Besides men attainted in a *præmunire*, every person, that is attainted of high treason, petit treason, or felony, is disabled to bring any action: for he is [*] *extra legem positus*, and is accounted in law *civiliter mortuus*.

It is to be understood, that there is a generall protection of the king, whereof Littleton here speaketh; and this extends generally to all the king's loyall subjects, denizens and aliens within the realme, whose offences have not made them incapable of it, as before it appeareth. And there is a particular protection by writ, which is one of the king's writs, that Littleton here speaketh of. This particular protection is of two sorts; one, to give a man an immunity or freedom from actions or suits; the second for the safetie of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawfull molestation or wrong. The first is of right, and by law; the second are all of grace, (saving one) for the generall protection implyeth as much. Of the first sort some are *cum clausula (volumus)* so called, because the writ hath this word (*volumus*) in it, viz. *volumus quod interim sit quietus de omnibus placitis & querelis, &c.* and the other a protection *cum clausula (nolumus)* so called for the like reason. Of protections *cum clausula (volumus)* for staying of pleas and suites there be foure kindes, viz. *quia profecturus* (so called by reason they are part of the words of the writ). 2. *Quia moraturus* (so named for distinction for the like cause). 3. *Quia indebitatus nobis existit* of the matter. 4. When any sent into the king's service in warre is imprisoned beyond sea. The former are for staying of actions and suits in generall. The third is for staying of suits of the subject for debts and duties due by the king's debtor to them. Of the fourth you shall reade hereafter in this place. For the former two these nine things are to be observed. First, for what cause they are to be granted. 2. For what persons they are allowable. 3. A three fold time is to be considered, viz. the time of the purchase of them, the time of the continuance of them, and the time when they shall be cast. 4. In what place the service is to be performed. 5. In what actions these protections are allowable. 6. Under what seale and to whom they are directed. 7. Who is to allow, or disallow of them. 8. By whom they are to be cast, and in what manner. 9. How upon just cause they may be repealed or disallowed. I must but point at these matters to make the studious reader capable of them, and referre him to the bookes and other authorities at large being excellent points of learning.

As to the first, it is of two natures, the one concerne services of war as the king's souldier, &c. the other wisdom and counsell, as the king's ambassador or messenger *pro negotiis regni*. Both these being for the publique good of the realme, private mens actions and suites must be suspended for a convenient time; for, *jura publica anteferenda privatis*; and againe, *jura publica ex privatis promissis decidi non debent*. [a] And the cause of granting of the protection must be expressed in the protection, to the end it may appeare to the court that it is granted *pro negotiis regni & pro bono publico*, [b] or as some others say, *pur le common profit del realme*. And Britton saith, *nostre service, sicome estre en nostre force, & le defence de nous & de nostre people, &c.* [*] A man in execution in *salva custodia* shall not be delivered by a protection.

[c] To the second, these protections are not allowable onely for men of full age, but for men within age, and for women (1), as necessary attendants upon the campe, and that in three cases, *quia latrix, seu nutrix, seu obstetrix*.

[d] Corporations aggregate of many are not capable of these two protections either *pro-futuræ*, or *moraturæ*; because the corporation it selfe is invisible, and resteth onely in [d] 30 E. 3. 1. 21. E. 4. 36. con- 21. E. 3. 97.

(1) A respectable writer, considering women as not requisite in a camp, thinks, that here lord Coke mistakes *protections* for *efforts*. Barr. on Ant. Stat. Ir. ed. 154. But, as we apprehend, those, who have been accustomed to a camp-life, will bear testimony to the necessity of each of the three capacities mentioned by lord Coke.

the inheritance posthumous children not born within forty weeks from the husband's death. Britt. 166. a. However, even this writer seems to extend in some degree beyond the forty weeks; unless he meant to make the wife's conception exactly of equal date with the husband's death, which surely is not a very reasonable construction. But without dwelling on such a nicety, it is sufficient, that the principal of the few other authorities in our books are against so rigid a rule. Bracton is very cautious, illegitimizing only the issue born so long after the husband's death, as to create an improbability of its being his child, without naming any fixed period. Bract. lib. 5. fo. 417. b. As to the determined cases, the only authorities of this sort, we meet with, are enumerated in the preceding annotation; and these duly weighed, will not be found, it is apprehended, to warrant lord Coke's conclusion. In Radwell's case, the finding against the issue is expressed to have been grounded merely on *presumption*; and besides, if we construe the record properly, the presumption arose from proof of the husband's non-access to the wife for a month before his death. The case of 9. E. 2. is an instance of allowing so much time beyond forty weeks, that it seems too strong to have much weight; but so far as it can claim any, it counts against lord Coke. The case of 18. Rich. 2. at first seems full for lord Coke's rule, the child, though born only eleven days beyond the forty weeks having been declared not the issue of the deceased husband. But when it is further considered, there will be found nothing to prove a *positive general rule*; for it was very special, the widow having married a second husband the day after the death of the first, so that the question was, not

though guardianship in the common acceptance of the word *trust* may be properly so denominated, yet it as surely is not so in the technical

11. H. 7. tit. *Præmunire*, p. 5.
17. H. 7. Justice Spilmans in
Turberville's case. Kelwey, fo.
195. Doct. & Stud. Lib. 2. cap.
32. Brooke, tit. *Præmunire*, 21.
Temps E. 6. Bishop Barloe's case.
[k] 24. H. 8. Brooke Coron.
196.
[*] 5. Eliz. ca. 1. Hil. 21. El.
Trudgin's case resolved per les
Justices. 7. H. 4. 20. Simon
Beverley's case.
(Post. 391. 2. Ro. Abr. 177.)

[1] 4. E. 4. 8. 1. E. 4. 1. b. 30.
E. 3. 4. 8. Eliz. Dier 245.
[*] Mich. 9. E. 3. coram rege
Rot. 84. Warw.

Protection. { General.
Particular.
Of the general, vid. 7. Co. Cal-
vin's case per totum.
(F. N. B. 28. B. 1. Leon. 185.
Mo. 239. 2. Ro. Abr. 32.)

[a] 39. H. 6. 39. 3. H. 6. tit.
Protection 2. 13. R. 2. ca. 16.
[b] Mirror cap. 3. Sect. 23. Brit-
ton fo. 281. Fleta lib. 6. cap. 7.
8. &c. Bracton.

[*] 5. Marie Dyer 162.

(Cro. Cha. 389.)

[c] 19. H. 6. 51. 30. E. 3. 21.
F. N. B. 28. l. 11. E. 3. Rot.
pat. 3. part for the Countesse of
Warw.

[d] 30 E. 3. 1. 21. E. 4. 36.
con- 21. E. 3. 97.

[c] 35. H. 6. 3. 43. E. 3. 23. consideration of lawe. [e] Protection for the husband shall serve also for the wife.

48. E. 3. 7. 4. H. 5. Protection

107.

[f] 45. E. 3. Protection. 37. 3. II

6. 18. 40. 8. H. 6. 16. 9. H. 6.

36. 40. E. 3. 48. 32. E. 3. Pro-

tection 44. 21. E. 3. 14. H. 4. 16.

45. E. 3. tit. protection. 40. 14. E.

3. Protection. 66.

(2. Ro. Abr. 324.)

[g] 24. E. 3. 26. 47. E. 3. 5.

5. H. 5. 38. E. 3. 1. F. N. B.

28. g. 20. R. 2. Protection. 106.

22. H. 6. 28. 9. H. 6. 36. 43. E.

3. 36. 17. E. 3. 24. 25. E. 3. 43.

24. E. 3. 26. 13. E. 3. Protection

71. 14. E. 3. ibid. 65. 63. 20. E.

3. ibid. 84.

[h] 7. H. 4. 3. a.

[i] 9. E. 3. protection. 80. 81.

32. E. 3. ibid. 55. 16. E. 2. ibid.

77. 13. E. 3. ibid. 70. 41. E. 3.

ibid. 95. 41. E. 3. 32. 42. E. 3. 9.

5. H. 5. 7. 3. H. 4. 15. 2. R. 2.

Protection. 45. 43. E. 3. ibid. 31.

2. H. 6. 22. 21. H. 6. 41. 38. E.

3. 12. 7. H. 6. 21. 33. E. 3. Pro-

tection. 116. 4. H. 4. 4. 29. E. 3.

41. 45. E. 3. 24. 28. 11. E. 4. 7.

F. N. B. 28. k. (11. Co. 5. b.)

[k] 3. H. 6. Protection. 2. 39. H.

6. 39. 44. E. 3. 12. 13. R. 2. ca.

16. 5. H. 4. 16. 11. H. 4. 7.

7. E. 4. 27. 28. H. 6. 1. 17. H.

6. protection. 56. 10. E. 3. 54. 13.

E. 3. Amerciament. 18. 7. Co. 7.

8. Calvin's case. 13. R. 2. cap. 16.

(2. Ro. Abr. 322. Ante 69. b.)

[l] 4. H. 6. 22. 17. E. 3. 76.

33. E. 3. tit. Protection. 115. 34. E.

3. ibid. 124. 27. E. 3. 79. 29. E.

3. Protection. 85. 88. 2. E. 4. 15.

19. E. 3. Protection. 82. 79. 13. E.

3. ibid. 72. 9. E. 3. 21. 3. H.

6. 55. 4. H. 6. 22. 11. H. 6. 14.

14. H. 6. 22. 21. H. 6. 10. 27.

H. 6. 4. 28. H. 6. 1. 35. H. 6.

58. 44. E. 3. 2. 16. 48. E. 3. 8.

7. H. 4. 5. 14. H. 4. 23. 27. E.

3. 78.

[m] 22. E. 3. 4. 16. E. 3. Pro-

tection. 47. 44. E. 3. 16. 3. E. 3.

Amerciament. 18. 34. E. 3. Pro-

tection. 121.

[n] 39. H. 6. 39. F. N. B. fol.

28. Fleta lib. 6. cap. 8. Temps.

E. 1. G and cape 26.

(Post. 254. b.)

[o] Brit. 10. 282. 283. & 280.

Fleta lib. 6. cap. 8. Accord.

[p] 7. E. 3. 25.

[q] 7. Co. 8. Calvin's case. 7. E.

4. 29. F. N. B. 38. c. g. h. 7. H.

4. 14. 19. H. 6. 35. 38. H. 6.

3. 32. H. 6. 3. R. 2. Rot. Par-

liament. nu. 21. 22. E. 4. Pro-

tection. 18. 8. R. 2. ibid. 125. 11.

H. 4. 57. Regist. judic. 14. 36.

H. 6. tit. Protection. 27. 6. R. 2.

ibid. 14. Regist. orig. 38. fape.

[r] Bract. lib. 5. 139. 140. Brit.

ten 181. Fleta lib. 6. cap. 7. 8.

&c. 14. E. 2. Protection. 109. 34.

E. 3. ibid. 122. 19. E. 3. ibid.

78. 33. E. 3. ibid. 99. 21. E.

3. 12.

[s] 10. H. 6. Protection. 105.

[f] Albeit the vouchee, tenant by reſceit, preſee in aide, or garniſhee, bee no parties to the writ, yet before they appeare a protection may be caſt for them; becauſe when the demandant grants the voucher or reſceit, in judgment of law they are made privie. But if the demandant counterplead the voucher or receit, then untill it be adjudged for them, and ſo privie in law, a protection cannot be caſt for them. And ſo it is of the garniſhee, a protection may be caſt for him at the day of the returne of the *ſcire facias*. [g] No protection can be caſt for the demandant or plaintife; becauſe the tenant or defendant cannot ſue a re-ſommons, or a re-attachment, but the plaintife onely, that ſued out the ſummons or attachment, &c. muſt ſue alſo the re-ſommons or re-attachment. And ſo it is of an actor in nature of a plaintife, &c. as the garniſhee after appearance, and an avowant, and the like. [h] An officer of the king's receit, or any other officer in any court of record, whoſe attendance is neceſſary for the king's ſervice or adminiſtration of juſtice, being ſued, cannot have a protection caſt for him.

[i] In every action or plea reall or mixt againſt two, where a protection doth lie, a protection caſt for the one doth put the plea without day for all. So it is in debt, detinue and account. But in treſpaſſe, or any action in nature of treſpaſſe, which is in law ſeverall, where every one may answer without the other, there a protection caſt for the one ſhall ſerve for him onely, unleſs they joyne in pleading; or if they plead ſeverall pleas, and one *venire facias* is awarded againſt all, there a protection caſt for one, ſhall put the plea without day for all; and therefore in former times the plaintife uſed to ſue out ſeverall *venire facias* in thoſe caſes for feare of a protection, &c.

[k] As to the three fold time, firſt, a protection *proſeſtura* regularly muſt not be purchaſed hanging the plea. But this faileth, when he goeth in the king's ſervice in a voyage royall; and that is two fold, either touching warre, and that onely is when the king himſelfe or his lieutenant, that is *prorex* goeth; or when any goeth in the king's amballaſſage, *pro negotio regni*, or for the marriage of the king's daughter, or the like, this alſo is called a voyage royall. But a protection *moratura* may be purchaſed and caſt, *pendente placiſito*.

[l] Regularly a protection cannot be caſt, but when the party hath a day in court, and when if he made default, it ſhould ſave his default. Therefore when execution is to bee granted againſt body, lands, or goods, no protection can be caſt; becauſe the defendant hath no day in court. If a protection be caſt at the *niſi prius* for one, if before the day in banke it bee repealed by *innoteſcimus*, yet becauſe it was once well caſt, it ſhall ſave his default; but if the protection be diſallowed, either for variance, or that it lay not in the action, or the like, there it ſhall turne to a default.

If a man hath a protection, and notwithstanding plead a plea, yet at another day of continuance, after that a protection may be caſt; ſo at a day after an exigent; but after appearance he cannot caſt a protection in that terme, untill a new continuance be taken.

[n] Thirdly, no protection, either *proſeſtura* or *moratura*, ſhall indure longer than a yeare and a day next after the *teſte* or date of it. And ſo it is of an *effoigne de ſervice le roy*. If a protection beare *teſte 7. die Januarii*, and have allowance *pro uno anno*, the re-ſummons, re-attachment, or re-garniſhment, may be ſued 8. *Januarii* the next yeare; and yet that is the laſt day of the yeare.

And where Britton, treating of an effoigne beyond the Græcian ſea, in a pilgrimage, &c. ſaith thus, [o] *aſcun gent nequident ſe purchaſent nos letters de protection patents durable a un an, ou a 2 ou a 3 ans, & jalameyns ſont attorneys generals, auſi per nos letters patents: & ceux ſont bien & ſagement, car nul grand ſeignior, ne chevalier de noſtre realme, ne doit prendre che-myn ſauns noſtre conge, car iſſint poct le realme remainer diſgarvy de fort gente.*

Three things are hereupon to be obſerved, firſt, that this was a protection of grace, whereof more ſhall be ſaid hereafter. Secondly, that it was for ſafetie of the great men of the realme, and that they ſhould make generall atornies, ſo as no actions, or ſuits ſhould be thereby ſtaied. Thirdly (by the way) that great men could not paſſe out of the realme without the king's licence. [p] A protection granted to one, &c. untill he returned from Scotland, was diſallowed for the incertaintie of the time.

[q] To the fourth, the protection, as well *moratura* as *proſeſtura*, muſt bee regularly to ſome place out of the realme of England, and that muſt be to ſome certaine place, as *ſuper ſalva cuſtodia Calicie*, &c. and not to Carlile or Wales, which are within the realme, or to the like. But it may be to Ireland or Scotland; becauſe they are diſtinct kingdomes; or to Calice, Aquitaine, or the like. But a protection, *quia moratur ſuper altum mare*, will not ſerve, not onely becauſe (as ſome thinke) that *mare non moratur*, but for the incertaintie of the place, and for that a great part of the ſea is within the realme of England.

[r] To the fifth. In ſome actions, protections ſhall not be allowed by the common law; and in ſome actions they are ouſted by act of parliament. Actions at the common law, as all actions that touche the crowne, as appeales of felony, and appeales of mayhem. [s] So where

not of legitimacy, but merely to which husband the iſſue belonged. One of the two only remaining caſes conſiderably extends the time beyond the forty weeks, for, in *Alſop and Stacey* the firſt of them, the iſſue was found legitimate, notwithstanding the lapſe of forty weeks and *ten days* and the lewd character of the wife: and even as to *Thecar's* caſe, which is the other of them, the iſſue having been born two hundred and eighty-two days, there was an exceſs of the forty weeks, though but a triſling one. The precedents, therefore, ſo far from corroborating lord Coke's limitation of the *ultimum tempus pariendi*, do, upon the whole, rather tend to ſhew, that it hath been the practice in our courts to conſider forty weeks merely as the more uſual time, and conſequently not to decline exerciſing a diſcretion of allowing a longer ſpace, where the opinion of phyſicians or the circumſtances of the caſe have ſo required.—In the courſe of our enquiries into the ſubject of this note, we were curious to know the general ſentiments of that eminent anatomist, Dr. Hunter, on three intereſting queſtions. Theſe were, what is the uſual period for a woman's going with child, what is the *earlieſt* time for a child's being born alive, and what the *lateſt*. The answer, which he obligingly returned through a friend, we have liberty to publiſh; and it was expreſſed in the words following. 1. *The uſual period is nine calendar months; but there is very commonly a difference of one two or three weeks.* 2. *A child may be born alive at any time*

technical ſenſe, in which our lawyers uſe the word, and Chancery exerciſes a juriſdiction over truſts; for, in this latter, truſts are invariably applied to *property*, eſpecially *real eſtates*, and not to the *perſon*. However we muſt not be underſtood by theſe remarks

where the king is sole partie, no protection is to bee allowed; in like manner in a *decies tantum*, where the king and the subject are plaintives; but, in late acts of parliament, protections in personal actions are expressly ousted. A protection may be cast against the queene the consort of the king.

[r] In a writ of dower *unde nihil habet*, no protection is allowable; because the demandant hath nothing to live upon. Otherwise it is in a writ of right of dower. Likewise in a *quare impedit*, or assise of darreine presentment, a protection lieth not, for the eminent danger of the laps. Neither lieth a protection in an assise of *novel disseisin*; because it is *festinum remedium*, to restore the disseisee to his freehold, whereof he is wrongfully and without judgement disseised. [u] In a *quare non admittit*, a protection is not allowable; because it is grounded upon the *quare impedit*; and the like in a certificate upon an assise for the like reason; and *sic de similibus*. A protection, *quia profecturus*, is not allowable (as hath beene said) in any action commenced before the date of the protection, unlesse it bee in a voyage royall. [w] An infant is vouched, and at the *pluries venire facias*, a protection was cast for the infant; and disallowed, because his age must be adjudged by the inspection of the court.

[x] By act of parliament no protection shall be allowed in an attainr; (but at the common law a protection for one of the petite jury hath put the plea without day for all); nor in an action against a gaoler for an escape; nor for victuals taken or bought upon the voyage or service; nor in pleas of trespassse, or other contract, made or perpetrated after the date of the same protection.

[y] In a writ of error brought by an infant upon a fine levied, the plaintive sued a *scire facias* against the conusee, for whom a protection was cast, and the court examined the age of the plaintive, and by inspection adjudged him within age, and recorded the same, and then allowed the protection; and this can bee no mischief to the plaintive, whereupon it followeth, that, albeit the plaintive dyeth afterwards before the fine be reversed, yet, after his age adjudged and recorded, his heire shall in that case reverse the fine for the nonage of his ancestor. [a] And so it was resolved in the case of *Kekewiche* (1) in a writ of error brought by him by the opinion of the whole court of the king's bench. Otherwise it is, if the plaintive dyeth before his age inspected.

[b] Note in judicall writs, which are in nature of actions, where the partie hath day to appeare and plead, there a protection doth lie; as in writs of *scire facias* upon recoveries, fines, judgements, &c. Albeit by the statute of W. 2. essoignes and other delayes bee ousted in writs of *scire facias*, yet a protection doth lie in the same. So it is in a *quid juris clamat*, and the like. But in writs of execution, as *habere facias seisinam*, *elegit*, execution upon a statute, *capias ad satisfaciendum*, *feri facias*, and the like, there no protection can bee cast for the defendant; because he hath no day in court, and the protection extendeth onely *ad placita & querelas*, and must be allowed by the court, which cannot bee but upon a day of appearance.

[c] In a writ of disceit brought against him, that obtained and cast a protection upon an untrue surmise in delay of the plaintive, that protection is allowable. In an action brought upon the statute of labourers a protection doth lie, & *sic de similibus*.

[d] To the sixth, no writ of protection can be allowed, unlesse it be under the great seale, and it is directed generally.

[e] To the seventh, the courts of justice, where the protection is cast, are to allow, or disallow of the same, bee they courts of record, or not of record, and not the sherife, or any other officer or minister.

[f] To the eighth, the protection may be cast, either by any stranger, or by the partie himselfe. An infant, feme covert, a monke, or any other, may cast a protection for the tenant or defendant. And this difference there is when a stranger casteth it, and when the tenant or defendant casteth it himselfe; [g] for the defendant or tenant casting it, he must shew cause wherefore he ought to take advantage of the protection; but an estranger neede not shew any cause, but that the tenant or defendant is here by protection.

[h] As to the ninth, a protection may be avoyded three manner of wayes. First, upon the casting of it before it be allowed. Secondly, by repeale thereof after it be allowed. (2) By disallowing of it many wayes, as for that it lieth not in that action, or that he hath no day to cast it, or for materiall variance betweene the protection and the record, or that it is not under the great seale, or the like. [i] Thirdly, after it be allowed, by *innotefcimus*; as if any tarry in the country without going to the service for which he was retained, over a convenient time after that he had any protection, or repaire from the same service, upon information thereof to the lord chancellor, he shall repeale the protection in that case by an *innotefcimus*. But a protection shall not be avoyded by an averment of the partie in that case; because the record of the protection must be avoyded by matter of as high nature.

There

(1) S. C. Mo. 844.—(2) The sense requires *thirdly* here; and that, where *thirdly* is, it should be *fourthly*. But the print in the former editions is, as we have given it.

time from three months; but we see none born with powers of coming to manhood, or of being reared, before seven calendar months, or near that time. At six months it cannot be. 3. I have known a woman bear a living child, in a perfectly natural way, fourteen days later than nine calendar months, and believe two women to have been delivered of a child alive, in a natural way, above ten calendar months from the hour of conception.

remarks to controvert the present legality of the jurisdiction thus exercised in Chancery over infants: our intent being simply to shew, that such jurisdiction is not, as far as yet appears, of ancient date; and that, though it is now unquestionable, yet at first it seems to have been an usurpation, for which the best excuse was, that the case was not otherwise sufficiently provided for. Our conjecture, as to the late commencement of this branch of jurisdiction in Chancery, is strengthened by some precedents, which have been obligingly communicated to us by a respectable gentleman in the Register's office. According to these, the first instance to be found of a guardian appointed by the chancellor, on petition without bill, was in 1696, in the case of

Y y y

Hampden.

[r] 39. H. 6. 39. 43. E. 3. 6 & 32. 27. H. 6. 1. F. N. B. 28. 17. E. 3. 23. 4. Co. 35. Broom's case. Bract. lib. 5. 10. 139. 140.

(2. Ro. Abr. 325. 326.) [u] 13. E. 3. tit. Protection 52. 12. E. 3. ibid. 69. 31. E. 1. ibid. 112.

[w] 19. E. 2. Protect. 111. 32. E. 3. ibid. 54.

[x] 23. H. 8. c. 3. 34. E. 1. Protection 38. 7. H. 4. c. 4. 1. R. 2. cap. 8.

[y] 21. E. 3. 24. 31. E. 3. Protect. 97. 5. E. 4. 50. 35. H. 6. 43. 46. 8. E. 4. 8. 17. E. 3. 22. 13. E. 3. Protect. 71. (Post. 380. b. Mo. 78. 189. Cro. Jam. 230.)

[a] Pasch. 12. Ja. Regis in the King's Bench.

[b] 13. E. 3. Protect. 72. Fleta l. 2. c. 12. 40. E. 3. 18. 48. E. 3. 18. 19. 37. H. 6. 32. 21. E. 4. 19. 15. H. 7. 8. 47. E. 3. 5. 17. E. 3. 68. 14. E. 3. Protect. 64. W. 2. cap. 45.

[c] 20. E. 3. Protect. 83.

[d] 35. H. 6. 2. Artic. super Cart. 6. 46. E. 3. Petition 19. [e] 2. Co. 17. Lane's case. 8. Co. 68. Trallop's case. 20. H. 6. 25. 2. E. 4. 4. 38. H. 6. 23. [f] 43. E. 3. Protect. 96.

[f] 21. E. 4. 18.

[g] 38. H. 6. 23.

[h] 44. E. 3. 12. 47. E. 3. 6.

[i] 13. R. 2. c. 16. 11. H. 4. 70. 7. H. 6. 22. 22. H. 6. 50. 30. H. 6. 3. 19. H. 6. 35. 21. E. 4. 20. 1. H. 6. 6. 42. E. 3. 9. 44. E. 3. 2. 39. E. 3. 4. 5. 20. E. 3. Protect. 80. 34. E. 3. ibid. 119.

[k] 44. E. 3. 4. 12. 47. E. 3. 6.
34. E. 3. 1. protect. 119. 28. H.
6. 3. 34. H. 6. 22. 50. H. 6. 3.
32. H. 6. 4.

[k] There is a clause in the protection to this effect, *presentibus minime valituris, si contingat ipsum, &c. à custodia castri prædicti recedere. Or si contingat iter illud non arripere, vel infra illum terminum à partibus transmarinis redire.* Whereupon there be two conclusions to be observed.

First, that though the protection be allowed by the court for a yeare, yet if it be repealed by an *innoteſimus*, that the re-sommons or re-attachment shall be granted upon the repeale within the yeare; for the protection that was allowed had the said clause in it. And of that opinion be our latter bookes; and the repeale by *innoteſimus* should serve for little purpose, if the law should not be taken so.

Secondly, that albeit he, that had the protection either *moraturæ* or *proſecturæ*, returne into England, and haply be arrested and in prison, yet, if he came over to provide munition, habiliments of warre, victuals or other necessaries, it is no breach of the said conditionall clause, nor against the act of 13. Richard 2. cap. 16. for that in judgement of law coming for such things as are of necessity for the maintenance of the warre, *moraturæ*, according to the intention of the protection and statute aforesaid. And thus much of the two first protections, *cum clausula volumus, proſecturæ* and *moraturæ*.

[l] Registrum 281. b. F. N. B.
28. b. 33. H. 8. ca. 29. in the
Preamble 41. E. 3. tit. Execu-
tion 38. 18. E. 3. ibid. 56. 27.
E. 3. 88. b. 4. E. 4. 16. 3. Eliz.
Dier. 197. Rot. Pat. 27. E. 3.
part. 1 m. 2.

[m] 25. E. 3. cap. 19.
(Cio. Cha. 389. 390. Hob. 115.)

[l] As to the third protection *cum clausula volumus*, the king by his prerogative regularly is to be preferred in payment of his duty or debt by his debtor before any subject, although the king's debt or duty be the latter; and the reason hereof is, for that *thesaurus regis est fundamentum belli, & firmamentum pacis.* (1) And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached untill hee paid the king's debt. But hereof grew some inconvenience, for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof [m] it is enacted by the statute of 25. E. 3. that the other creditors may have their actions against the king's debtor, and proceed to judgement, but not to execution, unlesse he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts.

[n] 41. E. 3. 15. 17. E. 3. 73.
29. E. 3. 13. 4. E. 4. 16.

This kind of protection hath (as it appeareth) no certaine time limited in it. But in some cases the subject shall be satisfied before the king; [n] for regularly whensoever the king is intitled to any fine or duty by the suit of the party, the party shall be first satisfied, as in a *decies tantum.* And so if in an action of debt, the defendant denie his deed, and it is found against him, he shall pay a fine to the king, but the plaintife shall be first satisfied, and so in all other like cases. And so it is in bills preferred by subjects in the Star-chamber, there costs and damages (if any be) shall be answered before the king's fine, as it is daily in experience.

The fourth protection, *cum clausula volumus* is, when a man sent into the king's service beyond sea is imprisoned there, so as neither protection *proſecturæ* or *moraturæ* will serve him; and this hath no certaine time limited in it, [o] whereof you shall read at large in the Register, and F. N. B.

[o] Regist. sæpe. F. N. B. 28. c.

[p] Vide 7. Co. 8. 9. Calvin's
case.

[p] Now are we at length come to protections *cum clausula volumus*, all which, saving one, are of grace, and, as hath beene said, are implied under the generall protection; for as Fitzherbert saith, every loyall subject is in the king's protection. Of these protections of grace, you shall not read much in our yeare bookes; because they stayed no actions or suites. [q] Of the divers formes of these you shall read at large in the Register, and F. N. B. which were too long and needlesse to be here recited.

[q] Register 280. &c. F. N. B.
29. A. B. C. D. E. F. G. H.
Register 280. Statut. de 14. E.
3. F. N. B. 30. A.

The protection *cum clausula volumus*, that is of right, is, that every spirituall person may sue a protection for him and his goods, and for the fermors of their lands and their goods, that they shall not be taken by the king's purveyor, nor their carriage or chattels taken by other ministers of the king, which writ doth recite the statute of 14. E. 3.

Of these protections I cannot say any thing of mine owne experience, for albeit queene Elizabeth maintained many warres, yet shee granted few or no protections; and her reason was, that he was no fit subject to be employed in her service, that was subject to other mens actions, lest she might be thought to delay justice (2).

Section 200.

ENTRE LE 5. est un home **THE fifth is, where a**
& profes- **que est enter et pro-** **man entred and pro-**
se en religion. fesse en religion. Si tiel fessed in religion. If
suiſt

(1) See ante 30. b. — (2) Since lord Coke's time protections have fallen wholly into disuse; lord Cutts, a famous officer in the reign of William the third, being the last person indulged with one, of whom our Reports take notice. 3. Blackst. Comm. 8th. ed. 289. & 3. Lev. 332. However it is still usual in acts of parliament to guard against the use of protections in suits, to which persons acting under the authority of the legislature are parties.

Hampden. But since that time, the court of Chancery hath exercised the power of appointing guardians, without its being once called into question. Therefore in the case of lady Teynham against Mr. Lennard, which was heard on an appeal to the lords in 1724, the counsel for the respondent very properly stated it as a thing fixed, that the lord chancellor was intrusted with that part of the crown's prerogative, which concerned the guardianship of infants. 1. Brown. Cas. in Parl. 544. Under the same idea too, the last marriage-act refers to the chancellor for the appointment of a guardian to consent to marriage, where the infant is without aguardian and the mother is not living. 26. G. 2. c. 33. s. 11.

The third kind of guardian, not hitherto mentioned, is guardian by appointment of the ecclesiastical court. The right of appointing guardians for the personal estate, and, if there is no other guardian by tenure or otherwise, for the person also, is, we understand, claimed by the ecclesiastical court. Swinburne takes notice of such a guardian; but confines his observations, on the appointment and his extent of power, to the custom within the province of York. Swinb. on Testam. 12.

*fuit un action, le tenant ou defendant, poit mon-
strer, que tiel est enter
en religion en tiel lieu en
l'ordre de Saint Benet,
& la est moigne professe,
ou en l'ordre des friers
preachers, ou minors, &
la est frere professe, &
issint des auters orders
de religion, &c. & de-
maundera judgement sil
serra respondue. Et la
cause est; pur ceo que
quant un home entra en
religion, & est professe, il
est mort en ley, & son
fils, ou auter cousin,
maintenant luy inherit-
era, auxy bien sicome il
fuit mort en fait. Et
quant il entra en reli-
gion, il poit faire son
testament, & ses execu-
tors; les queux execu-
tors averont un action
de det due a luy devant
lentre en religion, ou
auter action que execu-
tors poient aver, sicome
il fuit mort en fait. Et
sil ne fait ses executors
quant il entra en reli-
gion, donques l'ordinarie
poit committer l'adminis-
tration de ses biens a
auters homes, sicome il
fuit mort en fait.*

Il est mort en ley. *Civiliter mortuus, or mortuus seculo.* [d] There is a death in [d] Bracton, fo. 301. 426. Brit-
deede, and there is a civil death or a death in law, *mors civilis* and *mors naturalis*, as here it ton fo. 226. 250. 251. Fleta lib.
appeareth; and therefore to oust all scruples. Leases for life are ever made during the natu- 6. ca. 41.
ral life, &c. (1) If the father enter into religion, then shall his sonne and heire have an as-
sise of Mordancester, and the writ shall say, [e] *Si W. pater, &c. die quo obiit habitum religionis* [e] F. N. B. 196. 5. E. 4. 3.
assumpsit, in quo habitu professus fuit ut dicitur.

such a one sue an action, the tenant or defend-
ant may shew, that such a
one is entred into religion
in such a place, into the
order of Saint Benet, and
is there a monke profes-
sed, or in the order of
friars minors or preachers,
and is there a brother pro-
fessed, and so of other
orders of religion, &c. and
aske judgement if he
shall be answered. And
the cause is this; that
when a man entreth into
religion, and is professed,
he is dead in the law, and
his sonne, or next cousin,
incontinent shall inherit
him, as well as though
he were dead indeed. And
when he entreth into re-
ligion, he may make his
testament and his execu-
tors, and they may have
an action of debt due to
him before his entry into
religion, or any other ac-
tion that executors may
have, as if he were dead
indeed. And if that he
make no executors when
he entreth into religion,
then the ordinary may
commit the administration
of his goods to other, as
if he were dead indeed.

[a] It is to be observ-
ed, that a man doth
enter into religion at
his first comming,
and liveth under o-
bedience; but hee is
not professed, till a
yeare be past, or some
time of probation.
And he is said to be
professed, when he
hath taken the habit
of religion, and vow-
ed three things, obe-
dience, wilfull po-
verty, and perpetual
chastity. And there-
fore our authour saith
here, *enter & pro-
fesse.*

*En l'ordre, des
freres preach-*

ers, ou [b] mi-
nors. It appear-
eth in our bookes,
that of friars there
were foure orders,
viz. minors, augus-
tins, preachers, and
carmelites; and the
franciscani, capu-
chini, and observan-
tes, are included
under the title of
minors; and they
were called obser-
vants, because they
bee not conventuall
or joyned together
in a brotherhood, but
live separately, and
bound themselves to
observe more strictly
the rights of their
order. [c] *Cum [c] Bracton, fo. 421. b.*
quis semel se religioni
contulerit, renunciat
omnibus quæ seculi
sunt, habita distinc-
tione, utrum habitum
probationis suscepit,
vel habitum professi-
onis.

Auxibien

(1) See Acc. 2. Co. 48. b. Blackst. Comm. 8. ed. v. 1. p. 132. v. 2. 121. But by lord Coke's observing here, that *natural* is added
to oust all scruples, it seems as if he did not conceive it to be absolutely necessary.

1st ed. 99. b. In a case, first before the King's Bench in lord Hale's time, he admitted the right of the ecclesiastical court
to appoint a curator of the personal estate; and after his death the court inclined to the same opinion. 2. Lev. 162. T.
Jo. 50. In another case soon after, the court of King's Bench allowed the right as to the infant's portion, but denied it
over the person. 3. Keb. 384. In the next case on the subject, the question as to the right was largely debated on a plea in pro-
hibition. This alledged, that by the common law used and approved in England, if any person by his will devises any goods
to his children, the ordinary, before whom the will is proved, hath used to commit the custody of the sons and their
portions till fourteen, and of the daughters and their portions till twelve, except where they are in the custody of any
other by reason of any tenure or by the father's appointment; and if any person detained such infants or their portions, the
ordinary hath also used to compel the delivery of them by ecclesiastical censures. 2. Lev. 217. But on a demurrer this plea was
over-ruled and the prohibition ordered to stand; the latter being founded on the libel in the suit in the ecclesiastical court,
which had stated the right in a more extensive way; for the libel was, that by the ecclesiastical law, every person having the
tutition of any infant under age, by the will of the father or *per judicem competentem*, ought to have the custody of the infant and
suit in the ecclesiastical court for the detainer. After this case we find nothing on the subject for a long time. But, in a case
of the late king's reign, Lee justice casually takes notice of the ecclesiastical court's appointment without objection, saying, that
the course of the spiritual court is, that if the infant is under seven years, they chuse a curator, but if he is seven he chuses.
Fitzgib.

Auxibien come il fuit mort en fait. But yet to three purposes, profession, that is, the civil death, hath not the effect of a naturall death.

First, this civil death shall never derogate from his owne grant, nor be any mean to avoid it. And therefore if tenant in taile maketh a feoffment in fee, and entereth into religion, his issue shall have no formedon during his life; because that should be in derogation of his own grant, and be a meane to avoyd the same.

(F. N. B. 213 A.)

[f] 32. E. 1. Dower 176. 31. E. 3. Collusion 29. 31. E. 3. Entre coge. 52. 21. E. 4. 14. (Ante 33. b.)

[f] Secondly, it shall never give her availe, without whose consent he could not have entered into religion, and therefore his wife after his civil death shall not be indowed, untill his naturall death. But if the wife, after her husband hath entered into religion, alien the land which is her owne right, and after her husband is deraigned, the husband may enter and avoid the alienation.

Thirdly, it shall not worke any wrong or prejudice to a stranger that hath a former right; and therefore if the disseisor entereth into religion, and is professed, so as the land descends to his heire, yet this descent shall not tolle the entrie of the disseisee.

[g] 5. E. 4. 3. 2. [h] 18. H. 6. 33. per Fortesc.

[g] A woman cannot be professed a nunne during the life of her husband. But some do hold a diversitie, [h] that, *ante carnalem copulam*, the husband or wife may enter into religion without any consent, but *post carnalem copulam* neither of them can without consent of other.

[i] 21. E. 3. Collusion 29. [k] 34. E. 3. Garranty 71. Vid. the chapter of Warranty, sect.

[i] But if a man holdeth lands by knight's service, and is professed in religion, his heire within age, he shall be in ward. [k] If I be disseised, and my brother releaseth with warranty, and is professed in religion, and the warrantie descendeth upon me, this warrantie shall binde me; because I am his heire, and such inheritance as my brother had shall descend upon me.

[l] 21. R. 2. Judgm. 263. (Post. 181. b.)

[l] And if one joyntenant be professed in religion, the land shall survive to the other. If a man or a woman be professed in religion in Normandie, or in anie other foraine part, such a profession shall not disable them to bring any action in England; because it wanteth triall, but they must be professed in some house of religion within this realme, for that may be tried by the certificate of the ordinarie, so as of foraine professions the common law taketh no knowledge (1). [m] And yet in some case one that is professed in religion within the realme shall have an action; as if he be made an executor, or if he be an administrator, he shall maintaine an action, not in his owne right, but in right of the dead.

[m] 10. E. 3. 511. 14. E. 3. Executors 87. 5. H. 7. 25. 21. H. 6. 30. 3. H. 6. 24.

[n] 44. E. 3. 9. Nonability 3. 14. H. 8. 16.

[n] If a monke be made a bishop, or a parson, or a vicar, he shall have an action concerning his bishoprick, parsonage, or vicarage, & *sic de similibus*.

[o] 2. H. 4. 7. 8. H. 5. 6. 7. E. 4. 30. 44. E. 3. 4. 20. E. 3. Vill. 10. & Nonability 9. 49. E. 3. 4.

[o] And if a monke be farmer of the king, yeelding a rent, he shall have an action concerning that farme. And albeit Littleton speaketh generally of one that is professed in religion, yet must it not be understood of the soveraigne or head of the religious house, as of the abbot, prior, and the like; [*] for albeit they be professed in religion, yet by the policie of the law, they are persons able to purchase, and to implead, and to be impleaded, to sue, and to be sued for any thing that concernes the house of religion; for otherwise the house might be prejudiced, and other men also of their lawful actions. And this is the ancient law of England, as it appeareth in these words, [p] *des biens des gens de religion appent l'action al chiefe en son noyme pur luy & son convent*. But what if a monke, &c. were beaten, wounded, or imprisoned, &c. doth the law give no remedie therefore? Yes, verily; [q] for in that case the abbot and the monke shall joyne in an action against the wrong doer; and if the writ be, *ad damnum ipsius prioris*, the writ is good; and if it be *ad damnum ipsorum*, it is good also. Also if a monke be by conspiracie falsely and maliciously indicted of felony and roberie, and afterwards is lawfully acquitted, his soveraigne and he shall joyne in a writ of conspiracy and the like. And where Littleton speaketh of a man that is professed in religion, the same law is of a nunne, *sanctimonialis, mutatis mutandis*.

[*] Bract. fo. 415. 416. 429. Mir. c. 2. sect. 14. 14. H. 4. 37. b. 5. H. 7. 26. Vid. sect. 256. 14. E. 4. 36.

[p] Mir. ubi supra.

[q] 22. Aff. 87. 21. E. 3. 41. 22. E. 3. 2. 37. H. 6. 8. 32. H. 6. 36. Bract. l. 5. f. 416. 420. 13. E. 3. Bre. 261. 22. Ed. 3. 2. 38. H. 6. 7. b. 24. E. 3. 34. b. 45. 7. R. 2. Nonability 3. 9.

[r] 4. H. 3. Bre. 766.

[r] A wife is disabled to sue without her husband, as much as a monke is without his soveraigne; and yet we read in books, that in some cases a wife hath had abilitie to sue and be sued without her husband: [s] for the wife of Sir Robert Belknap, one of the justices of the court of common pleas, who was exiled or banished beyond sea, did sue a writ in her owne name, without her husband, he being alive; whereof one said, *ecce modo mirum, quod femina fert breve regis non nominando virum conjunctum robore legis*.

[s] 2. H. 4. f. 7. a. (1. Bull. 140. Mo. 7. 666. 351. 1. Ro. Rep. 400.)

[t] 10. E. 3. 53.

[t] King Edward the third brought a *quare impedit* against the lady of Maltravers; and she pleaded, that she was covert of baron; whereunto it was replied for the king, that her husband the lord Maltravers was put in exile for a certaine cause, and she was ruled to answer.

[u] 1. H. 4. r. b.

[u] King Henrie the fourth brought a writ of ward against Sibel B. who pleaded, that shee was covert baron, &c. whereunto it was reped for the king, that her husband for a crime, that he had committed against the king and the peeres, was relegate or exiled into Gascoigne, there to remaine untill he obtained the king's grace: and Gascoigne chiefe justice, *ex assensu sociorum*, awarded that she should answer.

Sir Tho. Egerton, lord chancellor, in his argument which he published apart by himselfe in Cal.

(1) See ante 3. b. n. 7. to which add the arguments in the case of *Thornby* and *Fleetwood* 1 Stra. 347. Com. 207. 10. Mod. 113. 356. 406.

Fitzgib. 164. However, in a loose note of a still later case, lord Chancellor Hardwicke is made to say, that only guardians *ad litem* can be appointed by the ecclesiastical court. 14. Vin. Abr. 176. pl. 7. in a note. In another case, the report of which is more to be relied upon, the same respectable judge reprobated it, as a presumption in the ecclesiastical court to appoint a guardian of the person and estate, and declared their appointment of any, except when a suit was depending, to be an interference with his power as chancellor; and so displeased was he in the instance before him, as to conclude with recommending to the attorney-general, to consider, whether a *quo warranto* would not lie against the ecclesiastical court. 3. Atk. 631. Under a like apprehension of the subject, the present chief justice of the King's Bench, in *Miss Catley's case*, spoke of the appointment by the ecclesiastical courts as confined to guardians *in litem*, and therefore as perfectly insignificant. 4. Burr. v. 3. p. 1436. These authorities being brought before the reader, we shall leave him to his own judgment, with this further information only, that, in the warm debates in parliament about the last marriage act, this species of guardianship is said to have been incidentally discussed.

The fourth kind of guardian, not yet enumerated, is the guardian *ad litem*. But of this special guardian it may suffice for the present purpose to observe, that the power of appointing such is incident to all courts; and that the king may, as it is said, by letters patent appoint a guardian to prosecute or defend for an infant in suits generally, though such appointments have been long out of use. F. N. B. 27. L. See further as to guardian *ad litem* Post. 135. b.

In the preceding notes about guardianship, we have purposely confined ourselves to the subject exclusive of the royal family. Their case is too delicate to warrant our touching on the subject without better materials, than we are at present possessed of. Therefore

Calvin's case *de post natis* demanded what former president there was for the warrant of the lady Belknap's case in 2. H. 4. 7. (1) which occasioned me to search, and upon search I Pl. in Parliam. 19. E. 1. found, that the like judgment had bin given before at the parliament holden in Craft. Epip. an. 19. Edw. 1. where the case was, that Thomas of Weyland being abjured the realme for felony in the yeare before, Margerie de Mose his wife, and Richard sonne of the said Thomas, exhibited their petition of right into the parliament, for the manor of Sobbir, wherein her husband had but an estate for life joyntly with her, and the inheritance in Richard the son by fine. The earle of Gloucester, lord of the fee, (who, claiming the land by escheat, had taken the possession thereof) alleged, *quod non fuit juri consonum, quod aliqua femina intraret in aliquas terras vivente marito suo, eo quod prefatus Thomas abjuravit regnum, & adhuc vivit; & asserit idem comes nunquam hujusmodi casum accidisse, & inde petit post multas allegationes, quod possit predictum manerium tenere ut eschaetam suam. Super quo per ipsum dominum regem preceptum fuit, quod tam iustici sui de utroque banco, quam ceteri de regno suo, tam milites quam servientes in legibus & consuetudinibus Angliæ experti, mandarentur, quod essent coram rege & ejus consilio, &c. ad certiorandum ipsum regem, qualiter & quomodo in casu isto fuerit procedendum, & qualiter temporibus præteritis & antecessorum suorum in casibus consimilibus fieri consuevit, & interim scrutantur recorda de consimilibus, ubi recitantur duo vel tres consimiles casus. Et quia, licet prius non videbatur aliquibus juri consonum fuisse, quod uxor in vita viri secundum sanctam ecclesiam, qualitercunque deliquisset quoad forum regium, non posset nec deberet à viro suo separari, & sic quicquid foret in possessione uxoris converteretur in potestatem viri sui, & hoc manifeste immineret contra consuetudinem regni; & etiam quia quidam dubitabant, quod de possessionibus & bonis uxoris vir possit aliquantulum sustentari: tamen coram consilio domini regis, vocatis thesaurar' & baronibus & iusticiariis de utroque banco, concordatum est, quod predicta Margeria rebabeat talem seisinam, &c. secundum purportum finis predicti. &c. (2) Patet etiam consimile exemplum tempore Henrici patris regis. I have cited this solemne resolution the more*

Note the ancient triall of difficult matters in law.

The great authority of judicial records and precedents.

A solemne resolution of the law in this point.

at large; because there be many excellent things to be observed in it: so as by that which hath beene said, it plainly appeareth, that this opinion, concerning the hability of the wife of a man abjured or banished, was not first hatched by the judges in Henry the fourth's time. And here is to be observed, that an abjuration, that is, a deportation for ever into a forreine land, like to profession, (whereof our author speaketh here) is a civil death; and that is the reason that the wife may bring an action, or may be impleaded during the naturall life of her husband. And so it is, if by act of parliament the husband bee attainted of treason or felony, and saving his life, is banished for ever, as Belknap, &c. was, this is a civil death, and the wife may sue as a *feme sole*. And hereby you may understand your bookes, which treat of this matter. But if the husband, by act of parliament, have judgement to be exiled but for a time, which some call a relegation, that is no civil death (3).

And in 8. E. 2. an abjuration is called a divorce betwene the husband and wife. *Sed opus est interprete*; for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam*, but by authority of parliament, or in case of abjuration, and that must be upon an ordinary proceeding of law, as it was in this case of Weyland.

Another example we have in our bookes to this effect. If the husband had aliened the land of his wife, and after had committed felony and beene abjured the realme, the wife shall have a *cui in vita* in his life time, agreeable with the said resolution in parliament: for that the abjuration was a civil death (4).

See in the Register, a woman was banished out of the towne of Calice for adultery, by the law or custome of that place, and there appeareth *carta pardonationis pro muliere bannita. Sed nos non habemus talem consuetudinem*.

[a] But by the common law, the wife of the king of England is an exempt person from the king, and is capable of lands or tenements of the gift of the king, as no other *feme covert* is, and may sue and be sued without the king; for the wisdom of the common law would not have the king (whose continuall care and study is for the publike, & *circa ardua regni*) to be troubled and disquieted for such private and petty causes: so as the wife of the king of England is of ability and capacity to grant and to take, to sue and be sued as a *feme sole* by the common law.

[b] And such a queene hath many prerogatives, as, she shall find no pledges, for such is her dignity, as she shall not be amerced.

The queene, nor the king's sonne, are restrained by the statute of 1. H. 4. cap. 6. concerning grants by the king.

[c] In a *quare impedit* brought by her, some say, that plenarty is no plea, no more than in the case of the king.

[d] If any bailife of the queene's bring an action concerning the hundred, he shall say, *in contemptum domini regis & reginæ*.

(3. Inst. 217.)

8. E. 2. Coron. 425.

So resolved in parliament upon the making of the statute of 35. E. 1. ca. 1. *exilium Hugonis de Spencer patris & filii tempore E. 2.*

31. E. 1. Cui in vita 31.

(Ante 3. a.)

Regist. fol. 312. b.

[a] Vide in my preface to the first booke. This was law before the Conquest. 10. E. 3. 26. b. 30. E. 3. 5. 18. E. 3. 1. 22. E. 3. 21. 49. E. 3. 4. 49. Aff. 8. 11. H. 4. 67. 14. Ed. 3. Voucher 110. 20. E. 3. Nona. 9. 31. E. 3. Quar. imp. 146. 3. H. 7. 14. 19. H. 6. 2. 28. H. 6. 13. 7. H. 7. 7. 2. 26. H. 6. Aid le roy 24. Flet. li. 2. ca. 63. in Fine. Pl. Com. 231. Stanf. Præf. 10. b. (Ante 3. a.)

[b] 18. E. 3. 2. 33. E. 3. Brief 916. F. N. B. 101. a.

[c] 18. E. 3. 32. 24. E. 3. 35.

75.

[d] 32. E. 3. Bre. 346. 9. E. 3.

The 33.

(1) See Ellefm. Argum. in the case of the *post nati* 56.—(2) The whole record of Weyland's case is amongst the Collection of Parliamentary Records lately published; and by this it appears, that lord Coke is not very accurate in the words of his extract. 1. Parl. Rec. 66. Amongst other deviations from the record, one is, that he mentions *two or three like cases* to have been recited, whereas in the record the *only one* taken notice of is that of Matilda the wife of Robert Cissor, in the reign of Henry the third.—(3) But though it is not a civil death, yet for the time the effect is the same to the wife; and therefore it is equally necessary, that she should have a right to sue alone. For the authorities on this subject, see 4. Vin. 152. 1. Com. Dig. 18.—(4) Vid. Mich. 9. & 10. E. 1. Rot. 46. *A wife shall have a writ of deceit against her husband, who levies a fine in her name.*—Vid. Rot. Parl. 3. & 4. E. 4. n. 41. *Special act to enable the duchess of Exeter to act as a single woman during the life of her husband, who was attainted of treason.* Hal. MSS.—See the act in Ro. Parl. v. 5. p. 548.

Therefore we can only refer to the arguments, in the case on the king's right in respect to the education and marriage of his grand-children, which was referred to the judges in the reign of George the first. See Fortesc. Rep. 401. & Post. 133. b. note 1.

The queene shall pay no tolle.

[c] F. N. B. 235. A.

[f] F. N. B. 1. F.

[g] 14. E. 3. Voucher 110. 21. k. 3. 53. 22. E. 3. 3. b. 17. E. 3. 65. 10. E. 3. 17. 5. E. 3. 4. 25. E. 3. Aide del roy 66. 10. E. 3. 18. 26. H. 6. Aide le roy 24. [h] 21. E. 3. 17. 34. E. 3. Pro- teet. 122. 11. H. 4. 67. b. [i] 30. E. 3. 5. [k] L'etat. de 25. E. 3. de Pro- ditionibus. [l] Rot. Parliam. 8. H. 6. nu. 7.

[m] 4. E. 4. 25. 6. E. 4. 4. 45. E. 3. 10. a. 18. E. 4. 19. 22. H. 6. 5. 5. H. 7. 25. b.

[n] Pl. Com. 280. 281. Greif- brooke's case.

[c] If the tenant of the queene alien a certaine part of his tenancie to one, and another part to another, the queene may distraine in any one part for the whole, as the king may doe; but other lords shall distraine but for the rate; and therefore where the queene so dis- trained, there lyeth a writ *de onerando pro rata portione*. [f] The writ of right shall not be directed to the queene no more than to the king, but to her bailife. Otherwise it is, when any other is lord.

[g] In case of aide prier of the queene, it is *domina regina inconsulta*, and the cause of the aide prier shall not be counterpleaded no more than in the king's case. And see where the aide shall be granted of the king and queene, and where of the queene onely, and she of the king. [h] But a protection shall be allowed against the queene, but not against the king. Neither shall the queene be sued by petition, but by a *precipe*. [i] The queene is not bound by the statute of Marlebridge for driving a distresse into another county.

[k] If any doe compasse the death of the queene, and declare it by any over fact, the very intent is treason, as in the case of the king.

[l] No man may marry the queene dowager without the king's licence. (1) But let us now returne to Littleton.

Il poet faire son testament & ses executors, &c. [m] If A be bound to the abbot of D. A is professed a monke in the same abby, and after is made abbot thereof, he shall have an action of debt against his owne executors.

Donques l'ordinaire poet commiter administration, &c. sicome il fuit mort en fait. [n] Note the statute of 31. E. 3. ca. 11. that giveth actions to the administrators, speaketh of a man that dies intestate, which by the authority of Littleton extendeth as well to a civill death as to a naturall.

Section 201.

EXcommenge, ex-communicatus, ex-

communicatio. [a] Sicut quis poterit habere lepram in corpore, ita & in anima. Excommunicato interdicatur omnis actus legitimus, ita quod agere non potest, nec aliquem convenire, licet ipse aliis possit conveniri.

Excommunicatio est nihil aliud quam censura, à canone vel iudice ecclesiastico prolata & inflicta, privans legitimam communionem sacramentorum, & quandoque hominum. • It is divided into the greater and the lesser. Minor est, per quam quis à sacramentorum participatione conscientia vel sententia arceatur. Major est, quæ, non solum à sacramentorum, verum etiam fidelium communionem excludit, & ab omni actu legitimo separatur & dividit. But either of them both disableth the party. [b] Cum excommunicato, autem, nec orare nec loqui, nec palam, nec absconditè, nec vesci licet, exceptis quibusdam personis. But every excom-

LE vi. est, lou un home est excom-

menge per la ley de saint esglise, & il fust un action real ou personal, le tenant ou defendand poit pleder, que celuy, que fust, est excommenge, & de ceo covient monstrier lettre de l'evesque south son seale, tesmoignant l'excommengement, & demaundera judgement, sil serra respon- due, &c. Mes en cest cas, si le demandant ou plaintife ceo ne poit dedire, le breve n'abatera my, mes le judgement serra, que le tenant ou defendand alera quite sans

THE 6. is, where a man is excommu- nicated by the law of holy church, and he sueth an action reall or personall, the tenant or defendand may pleade, that he, that sueth, is excommunicated, and of this it behoves him to shew the bishop's letters under his seale, witnessing the excommunication, and aske judgment, if he shall be answered, &c. But in this case, if the demandant or plaintife cannot deny it, the writ shall not abate, but the judgment shall be, that the tenant or defendand shall go quite without

jour,

(1) We have searched in vain for the parliamentary roll of 8. Hen. 6. cited in the margin, as an authority for this position. It is neither amongst the printed Statutes at Large, nor amongst the Rolls of Parliament lately published. Yet it is taken notice of as a statute in the Abridgment of Parliamentary Records. Cott. Rec. 589. In another of lord Coke's works, he cites it as of the 8. Hen. 6. See 2. Inst. 18. But we cannot find any such statute in print. It is not meant by this to doubt the existence of such a statute. We only apprise the reader of the inaccuracy in the reference to it. For the doctrine of marriages of the royal family, we refer the curious reader to the opinion of the judges in the reign of George the first, when they were consulted on the prerogative claimed by the king over his grand children; and to the debates, whilst the act of the present reign for regulating the future marriages of the royal family was under the consideration of parliament. See Fortesc. Rep. 401. 12. Geo. 3. c. 11. Ann. Reg. for 1772. and the two protests of the dissentient lords in Journ. Dom. Proc. 3. March 1772.

[a] Bracton, lib. 5. fo. 415. 426. 427. Fleta lib. 6. c. 44. Britton, ca. 49. fol. 125.

(F. N. B. 62. Doctr. Plac. 8.)

• F. N. B. 64. F.

[b] Bracton 426. b. acc.

jour, pur ceo que quant le demandant ou plaintife ad purchase les letters de absolution, & ceux sont monstres a le court, il poit aver un resummons, ou reattachement, sur son original, solongue la nature de son briefe. Mes en les auters v cases le briefe abatera, &c. si le matter monstre ne poit estre dedit.

day, for this, that when the demandant or plaintife hath purchased his letters of absolution, and shewed them to the court, he may have a resummons or a reattachment, upon his original, after the nature of his writ, &c. But in the other cases the writ shall abate, &c. if the matter shewed may not be gainsaid.

munication disableth not the party. [c] If Bailifes and commons, or any other corporation aggregate of many, bring an action, excommungement in the bailifes shall not disable them; for that they sue and answer by attorney. Otherwise it is of a sole corporation. But if executors or administrators be excommunicated, they may be disabled; because they, which converse with a person excommunicate, are excommunicate also. [d] If a bishop be defendant, an excommunication by the same bishop against the plaintife shall not disable him, and it shall be intended for the same cause, if another be not shewed.

[c] 30. E. 3. 15. 42. E. 3. 13. 21. H. 6. 30. 21. E. 4. 49.

[d] See Artic. Clerica. 7. 5. E. 3. 8. 8. E. 3. 70. 9. H. 7. 21. 10. H. 7. 8. & 9. 18. E. 3. 58. 28. E. 3. 97. 16. E. 3. Excom. 5. 20. E. 3. ibid. 9. 3. H. 4. 3.

Lettre del evesque de south son seale. [e] None can certifie excommungement, but only the bishop, unless the bishop be beyond sea or *in remotis*; or one that hath ordinary jurisdiction, and is immediate officer to the king's courts, as the archdeacon of Richmond, or the dean and chapter in time of vacation. [f] But in ancient time every official or commissary might testify excommungement in the king's court; and, for the mischief, that ensued thereupon, it was ordained by parliament, that none should testify excommungement but the bishop only.

[e] Bracton lib. 5. fo. 426. b. 12. E. 4. 15. 20. H. 6. 17. 20. E. 3. Excommungement 20. 33. E. 3. ibid. 29. 44. E. 3. ibid. 23. 11. H. 4. 14. F. N. B. 64. 65. 239. 7. E. 4. 14. 8. H. 6. 3. Registr. 67. (8. Co. 68. 1. Ro. Abr. 883.)

[g] If a bishop certifie, that another bishop hath certified him, that the partie, which is his diocesan, is excommunicated, this certificat upon another's report is not sufficient. [h] If the bishop of Rome, or any other having foraigne authority, doth excommunicate any subject of this realm, and certifieth so much under his seale of lead, this shall not disable the party; for the common law disallows all acts done in disability of any subject of this realm by any foraine power out of the realme, as things not authentique, whereof the judges should give allowance. [i] If the bishop certifieth the excommunication under seale, albeit he dyeth, yet the certificate shall serve. [k] *Si quis innodatus fuerit per excommunicationes diversas pro diversis delictis, & profert literas absolutionis de una sententia, non erit absolutus, quousque de omnibus aliis absolvatur.*

[f] 11. H. 4. 62. in Debt. [g] 33. E. 3. Excom. 29. F. N. B. 65. (Dy. 371. b. 4. Inft. 327.) [h] 16. E. 3. Excom. 4. 31. E. 3. ibid. 4. & 6. 30. Aff. 19. F. N. B. 64. 4. H. 7. 15. 12. E. 4. 15. 14. H. 4. 14. [i] 14. E. 3. Excom. 8. 8. E. 2. ibid. 26. [k] Hil. 14. E. 3. Coram rege, London, in Thesaur. (Ante 97. a. Post. 344.)

Evesque. *Episcopus*, a bishop is regularly the king's immediate officer to the king's court of justice in causes ecclesiasticall, and all the bishopricks in England are of the king's foundation, and the king is patron of them all; [l] and at the first they were donative, and so it appeares by our bookes, and by acts of parliament, and by history, and that was *per traditionem annuli & pastoralis baculi*. i. e. the crozier (1). And king Henry the first, being persuaded by the bishop of Rome to make them elective by their chapter or convent, refused it (2). [m] But king John by his charter, acknowledging the custome and right of the crowne in former times, yet granted *de communi consensu baronum*, that they should bee eligible, which after was confirmed by divers acts of parliament. And afterward the manner and order, as well of election of archbishops and bishops, as of the confirmation of the election and consecration, is [n] enacted and expressed in the statute of 25. H. 8. But by the statutes of 31. H. 8. and 1. E. 6. (3) they were made donative by the king's letters patents, both which statutes are repealed (4), and the statute of 25. H. 8. doth yet remaine in full force and effect (5).

[l] 17. E. 3. fo. 40. 25. E. 3. cap. de Provis. 25. H. 8. ca. 10. 3. Co. 73. le Case de Deane & Chapter de Norwich. Mat. Par. pag. 62. Vid. scilicet. 133. 134. [m] Rot. Patent. 15. January 17. Regis Johannis. Mar. Par. pag. 253. 35. E. 1. Lestat. de Carlisle. 25. E. 3. Lestat. de Provis. 13. R. 2. ca. 2. [n] 25. H. 8. ca. 20.

And where Littleton saith, that the bishop under his seale must testify, &c. it is to be knowne, [o] that none but the king's courts of record, as the court of common pleas, the king's bench, justices of gaole delivery, and the like, can write to the bishop to certifie bastardy, mulierty, loyalty of matrimony, and the like ecclesiasticall matter: for it is a rule in law, that none but the king can write to the bishop to certifie; and therefore no inferiour court, as London, Norwich, Yorke, or any other incorporation, can write to the bishop, but [p] in those cases the plea must be removed into the court of common pleas, and that court must write to the bishop, and then remand the record againe. And this was done in respect of the honor and reverence, which the law gave to the bishop, being an ecclesiasticall judge,

[o] 2. E. 3. Corone, 160. 8. E. 3. 59. 24. E. 3. 33. 44. E. 3. 28. 8. R. 2. Consuans, 88. (2. Ro. Abr. 589.) [p] 41. E. 3. 42. E. 3. fo. 18. E. 3. 61. 14. H. 4. 25. 3. H. 4. 12. Registr. 7. a. F. N. B. 6. E.

(1) Mr. Washington, one of the writers against the dispensing power in the reign of James the second, insists, that in the Saxon times bishopricks were conferred in parliament; and that the king's investiture was subsequent to such election. For proof of this position, one of his chief authorities is the following passage in Ingulphus: *A multis annis ante retroactis nulla erat electio praelatorum mere libera et canonica; sed omnes dignitates, tam episcoporum quam abbatum, regis curia pro sua complacencia conferrebat.* Ingulph. Hist. fol. 309. b. Observat. on Eccles. Jurisd. 24. Another instance relied on is the election of Wulfstan bishop of Worcester, which Matthew Paris describes in the words following: *Wulfstanus, electo ad archiepiscopatum Eboracensem Aldredo, unanimi consensu, tam cleri, quam totius plebis, rege insuper, ut quem vellet sibi eligerent presulem et animarum pastorem, annuente, in episcopum ejusdem loci eligitur.* Matth. Par. Hist. 20. — (2) After some struggles, Henry gave up the point of investiture; but, according to Mr. Washington, elections of bishops continued as before till king John's time; and he says, there are precedents of many bishops elected in parliament in the reigns of Stephen and Henry the second. Observat. on Eccles. Jurisd. 33. & 2. Spelm. Concil. 42. & 119. — (3) 31. H. 8. c. 9. & 1. E. 6. c. 2. But the former statute only relates to the new bishopricks erected by Henry. See Rastall's 3. ed. of Stat. — (4) But notwithstanding the repeal of the 1. E. 6. the election of bishops is, as that statute emphatically expresses it, mere shadow, colour, and pretence; for by the 25. of Hen. 8. if they do not elect the person recommended by king's letter missive, which accompanies his *congé d'élire*, they incur the penalties of a *præmunire*. See f. 7. There is no such statute

[a] 8. E. 3. 59. 36. H. 6. 33. tit. Quar. Imp. Brooke 109. 35. H. 6. 30. 11. H. 6. 3. 24. E. 3. 33.
[b] 15. E. 3. Conusans 41. Juridict. 24. 40. E. 3. 2. vide lect. 134.
[c] Braet. lib. 3. 106.
[d] Fleta lib. 5. cap. 14. Britton fol. 248. b.

and a lord of parliament by reason of the baronie which every bishop hath. (1) And this was the reason [a] a *quare impedit* did lye of a church in Wales in the county next adjoyning; for that the lordship's marchers could not write to the bishop, [b] neither shall consufance be granted in a *quare impedit*, because the inferior court cannot write to the bishop. And here- with agreeth antiquitie. [c] *Nullus alius præter regem potest episcopo dem. ndare inquisitionem faciendam.* [d] And another speaking of loyaltie of marriage, *nec alius quam rex super hoc de- mandaret episcopo, quod inde inquireret. Episcopus alterius mandatum, quam regis, non tenetur obtemperare.* And therewith agreeth Britton also.

Le briefe n'abatera, &c. Abater is a French word, and signifieth *destruere*, or *prostruere*, to destroy or prostrate. And *abatement de briefe* is a prostration or overthrowing of the writ.

[e] Braet. lib. 5. fol. 425. 11. R. 2. Excom. 25. 13. E. 4. 8. 3. Aff. p. 12. Vide. lect. 691.

[*] *Alera quite sauns jour, &c.* That is, to goe quiet without any continuance to any certaine day; and therefore the defendant is not bound to any certaine attendance, untill the party purchaseth his letters of absolution, and the reattachment or reformons bee sued, the entry of which award is, *ideo loquela prædicta remaneat sine die quousque, &c.*

[f] 51. H. 3. cap. 1. & 2. Marlebr. ca. 12. 32. H. 8. ca. 21.

Four. Dies [e] in legall understanding is the day of appearance of the parties, or continuance of the plea. And you shall understand, that first in reall actions there are *dies communes*, common dayes, whereof you shall reade in divers ancient statutes.

[f] Artic. super Cart. ca. 15. 28. E. 1.
[g] 8. H. 6. 20. 30. H. 6. 35. 8. Eliz. Dier. 252.
(2. Inst. 567.)

[f] Also in all summons upon the originall there must be fiteene dayes after the summons before the appearance. [g] But if the originall be returned *tarde*, and *summons alias* goeth forth, there must be nine returnes betwene the *teste* and the returne. And so in other judiciall processe in reall actions, saving if consufans be demanded to be holden within his mannor, there processe shall be awarded from three weekes to three weekes.

[g] Mirror cap. 2. sect. 19. Braet. lib. 5. fol. 334. & lib. 4. fol. 255. Brit. fol. 279. b. Fleta. lib. 6. cap. 6. 12. E. 4. 15.

And before the statute of *articuli super cartas*, in all summons and attachments in plea of land there shall be contained the terme of fiteene dayes. [q] And it appeareth as well by the statute, as by the ancient authors of the law, who wrote before the statute, that this was the ancient common law: and the reason of these long dayes given in reall actions was the recovery being so dangerous, that the tenant might the better provide him both of answer and of proofes. [*] But by consent they may take other than common dayes.

[*] 11. H. 6. 23. 15. E. 3. Jour. 22. 21. E. 3. 29. 15. Aff.

And it is not amisse to note what the ancient law was in proceeding against a man for his life. And therefore heare what Britton saith, *sur le presentment de cest felony* (under which he includeth also treason) *voilons nous* (for he wrote in the king's name) *que trestous ceux, que ent serr' endites, face le viscont bastiment prender, & fassent leur corps en prison garder, & que ilz sont menes devant nous, ou devant nos justices: & pur ceo que nulluy ne soit diszarnis de leur respous, voilons que ceux, que issint soient prise, qui ilz eunt temps de purveyer leur respous 15 jours au meyns filz le prient, & en dementiers soient fassent garder.* [r] Vide Fortescue of this matter. And see the Mirror, that in some cases the party convicted had forty dayes, or at least thirty dayes to shew some matter to disturbe, (that is to arrest) judgement, which now I know is gone in *desuetudinem*, and great expedition is now made in pleas of the crowne concerning the life of man. *Sed de morte hominis nulla est cunctatio longa.*

[r] Fortescue in libro de Laudibus Legum Anglie. Mirror. ca. 4. sect. Sept. choles disturbent judgement mortels.

[s] 9. Co. 118. b. Zancher's case.
(2. Inst. 568.)

[s] And the use of the king's bench at this day is, that, if the offence be committed in another county than where the bench sits, and the inditement be removed by *certiorari*, there must be fiteene dayes betwene every processe and the returne thereof; but, if it be committed in the same county where the bench sit, they may proceed *de die in diem*; but so they will doe rarely. But let us returne againe to the common pleas.

[a] Artic. super Cart. ubi supra. F. N. B. 177. c. 11. Aff. 30. 12. Aff. 4. 22. Aff. 79. 3. H. 6. Aff. 2. 9. E. 4. 5. a. 27. E. 3. 1. 2. W. 1. cap. ult.
[*] F. N. B. 177. D. 7. Aff. 7. 14. Aff. 4. 24. E. 3. 31. 39. E. 3. 20. 9. E. 4. 18. 12. E. 4. 15. 8. H. 5. Error 87.
12. E. 4. 15.

Secondly, there is a day called *dies specialis*, [a] as in an assise in the king's bench or common pleas, the attachment need not be 15 dayes before the appearance. Otherwise it is before justices assigned. But generally, in assises, the judges may give a speciall day at their pleasure, and are not bound to the common dayes; [*] and these *daies* they may give as well out of terme as within. So upon an imparlance the court may give any speciall or particular day; but that must be in the terme time; and likewise in a *seire facias*, upon a fine or a recovery in a reall action, because it is a writ of execution; and so it is in a *per quæ servitia* and the like, and in all judiciall writs, in processe against an infant to judge of his age, or where the husband prayeth in ayd of his wife, or in a *pone* at the suit of the defendant, there need not be fiteene dayes. And after demurrer in law, the court may give what day they will. [b] And it is worthy the noting, that if in an assise the parties be adjourned to Westm. *usque* 15. Pasche, there they be not demandable till the fourth day; but if it be adjourned *usque diem Lunæ*, or *diem Martis*, there the parties are demandable on that day.

[b] 41. E. 3. Jour. 16. 8. E. 4. 4. 1. H. 6. 4. 27. Aff. 33.
[c] 3. E. 2. Avowrie. 188. 15. E. 3. Jour. 20. 22. E. 3. 20. 1. E. 3. 4. 9. Co. 49. Countee de Salop's case. 33. H. 6. 42.

Thirdly, [c] there is a day of grace, *dies gratia*, or a day of courtesie. The name doth shew of what kind it is; and regularly this day is granted by the court, at the prayer of the defendant

(1) Acc. ante 70. b. & 97. a.—We have already taken notice, that, according to lord Hale, the title, by which bishops sit in parliament, is, not having *baronial* possessions, but *usage* and *custom*; and that his notion had been ably controverted by bishop Warburton.

statute now in force, in respect to deaneries, which we have observed in a former note; and yet the election to the *old* deaneries is in practice controuled by the king's letter missive, as much as the election to bishopricks. See ante 96. a. note 3. It is probable, therefore, that the *letter missive* is of considerably greater antiquity as to both than the statute of Hen. the eighth. Ibid.—(5) This was once doubted; for the 1. Ma. st. 2. c. 20. which repealed the 1. Edw. 6. was, by an oversight, as it seems, wholly abrogated by the 1. Jam. 1. c. 25. instead of being abrogated merely so far as relates to the marriage of priests. At length, however, the judges held, that the 1. E. 6. c. 2. was virtually repealed by the 1. & 2. Ph. & M. c. 8. and 1. Eliz. c. 1. See Tracts by Antiq. Soc. v. 3. p. 416. 12. Co. 7.—It is observable, that lord Coke, in this his account of the patronage of bishopricks, omits distinguishing those of the *old* foundation from those of the *new*. But this is material, the latter being still *donative* by letters patent, according to the statute of 31. H. 8. which authorized their erection. See 31. H. 8. c. 9. in Rastall's edition of the Statutes.—As to the *Irish* and *Welsh* bishopricks, about which lord Coke is silent, the former, by force of the Irish statute of 2. Eliz. c. 4. are made *donative* by the king's letters patent; but what the latter are, we cannot at present inform the reader, Mr. Brown Willis's *Survey of the Cathedrals*, which is the only book we are possessed of on the subject, not stating, how the Welsh bishops are created.

mandant or plaintife in whose delay it is, and never at the prayer of tenant or defendant. But it is worthy of observation, [d] that a day of grace is never granted, where the king is party by aide prayer of the tenant or defendant; nor where any lord of parliament or peere of the realme is tenant or defendant. [e] And sometime the day, that is *quarto die post*, is called *dies gratiæ*; for the very day of returne is the day in law, and to that day the judgement hath relation; but no default shall be recorded till the fourth day be past, unlesse it be in a writ of right, where the law alloweth no day, but only the day of returne. This day is sometime called *dies amoris*, and sometime a *dies datus*. But it were too long to enumerate all. This shall be sufficient to give the reader a taste to understand the residue concerning this matter.

[f] There is also a day of appearance in court by the writ, and by the roll. By writ, when the sherife returns the writ. By the roll, when he hath a day by the roll, and the sherife returne not the writ, there the defendant, to save himselfe from corporall paine, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appeare by the day he hath by the roll.

[g] Note, it is said commonly, that the day of *nisi prius*, and the day in bank, is all one day. That is to be understood as to pleading, but not to other purposes.

There are *dies juridici* (which [b] Britton calleth *temps covenables*) and *dies non juridici*. *Dies juridici* (except it be in assises) are onely in the tearme. [i] And there be also in the tearme *dies non juridici*. As in all the foure termes the sabbath day is not *dies juridicus*; for that ought to be consecrated to divine service. (1) Also in Michaelmasse tearme the feasts of All Saints and of All Soules. (2) In Hillarie tearme, the Purification of the blessed Virgin Marie; and in Easter terme the feast of the Ascension are not *dies juridici*, but set apart by the ancient judges and fages of the law for divine service. For Trinity tearme, (which sometime had seven dayes of returne, and was as long as Michaelmasse tearme is now: but for avoiding of infection in that hot time of the yeare, and that men might not be letted to gather in harvest, three returnes (since Littleton wrote) *viz. Crastino Sancti Johannis Baptiste, Oclabis Sancti Johannis Baptiste, and 15 Sancti Johannis Baptiste* are by the statute of 32. H. 8. cut off and become *dies non juridici*. And in those dayes the feast of Saint John the Baptist was not *dies juridicus*. And the said statute called, *Dies Communis in Banco*, is in divers points (since Littleton wrote) altered, as by the said statute appeareth. And in ancient time respect and reverence was had by law to certaine times, as it appeareth [k] by the statute of W. 1. cap. 51. which hath a short but an excellent preamble: *viz. Et pur ceo que grand charitie ferra de faire droit a tous en tout temps, ou messior serroit; purvieu est per assentement des prelates, que assises de novel discein, mortdauncester, Et darreine presentment, fuissent prises en le advent, en septuagesime, Et en quaresme, auxibien come (le bome) prent lenquestes, Et ceo pria le roy, as evesques.*

[l] This statute is expounded in bookes, which I have onely added, to the end the studious reader might understand the bookes that darkly speake of this matter, and be ignorant of nothing that belongs to the understanding of any part of the law. Now advent is a moneth before the feast of the Nativity of our Saviour Christ, so called, *de adventu Domini in carne*. *Septuagesima* beginneth ever on the sabbath day, and is the third sabbath before Shrove Sunday, so called; because it is the 70th day before the feast of Easter. *Sexagesima* is the second sabbath before Shrove-Sunday, so named, because it is the 60th day before Easter; and so of *Quinquagesima*, and *Quadragesima*, [m] whereof you shall reade in acts of parliament, and ancient authors. (3) Now as there be *dies juridici*, so there be *horæ convenientes*, whereof the Mirror saith, [n] *abuson, que len tient pleas per demenches (id est sabbathis) ou per auters jours defendus, ou devant le soliel levy, ou noelantre, ou en disboneff lieu.*

[o] Furthermore, there are (as ancient authors term them) *dies solaris* & *dies lunaris*, secundum quod Deus divisit lumen a tenebris, ex quibus duobus diebus efficitur unus dies, qui dicitur artificialis ex die precedente & nocte subsequente, qui constat ex 24 horis.

But we at this day, retaining the same method, doe differ in words. For we say, *dierum alii sunt naturales, alii artificiales; dies naturalis constat ex 24 horis, & continet diem solarem & noctem*: and therefore in indictments of burglary, and the like, we say, *in nocte ejusdem diei*. *Iste dies naturalis est spatium, in quo sol progreditur ab oriente in occidentem, & ab occidente iterum in orientem. Dies artificialis sive solaris incipit in ortu solis, & definit in occasu*: and of this day the law of England takes hold in many cases. Now divers nations beginne the day at divers times. The Jewes, the Chaldeans, and Babylonians, beginne the day at the rising of the sunne; the Athenians at the fall; the Umbri in Italy beginne at midday; the Egyptians and Romanes from midnight; and so doth the law of England in many cases. Of all which you shall reade plentifull matter in our bookes, and in my Reports, which by this short instruction you shall the better understand.

[p] There is also *annus minor* and *major*. The lesser yeare consisteth of 365 dayes, and [p] Braet. lib. 5. fol. 359. Britton fol. 209. a. have fixe houres, whereby in every fourth yeare there is *dies excrefcens*, which makes that yeare to

(1) Writ of summons in a common recovery was made returnable in a month from the day of Easter, which happened to be Sunday; and the tenant in tail, who was vouchee, died the same day. The judgment was reversed; because it could not be given till the day after the vouchee's death, and then it came too late. *Swan and Broome* 4th. part Burr. v. 3. p. 1596. But though Sunday is not *dies juridicus* for giving judgment, or awarding judicial process, yet it is for some other purposes, as for exhibiting an information on the 5. & 6. E. 6. against ingrossing. W. Jo. 156.—(2) In consequence of the abbreviation of Michaelmas term, by the 24. Geo. 2. c. 48. these two days do not now fall within it.—(3) See further, as to *dies non juridici*, Spelman's Treatise on the Terms amongst his Posthuma, page 87.

Warburton. Ante 70. b. n. 2. However, on further investigating the subject, we incline to concur with lord Hale. But then it is with some little addition. In the Anglo-Saxon times the bishops certainly were admitted to sit in parliament; and as this was prior to their holding their estates by a baronial tenure, it could not then be on account of their baronies; nor will it be easy to suggest any other probable reason for their presence during that period, than an usage founded on the propriety of having the heads of the church to guard it from injury, and to assist the other members of the legislature in their deliberations on religion and other ecclesiastical concerns. At the Conquest, as all agree, the possessions of the bishops were converted into baronies; and for a long time after they were summoned to parliament as barons by tenure. But it is no less certain, that, for many centuries past, they have been called to sit, without any regard to their temporal possessions or the tenure by which they are holden; which is more especially true in the instance of the new sees erected by Henry the eighth, the bishops

[q] 17. Eliz. Dier. 345.
(2. Ro. Abr. 521.)

[r] 21. H. 3. stat. de anno bis-
sextili.

[1] 6. Co. 62. Catesby's case.
(2. Ro. Abr. 521. Cro. Jam.
167.)

have in rei veritate 366 daies, and that is called *annus major*. [q] A quarter of a year containeth by legall computation 91 dayes, and half a yeare containeth 182 days; for the odde houres in legall computation are rejected; and by [r] the statute *de anno bissextili*, it is provided, *quod computentur dies ille excrescens & dies proximè præcedens pro unico die*, so as in computation that day excrescent is not accounted. A month, *mensis*, is regularly accounted in law 28 dayes, and not according to the solar month, nor according to the kalendar [1] unlesse it be for the account of the laps in a *quare impedit*. There is *mensis solaris*, and *mensis lunaris*. *Solaris est 12 pars anni, viz. spatium 30 dierum, horarum 10 & minutorum 30 & lunaris est spatium 28 dierum.*

[1] Braet. lib. 5. fo. 425. Brit-
ton ca. 74. 7. Co. 29. 30.
(Post. 363. a.)

Resummons ou re-attachment. These are writs, that the demandant or plain- tife, after he hath obtained his letters of absolution, may sue out to bring the tenant or de- fendant againe into court to have day, to make answer unto him. [1] And these writs doe lye in all cases, when the plea is discontinued or put without day, either in this case, or in case when the demandant or tenant hath his age, or for the *non venue* of the justices, or in case of a protection or *essoine de service le roy*, &c. Of these writs there be two sorts, viz. generall and speciall, whereof you may see presidents, and reade more at large in the case of discontinuance of processe in my Reports, and need not here to be inserted.

But in the case of outlawry the writ shall abate if he obtaine not his pardon. 44. E. 3. 27.

Sur son originall. This is intended of his originall writs, or of that, which is in- stead of an originall writ. But note, that in the other five cases the writ shall abate; and in the case of excommungement the writ shall not abate, but the plea to be put without day untill the plaintife purchase his letters of absolution, and sue out his resummons, or re-at- tachment.

[u] Braet. lib. 5. fol. 421.

In ancient times more persons seemed to be disabled, then these fixe recited by Littleton, As first he that was a leper, and by the writ *de leproso amovendo* was *propter contagionem mor- bi prædicti* (as the writ saith) & *propter corporis deformitatem* (as others say) to be removed from the society of men to some solitary place; and thereupon [u] it is said, *datur etiam ex- ceptio tenenti, ex persona petentis peremptoria propter morbum petentis incurabilem & corporis de- formitatem, ut si petens leprosus fuerit, & tam deformis quod aspectus ejus sustineri non possit, & ita quod à communione gentium sit separatus, talis quidem placitare non potest, nec hereditatem pe- tere.* [x] And herewith Britton agreeth. Treating of disabled men, as men outlawed, ab- jured the realme, attainted of felony, &c. he addeth, *ne mesel, ouste de common gentis.*

[x] Britton fol. 39. & 88.

[y] Fleta lib. 6. cap. 39. 22. E.
3. in dorf. clau. 20. Part. nu. 14.
F. N. B. 234. Register.

[y] And Fleta saith, *competit etiam ei exceptio propter lepram manifestam, ut si petens lepro- sus fuerit, & tam deformis, quod à communione gentium merito debet separari; talis enim morbus petentem repellit ab agendo.*

And if these ancient writers be understood of an appearance in person, I thinke their opi- nions are good law; for they ought not to sue nor defend in proper person, but by attorney; for they are separated à *communione gentium propter contagionem morbi & deformitatem corporis.*

[a] Camden in Leicestershire, verbo Burton.

Before the Conquest this disease was not knowne in England; for master Camden, writing of Burton Lazars, in Leicestershire, saith, [a] *primis Normannorum temporibus collecto per Angliam sipe nosocomium hoc constructum ferunt, quo tempore lepra (quæ à nonnullis elephan- tiasis) gravissime vi contagionis per Angliam serpsit.* And it is called *morbus elephantiasis*; be- cause the skinnies of lepers are like to elephants. [b] And the law of England, for the removing of the lepers from the society of men to some solitary place, is grounded upon God's law.

[b] Levit. cap. xiii. verse 44. 45.
46. Numer. cap. v. verse 1. 2. 4.
Regum c. 15.

[c] Braet. l. 5. 420. 421. Britton
fol. 39. Fleta lib. 6. cap. 37.

[c] Also there was a time, when ideots, madmen, and such as were deafe and dumb na- turally, were disabled to sue; because they wanted reason and understanding, (*tales enim non multum distant à brutis*). But at this day they all may sue; for the suit must be in their name, but it shall be followed by others. [d] And note, that, when an ideot doth sue or defend,

[d] 33. H. 6. 18. F. N. B. 27. G.

he shall not appeare by gardian or prochein amy, or attorney, but hee must bee ever in per- son; [e] but an infant, or a minor, shall sue by prochein amy, and defend by gardian. (1)

[e] 27. H. 8. 11. 40. E. 3. 16.
20. E. 4. 2. F. N. B. 27. H.
(2. Inst. 261.)

But now let us heare what Littleton will say unto us.

Sect. 202.

[a] Mirror cap. 2. sect. 18. Doct.
& Stud. fol. 141. 4. E. 4. 25.
per Danby. 27. Aff. pl. 49.

CHAPLEINE [a] *seculer* is he, that is *infra sacros ordines*; but he is not regular, (that is) liveth not under certaine rules,

ITEM si un villein *est fait un chap- leine seculer, uncore son seignior poit luy*

ALSO if a villeine be made a secular chaplaine, yet his lord may seise him (2) as seiser

(1) Acc. Fitzh. N. B. 27. H. At common law, infants could neither sue or defend, except by guardian; by whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's

bishops of these never having had any estates by a baronial tenure, and consequently having no claim to be called to parliament otherwise than as prelates of the church, and by reason of the usage, which had so long before prevailed in respect to their order. If all this be so, then, though the bishops once sat in parliament for their baronies, yet lord Coke's position, which imports, that they still sit by the same title, is not strictly accurate; but we should rather adopt lord Hale's idea of their sitting by usage as more applicable to the present circumstances. Perhaps, indeed, lord Coke only meant to refer to the more ancient reason of their being summoned to parliament, and thence to infer, that in presumption of law they are still deemed to be called on the same account; in which case there is little more than a difference of words between him and lord Hale. As to bishop Warburton's hypothesis on this subject, we still think that he shews great ability; but at the same time we cannot help owning, that he appears to us to have too much indulged in speculation, more adverting to what struck him as the most rational and proper grounds of admitting the bishops into the house of lords, than to the fact of the real title. He represents the bishops to sit as *barons by tenure*, so far as regards the judicial capacity of the lords, and as *prelates of the church*, so far as the lords act in a legislative character. But the fact, on which he builds the first part of this distinction, fails him; because, for the reasons already stated, the bishops no longer have baronies by tenure, nor have had any for several centuries past. Besides,

seifer come son villein, & seifer les biens, &c. Mes il semble, que si le villein entre en religion, & est professe, que le seignior ne peut luy prendre ne seiser, pur ceo que il est mort en ley; nient plus que si un frank home prent un niese a sa feme, le seignior ne peut prendre ne seiser la feme de le baron, mes son remedy est daver un action envers le baron, pur ceo que il prist sa niese a feme san son licence & volunt, &c. Et issint peut le seignior aver action envers le souverain del meason, qui prist & admittast son villein destre professe en mesme le meason sans licence & la volunt le seignior, & recoversa ses damages a la value de le villein. Car celuy, qui est professe moigne, serra un moigne, & come un moigne serra pris per terme de sa vie natural, sinon que il soit deraigne per la ley de saint esglise. Et il est tenu per son religion de garder son cloister, &c. Et si le seignior luy puisset prendre hors de sa meason, donques

his villeine, and seise his goods, &c. But it seemeth, that if the villeine enter into religion, and is professed, that the lord may not take nor seise him, because he is dead in law; no more than if a free man taketh a neise to his wife, the lord cannot take nor seise the wife of the husband, but his remedy is to have an action against the husband, for that he took his neise to wife without his licence and will, &c. And so may the lord have an action against the sovereign of the house, which takes and admitteth his villeine to be professed in the same house, without the licence and leave of the lord, and he shall recover his damages to the value of the villeine. For he, which is professed a monke, shall be a monk, and as a monke shall be taken for terme of his natural life, unlesse he be deraigned by the law of holy church. And he is bound by his religion to keepe his cloyster, &c. And if the lord might take him out of his house,

nor hath vowed those three things above specified.

[6] Enter en religion & est professe.

That is intended (as hath been said) when he is regular and profest under certain rules, as to become one of the four orders of friers (that is to say) *freres minores*, Augustines, Preachers, or Carmelites, or become a monke, cannon or nunne, &c. *Qui ad vivendum regulariter se astringunt, frve sunt monachi, frve canonici regulares, frve sanctimonialis.* For all these are regular and votaries, and are dead persons in law; but so are not the secular persons, as prebends, parsons, vicars, &c.

And therefore it is holden in our bookes, [c] that if a secular priest taketh a wife and hath issue and dyeth, the issue is lawfull and shall inherit as heire to his father, &c. for (as it was then holden) the marriage was not void, but voidable by divorce, and after the death of either partieno divorce can be had (1).

But if a man marieth a nunne, or a monke marieth, these marriages were holden void, and the issues bastards; because (as it was then holden) the marriage was utterly voyde; for that the nunne and the monke (as Littleton here saith) were dead persons in law. And that is the reason yeelded by Littleton, wherefore a villeine, being professed in religion, cannot be seised by the lord; because he is dead in law; and yet his blood or bondage is not thereby altered, but his person, in respect of his profession only privileged. [d] *In decretalibus statutum est, quod nullus episcopus spurios, aut servos, donec a dominis suis fuerint manumissi, ad sacros ordines promoveri presumat.* But notwithstanding his person is privileged till he be disgraced. And so it is holden in

[a] Britton cap. 31. fol. 79. Doctor & Student. fo. 141. (Doctr. Plac. 9. Ante 132. a.)

4. H. 4. cap. 14.

[c] 21. H. 7. 39. 19. H. 7. tit. Bastardy. 33. 5. E. 2. tit. Non-ability. 26. 47. E. 3. Casu ult. (12. Co. 9. 1. Ro. Abr. 340.)

[d] Glanvil. lib. 5. cap. 5. Britton fo. 79. & 82.

(1) See 2. Inst. 687.

our

infant's personal appearance, or appointed for suits in general by the king's letters patent. F. N. B. 27. H. & L. Sty. 369. Bro. Garden pl. 11. & 17. But this rule was found inconvenient, it sometimes happening, that an infant was secreted by those having the legal custody of him, and so prevented from applying to have a guardian *ad litem* appointed. Hence was seen the necessity of permitting any person to litigate for the infant's benefit, who should be disposed to risque the expence. On this principle the statute of Westminster the first enables any one to sue as *prochein amy* for an infant in an assise, where the infant himself

Besides, independently of this, the whole of the speculation seems to us unfounded in any sufficient authority, and consequently the mere offspring of modern refinement; our simple and unlettered ancestors, when they laid the foundations of the English parliament, not being likely to have acted under the influence of a policy so deep, as the nice distinction thus attributed to them necessarily supposes. At present we have only to add further on this curious and difficult subject, that, as we have touched it so slightly, our observations should be understood as intended to convey only a general idea. Should the reader have occasion to penetrate more deeply into the subject, he must consult the several pieces published in 1679 on the controverted question, whether the bishops can vote in the preliminary steps of a bill of attainder; particularly the tracts by bishop Stillingfleet and Mr. Hunt for the right, and those by lord Hollis against it. See 1. Burn. Hist. fol. ed. 460. 2. Stillingfleet's Eccles. Caf. 228. Hunt's Argument for the Right of the Bishops in Capital Cases 128. Hollis's Remains, 121.—See further Seld. Tit. Hon. ed. 1678. p. 697. Staundf. Pl. C. 153.

[e] Fleta lib. 2. cap. 44. Britton ubi supra.

our old bookes. [e] If a villeine be made a knight, for the honour of his degree his person is privileged, and the lord cannot seize him untill he be disgraced. *Nullam vilem personam natione spurium, vel servilis conditionis, ad militie strenuitatis ordinem promoveri licebit; sed cum à dominis suis petantur ut nativi, ipsis primo degradatis, statim ad iudicium procedatur.*

il ne viveroit come un mort person, ne lorsque son religion, le quel ferroit inconvenient, &c.

then he should not live as a dead person, nor according to his religion, which should be inconvenient, &c.

[f] F. N. B. 78. b. 30. E. 1. tit. Villen 46. 33. E. 3. ibid. 21. (Post. 137. b.) 18. F. 2. ibid. 30. 46. E. 3. 6. 4. E. 4. 25. 1. H. 4. 6. 13. E. 1. Villen. 36. 18. Aff. 10. Doct. & Stud. 141. Mirror. ca. 2. sect. 18. acc.

Si un frank home prent un niese.

[f] Some have holden, that by this marriage the wife shall be free for ever; but the better opinion of our bookes is, that she shall be privileged during the coverture onely, unlesse the lord himself marieth his niese, and then some hold, that she shall be free for ever (1).

[g] 16 H. 3. nuper obiit 17. 8. H. 3. Breve 789.

If a niese be regardant to a mannor, and she taketh a freeman to husband by licence of the lord, and the lord maketh a feoffment in fee of the manor, the husband dieth, the feoffee shall not have the niese but the feoffor; for that during the marriage she was severed from the mannor. And so is the booke 29. Aff. (which is falsly printed) to be understood.

[h] Vide Britton fol. 82. Foistesc. c. 43. 46. E. 3. 6. a.

[h] Mes son remedie est daver un action vers le baron, &c.

Albeit marriage is lawfull, yet when it worketh a prejudice to a third person, an action in this case lyeth against the husband to the value of his losse. And albeit he did not know her to be a niese, yet the action lyeth against him; for he must take notice thereof at his perill, [i] unlesse she be out of the service of the lord and vagrant; and then if one not knowing her to be a niese marieth her, some say, that in that case no action lyeth against the husband. [k] And likewise the lord shall have an action against those that were the meanes to make the villeine a knight.

31. H. 6. ca. 5. 12. H. 7. c. 7. 11. H. 4. 5. b.

Sovereigne, præcipuus, chiefe, as here, sovereigne del meason is the chiefe of the house.

31. H. 8. cap. 29.

Si non que il soit deraigne. This word (*deraigne*) commeth of the French word *derayer*, or *deraigner*, that is to say, to displace or to turne one out of his order; and hereof cometh *deraignment* a displacing or turning out of his order. So when a monke is derained, he is degraded and turned out of his order of religion, and become a lay man.

40. Aff. 27. per Finchden.

Le quel ferroit inconvenient. *Ab inconvenienti* is a good argument in law, as Littleton often observeth. And here Littleton concludeth, that the lord cannot take a monke out of his house, for that it should be inconvenient, which Littleton here sheweth, for divers reasons, and therefore unlawfull. And the inconvenience is, that where a man of religion should live according to his profession in religion, by the taking of him out he should not.

Si le seignior luy puisset prendre, &c. By this it appeareth, that, if a man detaineth a villaine in his house, the lord of the villaine may take him out of the house, for here the impediment, wherefore the lord could not take him out of the house, was, for that the villaine was a monke professed. And so in case of the wardship here next following.

Section 203.

BRIEFE de ravishment de garde.

This writ is given by the statute of W. 2. cap. 35. in *verbis conceptis*, the words of which writ be, that the defendant, *talem heredem, cuius maritadium ad ipsum A.*

EN mesme le maner est, si soit

gardeine en chivalrie de corps & de terre d'un enfant deins age, si l'enfant, quant

IN the same manner it is, if there be a gardian in chivalry of the body and land of an infant with age, if the infant,

il

(1) See ante 123. n. 3. Post. 137. b.

himself is esloigned by his guardian, or otherwise disturbed from suing the assise. 3. E. 1. c. 49. 2. Inst. 261. The statute of Westminster the second extended this provision, by permitting the *prochein amy* to sue in all actions; and though in this statute, as well as in the former, eloignment of the infant was mentioned, yet by construction it is not deemed necessary, but the *prochein amy* may sue, whether that circumstance occurs or not, it being considered merely as an instance of the necessity of the case, and as such only taken notice of by those who framed the statute. 13. E. 1. c. 15. 2. Inst. 390. But notwithstanding these statutes, as there is not any thing in them which prohibits the suing by guardian, we presume, that it remains as lawfull as it was before. It is therefore probable, that Fitzherbert and lord Coke, when they tell us, that an infant shall sue by *prochein amy*, did not mean to exclude the election of suing either in that way or by guardian. That Fitzherbert did not mean this, appears from his afterwards mentioning without disapprobation a case of debt, in which suing by guardian was allowed. Coke too, in his report of Rawlyn's case, says, that on search many precedents of infants suing by guardian were found; nor in that case was any objection grounded on its being a suit by guardian. 4. Co. 53. b. But whether we construe the meaning of these two judges rightly or not, a case occurred, in which the point is said to have been so adjudged. Young v. Young W. Jo. 177. However the reader

il vient al age de 14 ans entra en religion, & est professe, le garden n'ad auter remedy (quant a le garde de le corps) forsque breve de ravishment de garde envers le souverain de le meason. Et si ascun esteant de plein age, que est cousin & heire delenfant, enter en le terre, le gardein n'ad ascun remedie, quant al garde de la terre, pur ceo que lentrie del heire lenfant est congeable en tiel case.

when he comes to the age of 14 yeares, entreth into religion, and is profest, the gardian hath no other remedy (as to the wardship of the body) but a writ of ravishment *de gard* against the sovereign of the house. And if any being of full age, who is cousin and heire of the infant, entreth into the land, the gardian hath no remedy as to the wardship of the land, for that the entry of the heire of the infant is lawfull in such case.

pertinet, &c. rapuit & abduxit &c. contra pacem. Now *ravere* signifieth properly to take away by violence and force. And when the sovereign took and admitted the ward into his house to be professed, this in judgement of law is a ravishment of the ward; and as it appeareth in 9. Co. Doctor Hufley's case fol. 72. our bookes before the said statute, there lay a generall action of trespas in that case.

Après l'age de 14

ans, &c. Our author mentioned this age, because it is prohibited by the statute 4. H. 4. cap. 17. of 4. H. 4. that no childe shall be received into any house of religion before that age without consent of his parents and guardians, &c.

Le gardein n'ad ascun remedie, &c. Here it appeareth, that, by the profession of the ward, the lord loseth the wardship of the

land, because he is *civiliter mortuus*, a dead man in law, and cannot hold any inheritance; neither can the gardian continue the wardship of the land, because by the civil death of the ward the inheritance is descended to another, who is either to be in ward, or pay relieve. So as in this case the gardian hath *damnum*, but it is *absque injuria*, because he loseth the wardship of the land by act of law, viz. the descent thereof to another, and therefore the law giveth to him no remedy in this case, neither by any formed writ, nor by action upon his case, for Littleton's words are generall, (he hath nor any remedy).

Sect. 204.

ITEM, en mults divers cases le seignior poit faire manumission & enfranchisement a son villein. Manumission est properment, quant le seignior fait un fait a son villein de luy enfranchiser per hoc verbum (manumittere) quod idem est quod extra manum vel extra potestatem alterius ponere. Et pur ceo que per tiel fait le villein

ALSO, in many and divers cases the lord may make manumission and enfranchisement to his villeine. Manumission is properly, when the lord makes a deed to his villeine to enfranchise him by this word (*manumittere*), which is the same as to put him out of the hands and power of another. And for that that by such deed

Manumission.

[1] *Manumittere, quod idem est quod extra manum vel potestatem ponere.* [1] Glanvil. lib. 5. cap. 5. Britton fol. 78. &c. 82. 97. 110. Fleta lib. 3. cap. 13. & lib. 2. cap. 44.

Quia quamdiu quis in servitute est, sub manu & potestate domini sui est.

Qui in potestate domini sui est, in manu domini sui esse dicitur; sed postquam manumissus est, ab illo liberabitur, ergo dicitur quasi extra manum, id est, extra potestatem domini sui missus. And here is to be noted (as in many other places is observed) what regard Littleton hath to the true etymologies of words.

[m] *Enfranchise-* [m] Mirror ca. 2. sect. 18. ment. (Hereby Littleton explaineth manumission) and

is

reader should at the same time be apprized, that according to another report of the same case, the court delivered no opinion on the point, whether an infant may sue by guardian. Cro. Cha. 86. See further on this subject Palm. 295. & Vin. Abr. Guardian and Ward N. 7.—What we have hitherto advanced as to suing by *prochein amy* applies to the courts of common law only. As to our courts of equity, the usual practice in them is to sue for infants by *prochein amy* and to defend by guardian. But it is said, that they may sue in either way. Pract. Reg. in Chanc. 296.—(1) Vide tamen Pasch. 8. E. 1. rot. 7. the case of Edward Rowald contra.—Hal. MSS.

is derived from the French word *franchise*, that is, liberty; and in the common law it hath divers significations; sometimes the incorporating of a man to be free of a company or body politique, as a free man of a city, or burgesse of a burrough, &c. sometimes to make an alien a denison; and here to manumise a villeine or bondman. So as this word

est mis hors de la main & de la poier son seignior, il est appell' manumission. Et issint chescun maner de enfranchisement fait a un villein peut estre dit manumission.

the villeine is put out of the hands and out of the power of his lord, it is called manumission. And so every maner of enfranchisement made to a villein may be said to be a manumission.

[n] Mirror cap. 2. sect. 18.

[o] Fortescue cap. 46.

[p] 39. E. 3. 6. b. F. N. B. 79. a. (Dy. 266. b. 283 b.)

[q] Glanvil. lib. 5. cap. 5. Fle-
ta lib. 2. cap. 44. Brit. fol. 79.
Mirror cap. 2. sect. 18.
(2. Ro. Abr. 736. 737.)
[r] 27. Aff. p. 49.
[s] Glanvil. lib. 5. ca. 5.
[t] Britton ubi supra.
(Ante 136. b.)

Lib. Rub. cap. 78.

(*enfranchisement*) is more general than *manumission*; for that is properly applyed to a villeine; and therefore every manumission is an enfranchisement, but every enfranchisement is not a manumission. [n] There be two kindes of manumissions, one expresse, and the other implied. Expresse, when the villeine by deed in expresse words is manumised and made free. The other implied, by doing some act, that maketh in judgement of law the villeine free, albeit there be no expresse words of manumission or enfranchisement. [o] If a villeine be manumised, albeit he become ingratfull to the lord in the highest degree, yet the manumission remaines good: and herein the common law differeth from the civill law, for *libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Anglie semel manumissum semper liberum judicant, gratum & ingratum.*

There be also some cases where the villeine shall be privileged from the seisure of the lord, albeit he be not absolutely manumised or enfranchised. Sometimes *ratione loci*, [p] as if a villeine remaine in the ancient demeane of the king a yeare and a day without claime or seisure of the lord, the lord cannot have a writ of *natisso habendo*, or seise him, so long as he remaines and continues there; and the reason of this was, in respect of the service he did to the king in plowing and tillage of the demeanes, and other labours of husbandry for the king's benefit. And herewith agree old bookes, [q] which say, that this immunity was sometime granted by common consent to the king for his profit, and for the help or ease of his villeins. [r] If a villein be a priest of the king's chappel, the lord cannot seise him in the presence of the king, for the king's presence is a privilege and protection for him. Sometime *ratione professionis*, [s] as if a villeine be professed a monke, or a niese a nun, as hath been sayd. [t] Sometime (as some hath said) *ratione dignitatis*, as if the villeine be made a knight, &c. Sometime *ratione matrimonii*, as if a niese marry a free man, she is privileged during the marriage, but not absolutely enfranchised; for if her husband dye, she is niese againe, unlesse the lord himselfe marrieth the niese, and then she is enfranchised for ever, as hath been said before. (1) And it shall not be amisse to observe the wisdom of our ancients, with what solemnity (for more surety thereof) manumissions were made. *Qui servum suum liberat, in ecclesia, vel mercato, vel comitu, vel hundredo, coram testibus & palam faciat, & liberas ei vias, & portas conscribat apertas, & lanceam & gladium, vel quæ liberorum arma, in manibus ei ponat.* Our author having spoken of an expresse manumission, here followes enfranchisements in law.

Sect. 205.

(5. Co. 56. a.)

FOR when the lord enableth the villeine to have an action against him as for debt or annuity, &c. or giveth to the villeine a certaine and fixed estate in lands, tenements, or hereditaments, as a lease for yeares, this amounteth to an enfranchisement, not only during the yeares, but for ever; [u] and albeit the lease be made to the villeine without deed, yet it is an enfranchisement for ever.

[u] 30. E. 3. tit. Vil. 25. 11. H. 7. 13.

AUXI, si le seignior fait a son villeine un obligation de certaine somme d'argent, ou grante a luy per son fait un annuity, ou lessa a luy per son fait terres ou tenements pur terme des ans, le villeine est enfranchise.

ALSO, if the lord maketh to his villeine an obligation of a certaine sum of money, or granteth to him by his deed an annuity, or lets to him by his deed lands or tenements for terme of yeares, the villeine is enfranchised.

Sect.

(1) Ante 123. a. n. 3.

Sect. 206.

AUXY si le seignior fait un feoffment a son villeine, d'ascun terres ou tenements, per fait ou sans fait, en fee simple, fee taile, ou pur terme de vie ou ans (1) & a luy liver a seisin, ceo est un enfranchisement.

ALSO if the lord maketh a feoffment to his villeine of any lands or tenements, by deed or without deed, in fee simple, fee taile, or for terme of life or yeares, and delivereth to him seisin, this is an enfranchisement.

This is evident and agreeth with our bookes.

Vide 24. E. 3. 32. 22. H. 3. 61. Vill. 42.

Sect. 207.

MES si le seignior fait a luy un lease des terres ou tenements, a tener a volunt le seignior, per fait ou sans fait, ceo n'est ascunenfranchisement; purceo que il n'ad ascun manner de certainty, ne suertie de son estate, mes le seignior luy poit ouster quant il voilet.

BUT if the lord maketh to him a lease of lands or tenements, to hold at will of the lord, by deed or without deed, this is no enfranchisement; for that he hath no manner of certainty or suerty of his estate, but the lord may oust him when he will.

PER fait. So as a deed, made to a villeine by the lord, is no enfranchisement, when the deed transferreth no certaine or fixed estate, but revocable at the lord's will. If the lord release to his villeine all his right in black acre, and the villeine is not thereof seised, this is no enfranchisement; because it is voyd and can give no cause of action. If the lord attorneth to his villeine, this is no enfranchisement.

11. H. 7.

Sect. 208.

AUXY si le seignior suist envers son villein un præcipe quod reddat, s'il recover, ou soit nonsue apres appearance, ceo est un manumission, pur ceo que il puisse loyallyment entrer en la terre sans tiel suit. En mesme le manner est, s'il suist envers son villeine un action de debt, ou d'account, ou de covenant,

ALSO if the lord sueth against his villeine a præcipe quod reddat, if he recover, or be nonsuite after appearance, this is a manumission, for that he might lawfully have entered into the land without suit. In the same manner it is, if he sue against his villeine an action of debt, or account, or of covenant, or of

SI seignior suist envers son villeine un præcipe quod reddat, &c. ceo est un manumission. And the principal reason hereof is, for that by his suit he enableth the villeine to be a person able to render him the land by course of law, where the lord without any such suit might have entred. (a) But if the tenant in taylor be of a manor whereunto a villeine is regardant, and enfeoffeth the villein of the manor, and dyeth, the issue shall have a *formedon* against the villeine, and after the recovery of the manor he shall seise the villein. And the

[a] 24. E. 3. Discont. 16. Vid. Britton 78. & 126.

(1) The words *ou ans* not in L. & M.—Roh. or P. They first appear in Redm.

(Ante 122, b. 2. Ro. Rep. 409.) the reason is, for that he could not seise the villeine till hee had recovered the mannor which was the principall, and at the time of the writ brought he was no villeine.

The tenant infeoffes the villeine of the lord and an estranger upon collusion: in this case, although the lord may enter upon the villeine for the moity, yet, may he have a writ of ward against them both without enfranchisement of the villeine; for, if the lord should enter upon the villeine, then should his seigniorie be suspended, and then could not he have a writ of ward against the other.

The lord, upon a writ of covenant brought by the villeine, levies a fine to his villeine of land, which is ancient demesne; the lord of whom the land is holden reverseth the fine in a writ of deceit; albeit the authority and jurisdiction of the court is disproved, and that the lord of the villeine shall bee restored to the land given by the fine, yet is it an enfranchisement, for that he answered to the writ of covenant, and the fine was voydable, and not voyde, and therefore, being once an enfranchisement, it cannot be avoided by the reversing of the fine.

Soit nonsue (id est) non est prosecutus breve suum, for by the law the plaintife is first agent at every continuance; and therefore the record sayth, *quod petens seu querens* (naming them) *obtulit se*, who if he bee called, and make default, then he is said to be nonsuit, *id est, non est prosecutus*, &c.

By Littleton here it appeareth, that there is a nonsuite before appearance at the returne of the writ, or after appearance at some day of continuance. [x] The difference

[x] 8. Co. 58. 62. Beecher's case. 3. H. 6. 13. Brooke tit. Nonsuit 1. 8. H. 6. 7. 50. E. 3. 12.

between a *nonsuit* and a *retraxit* on the part of the demandant or plaintife is this. A *nonsuite* is ever upon a demand made, when the demandant or plaintife should appeare, and he makes a default. A *retraxit* is ever, when the demandant or plaintife is present in court

(as

(1) *Ou il fuit endict de ceo devant* in Red. but not in L. & M.—Roh.—or P.—(2) *Ne* in Roh. & Red. but not in L. & M.—or P. (3) *De illis quare* not in L. & M. or Roh.

ou de trespasse, ou de hujusmodi, ceo est un enfranchisement; pur ceo que il puisse emprison le villein, & prendre ses biens sans tiel suit. Mes si le seignior fust son villeine per appeale de felony, ou il fuit endict de ceo devant, (1) ceo ne enfranchisera pas le villeine, comment que le matter de l'appelle soit trove encounter le seignior, pur ceo que le seignior ne puisse aver le villein destre pendue sans tiel suit. Mes si villeine ne (2) fuit endict de mesme le felony, devant l'appeale sue envers luy, & puis est acquite de cest felony, issint que il recouvrera damages envers son seignior pur le faux appeal, donques le villeine est enfranchise, pur la cause de le judgement de damages a luy d'estre done envers son seignior. Et plusors autres cases & matters y sont, per queux un villein poit estre enfranchise envers son seignior, &c. Sed de illis quare (3).

trespasse, or of such like, this is an enfranchisement, for that he might imprison the villeine, and take his goods without such suite. But if the lord sue his villeine by appeale of felony, where he was indited of the same before, this shall not enfranchise the villeine, albeit that the matter of appeale be found against the lord, for that the lord could not have the villeine to be hanged without such suit. But if the villeine were not indited of the same felony, before the appeal sued against him, and afterward is acquitted of this felony, so as he recover damages against his lord for the false appeale, then the villeine is enfranchised, because of the judgment of damages to be given unto him against his lord. And many other cases and matters there be, by which a villeine may be enfranchised against his lord, &c. But enquire of them.

(as regularly he is ever by intendment of law untill a day be given over, unlesse it be when a verdict is to be given, for then he is demandable.) And this is in two sorts, one privative and the other positive. Privative, as upon demand made, that he make default, and depart in despite of the court, and then the entry is, [y] *et postea eodem die devenit ad barram prædicti* [y] Tr. 5. H. 6. Rot. 320. In tenens, & præd' petens tunc solenniter exactus non venit, sed à secula sua prædicta in contemptum curiæ se retraxit, ideo consideratum est, &c. Positive, as when the entry is, *et super hoc idem querens dicit, quod ipse non vult ulterius placitum suum prædictum prosequi, sed abinde omnino se retraxit, ideo, &c.* Another form thereof is, *quod idem querens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædicti defend', &c. de placito prædicto.* [z] A departer in despite of the court is on the part of the tenant, and is, when the tenant or defendant after appearance and being present in court upon demand makes departure in despite of the court, and then the entry is, *et prædicti tenens seu defendens licet solenniter exactus non revenit, sed in contemptum curiæ recessit & defaultam fecit, ideo, &c.* It is called a *retraxit*, because that word is the effectual word used in the entry, as before it appeareth; and it is ever on the part of the demandant or plaintiffe. [a] Another difference betweene a *retraxit*, and a nonsuit is, that a *retraxit* is a barre of all other actions of like or inferiour nature: *qui semel actionem renunciavit, amplius repetere non potest.* But regularly a nonsuit is not so, but that he may commence an action of like nature, &c. againe. For it may be, that he hath mistaken somewhat in that action, or was not provided of his proofes, or mistaking the day, or the like. But yet for some special reasons, nonsuit in some actions is peremptory.

In a *quare impedit*, if the plaintiffe be nonsuite after appearance, the defendant shall make a title, and have a writ to the bishop [b] and this is peremptory to the plaintiffe, and is a good barre in another *quare impedit* (1); and the reason is, for that the defendant had by judgement of the court a writ to the bishop, and the incumbent, that commeth in by that writ, shall never be removed, which is a flat barre as to that presentation; and of this opinion is Littleton in our bookes. And the same law, and for the same reason it is in the case upon a discontinuance.

[c] In a writ *de nativo habendo*, nonsuit after appearance is peremptory; for thereby the villeine is enfranchised. And so it is if two be plaintiffes in a *nativo habendo*, if one be nonsuit, this is the nonsuit of both, and no summons and severance doth lie in that case, albeit it be a reall action. And this is *in favorem libertatis*; for, in a *libertate probanda*, nonsuit after appearance is not peremptory, neither is the nonsuit of the one the nonsuit of both.

[d] Nonsuit in an appeale of murder, rape, robbery, &c. after appearance is peremptory, and this is, *in favorem vite*, for if the defendant be acquitted, and take out processe upon the statute of W. 2. against the abettors, or if he purchase his originall writ, for that cause he may be nonsuit.

[e] If the plaintiffe in an appeale of mayhem be nonsuit after appearance, it is peremptory; for the writ saith, *felonice maihemavit*, and therefore the nonsuit is peremptory.

[f] In an attainr, if the plaintiffe after appearance be nonsuit, it is peremptory, and the reason is, for the faith that the law gives to the verdict, and for the terrible and fearefull judgement that should be given against the first jury if they should be convicted, and therefore upon the nonsuit, the plaintiffe shall be imprisoned, and his pledges amerced. But if the processe in an attainr be discontinued, the plaintiffe may have another writ of attainr; because upon the nonsuit there is a judgement given, but not upon the discontinuance. Note it is truly said, that *exceptio probat regulam*; for these cases excepted stand upon their special and particular reasons, and fall not within the general reason of the rule. It is a general rule, that nonsuite before appearance is not peremptory in any case; for that a stranger may purchase a writ in the name of him that hath cause of action, as shall be said hereafter in this section.

[g] In reall or mixt actions the nonsuit of one demandant is not the nonsuit of both, but he that makes default shall be summoned and severed; but regularly in personall actions, the nonsuit of the one is the nonsuit of both, unless it be in certaine particular cases.

[h] In personall actions brought by executors there shall be summons and severance; because the best shall be taken for the benefit of the dead. And so it is in an action of trespassse as executor for goods taken out of their owne possession. Like law in account as executors by the receipt of their owne hands.

[i] In an *audita querela* concerning the personalty, the nonsuite of the one is not the nonsuit of the other; because it goeth by way of discharge and freeing of themselves, and therefore the default of the one shall not hurte the other.

[k] In a *quid juris clamat*, the nonsuit of the one is the nonsuit of both; because the tenant cannot attorne according to the grant.

[l] Some actions follow the nature of those actions, whereupon they are grounded; as the writs of error, attainr, *scire facias*, and the like. If a reall action be brought by severall *præcipes* against two or more, if the demandant be nonsuite against one, he is nonsuite

[y] Tr. 5. H. 6. Rot. 320. In Com. Banco.

[z] F. N. B. 78. f. & 208. d. 19 E. 2. Villein 31.

[a] 8. Co. ubi supra.

[b] 5. E. 3. 35. 2. H. 5. 31. H. 6. 15. 22. H. 6. 44. 45. 33. H. 6. 1. 55. 19. E. 4. 9. 21. E. 4. 2. b. & c. F. N. B. 38. k. 7. Co. 27. b. Sir Hugh Portman's case.

[c] 6. E. 2. Vill. 26. 11. E. 2. ibid. 28. 19. E. 2. ibid. 31. F. N. B. 78. c. 4. E. 2. Nonsuit 29.

[d] 9. H. 4. 1. 12. Stamf. Pl. Cor. 148. 2. & 171. c. 22. Aff. 97. Fitz. Cor. 184. 22. E. 3. 6. 47. E. 3. 16. 7. H. 7. 5. 40. E. 3. Dam. 77. 17. E. 2. Coron. 386. 3. E. 2. Action sur l'est. 28. [e] 43. Aff. 39. 40. Aff. 1. (1 Sid. 32.)

[f] 32. Aff. 13. 19. Aff. 13. 20. E. 3. Attainr 42. 22. E. 3. 7. F. N. B. 103. d.

[g] 11. H. 6. 23. 35. F. N. B. 35. b. 19. E. 3. tit. Sever. 14. 3. E. 2. Nonsu. 18. 19. E. 3. Sev. 16. 12. E. 3. ib. 22. 38. E. 3. 9. 29. H. 6. 45. 38. E. 3. 35. 41. E. 3. Nonsuit 10. 45. E. 3. 10. 2. H. 4. 2.

[h] 2. Ro. Abr. 132. 10. Co. 134. [i] 42. E. 3. 13. 48. E. 3. 14. 28. H. 6. 3. 11. E. 2. Sev. 26. 13. E. 3. ib. 45. 18. E. 3. ib. 28. 5. E. 3. ibid. 20. 7. E. 3. 12. [j] 15. E. 3. Sever. 23. 6. Co. 25. Ruddock's case.

[k] 20. E. 3. Severance 17. [l] 47. E. 3. 6. b. 47. Aff. 3. 29. Aff. 34. 7. H. 4. 45. 34. H. 6. 31. 25. H. 6. 19. 29. E. 3. 37. 6. Co. ubi supra. 22. H. 6. 42. 4. E. 4. 33. 19. E. 2. Nonsuit 32. 18. E. 3. ibid. 31. 20. E. 3. ib. 26. 27. 19. E. 3. ibid. 12. 3. E. 3. ibid. 17. 38. E. 3. 9. 10. H. 6. 45. 44. E. 3. 16. 19. E. 3. Severance 16. (1 Sid. 378.)

(1) But lord Dyer held the nonsuit not peremptory, if another *quare impedit* was brought within the six months. Dall. 81. 82. Perhaps, however, he only meant to assert this in the case of a nonsuit before appearance. As to lord Coke's doctrine, other authorities for it may be added to those he cites. See 1. Brownl. 161. 2. Salk. 559.

against all; for as to the demandant it is but one writ under one *teste*. Note, severance is twofold, viz. by summons *ad sequendum simul*, and that is when one of the demandants or plaintifes never appeared: and by award of the court of nonsuit without any summons, and that is after appearance.

[m] 6. R. 2. Nonsuit 13. 25. H. 8. Nonsuit Br. 68. 20. H. 7. 5. (2. Ro. Abr. 130. 131. Post. 227. b.)

[m] The king's majesty cannot be nonsuited, because in judgement of law, he is ever present in court; but the king's attorney, *qui sequitur pro domino rege*, may enter an *ulterius non vult prosecui*, which hath the effect of a nonsuite. But in an information by an informer, *qui tam*, &c. the informer may be nonsuited.

[n] 2. H. 4. ca. 7. 3. E. 3. 21. 47. E. 3. 1. 2. 3. E. 4. f. 11.

[n] At the common law upon every continuance or day given over before judgement, the plaintife might have been nonsuited; and therefore before the statute of 2. H. 4. after verdict given, if the court gave a day to be advised, at that day the plaintife was demandable, and therefore might have been nonsuit, which is now remedied by that statute.

[o] 2. H. 5. 5. 8. R. 2. Nonsuit 34.

[o] But after demurrer in law joyned, if the court doth give a day over, at that day the demandant or plaintife is demandable, and therefore may be nonsuit, for that is not holpen by any statute.

[p] 9. H. 7. 1. 21. E. 3. 32. 11. Co. 39. 41. Metcalfe's case. (2. Ro. Abr. 131. contra.)

[p] And after an award to account, the plaintife may be nonsuit; and so note a diversity betwene an interlocutory award of the court, and a final judgement (1).

By these few instructions you shall the more easily understand the bookes of tearmes and yeares, and other authorities of law. And here (to returne to Littleton) it is to be noted, that, albeit the lord be nonsuit, yet the enfranchisement of the villeine doth remaine; for that grew by the appearance to the writ, and cannot be taken away by the nonsuit subsequent. So it is if the writ do abate, yet the enfranchisement remaines.

[q] 7. H. 4. 8. 11. H. 4. 13. 9. E. 4. 23. 7. H. 4. 8. a. 7. H. 7. 6. b. 5. H. 7. 15.

[q] *Après appearance*, for otherwise a stranger may purchase a writ in his name, and therefore Littleton materially added these words, after appearance.

Præcipe. There be three kinds of *præcipes*. 1. A *præcipe quod reddat*, whereof Littleton here speaketh. 2. A *præcipe quod permittat*; and 3. a *præcipe quod faciat*, whereof you may read plentifully in the Register, and Fitzherbert's *Natura Brevium*, and belongs not properly to this treatise.

Account. Of this sufficient hath beene said before.

Vid. sect. 748. 4. Co. 80. Noke's case F. N. B. 145.

Covenant. *Conventio*. Hereof there be two kinds, viz. a covenant personall, and a covenant reall; and a covenant in deed, and a covenant in law.

[r] W. 2. cap. 12. 22. Aff. p. 39. 33. H. 6. 2. 14. H. 7. 2. 40. Aff. 18. 40. E. 3. 42.

Ou il fuit endite de ceo. [r] For if the villeine be not first indited of it, then, upon the acquittall of the villeine, the villeine shall recover damages against the lord by the stat. of W. 2. *quia multi per malitiam*, &c. and consequently shall be enfranchised. But if the villeine be formerly indited of the felony, then though the villeine be acquitted upon the appeale, he shall recover no damages against the lord. For wheresoever the lord giveth to the villeine a just cause of action, he is enfranchised. [s] And therefore if the lord kill his villeine, his sonne and heire shall have an appeale, and thereby his heire shall be enfranchised, because the offence of the lord gave to the heire a just cause of action against the lord.

[s] Kelway 134.

Sect. 209.

QUE *il ad esté*
Custome, &c.

Here some may object, that such a custome may have a lawful beginning; for Littleton in the beginning of this chapter, sect. 174. alloweth, that [a] a freeman may take lands of the lord to be holden of him, that is, to pay a fine for the marriage of his sonne or daughter, and therefore [b] some have thought that such a custome generally within the manor should be good. But the

[a] 10. E. 3. 23. Roger de Vale's case, 15. E. 3. Aid. 33.

[b] 34. H. 6. 15. a. per Litt.

ITEM *si seig-*
nior d'un manor

voile prescriber, que
il ad esté custome
deins son manor de
temps dont memo-
ry ne curt, que chef-
cun tenant deins
mesme le mannor, que
maria sa file a ascun
home sans licence de
le seignior del man-

ALSO if the lord of a mannor will prescribe, that there hath beene a custome within his mannour time out of minde of man, that every tenant within the same mannor, who marieth his daughter to any man without licence of the lord of the

nor

(1) But Brooke says, that the award to account is a judgment, and therefore that a man cannot be nonsuited after such award. Bro. Abr. Nonsuit pl. 17. 21. E. 3. 7. Rolle, to the same purpose, cites 3. H. 4. 7. 21. E. 3. 7. 21. H. 6. 26. 1. H. 7. 1. b. See 2. Ro. Abr. 131. However he adds, that the 17. E. 3. 87. and Co. Litt. are *contra*. Lord Coke's opinion is particularly warranted by Metcalfe's case in the Eleventh Report, which, as he here explains, proceeded on the distinction between an *interlocutory* and a *final* judgment.

nor, ferra fine (1), & ont fait fine al seignour del mannor pur le temps esteant, cest prescription est void. Car nul doit faire tiels fines forsque tant-solement villeines. Car chescun franke home poit frankement marier sa file, et que pleist a luy & sa file. Et pur ceo que cest prescription est encounter reason, tiel prescription est voyd.

villeines, (that is) either villeines of blood, or freemen holding in villenage or base tenure. So note a diversity between a freeholder and a freeman holding in villenage. Villeines use to pay to their lords in acknowledgement of their bondage for their several heads, and thereupon it is called *chevage*, *chevagium*, of the French word *chefe*, as it were the service of the head. Of which Bracton saith, [c] *chevagium dicitur recognitio in signum subjectionis & domini de capite suo*. And sometimes it is written *chivage*, but more properly *chiefage*. [d] *Chevagium* signifieth also a great misprison for any subject to take summes of money, or other gifts yearly in name of *chevage*; because they take upon them to be their chiefe heads or leaders (3).

Pur ceo que cest prescription est encounter reason, ceo est voyd. This (2, Ro. Abr. 265. Ante 113. a.) contains one of the maxims of the common law, viz. that all customs and prescriptions that be against reason are voyd.

mannour, shall make fine, and have made fine to the lord of the mannor for the time being, this prescription is voyd. For none ought to make such fine, but onely villeines. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is voyd.

answer is, that, though it may be so in a particular case upon such a special reservation of such a fine upon a gift of land, yet to claime such a fine, by a generall custome within the mannor, is against the freedome of a freeman, that is not bound thereunto by particular tenure. But a custome may be alledged within a mannor, [b] That every tenant (albeit his person be free) that holdeth in bondage or by native tenure, the freehold being in the lord, shall pay to the lord, for the marriage of his daughter without licence, a fine: and it is called *marchet*, as it were a *chete* or fine for marriage (2). And here Littleton saith, that none ought to pay such fines, but

[b] 43. E. 3. 5. 14. H. 6. 15.

[c] Bracton lib. 1. cap. 10. Britton fol. 79. b.

[d] 27. Aff. 44.

Sect. 210.

MES en le county de Kent, ou terres & tenements sont tenus en gavelkinde, la, ou, per le custome & use de temps dont memory ne curt, les fits males doient ovelment enheriter, ceo custome est allowable; pur ceo que il estoit ove ascun reason; pur ceo que chescun fits est auxy graund gentlehome come leigne fits est,

BUT in the county of Kent, where lands and tenements are holden in gavelkinde, there, where by the custome and use out of minde of man the issues male ought equally to inherite, this custome is allowable; because it standeth with some reason, for every sonne is as great a gentleman as the eldest sonne is, and perchance will grow

EN [e] le county de Kent. For that

in no county of England lands [f] at this day be of the nature of gavelkinde of common right, saving in Kent onely. But yet in divers parts of England, within divers mannors and seignories, the like custom is in force.

En gavelkinde. That is, gave all kinde: for this custome giveth to all the sonnes alike (4).

Les fitz males inheriter. And this is the generall custome extending to sonnes. But yet [g] by [g] 23. Aff. pl. 21; custome, when one brother dieth without issue, all the other

[e] Vide L'etatute de Consuetudinibus Kancie, ann. 21. E. 1. 2. E. 3. 12. 3. E. 3. 21. 38. 23.

Aff. pl. 12. 8. E. 3. 42. b.

(Post. 175. b.)

[f] Vide Mirror cap. 1. sect. 3.

[g] 23. Aff. pl. 21.

(1) The words *a le volente le seignior* are added in L. & M.—(2) See further, as to *marchet*, the word in Spelm. Gloss. and the Appendix to Robinson on Gavelkind p. 2.—(3) The case, cited by lord Coke from the book of Assises, consists of various articles enquired of by a jury in the court of King's Bench; and the seventeenth of these relates to those, who receive persons under their patronage, taking from them certain yearly fees, by gift, rent, or in the name of *chevage*, to maintain them in wrong or right. Lambard, in treating of unlawful assemblies, describes the offence of *chevage* from the Book of Assises, and takes notice of it as still inquirable. Lamb. Eirenarch. ed. 1602. p. 163.—(4) This was the common etymology, when lord Coke wrote; and it was countenanced by Mr. Lambard, in the explication of words prefixed to his Anglo Saxon laws. Lamb. de Prisc. Anglor. Leg. voc. Terra ex Scripto. But the latter afterwards inclined to a more probable derivation, conjecturing that *gavel* signified *rent*, and so *gavelkind* imported land of such a kind as to yield *rent*. Lamb. Perambulat. of Kent, ed. 1596. p. 519. Mr. Somner pursues the same idea, and expatiates to support it. Somn. Gavelk. 1st. edit. 3. It is rather surprising, that lord Coke did not hit upon a like derivation, as elsewhere he describes *gavel* or *gabel* to signify *rent*. Post. 141. a.—See further to this point Robins. on Gavelk. 1.

Lib. 2.

(1. Ro. Abr. 6:4)

Cap. II.

Of Villenage.

Sect. 211.

other brethren may inherit (1).

Chescun fitz est auxy grand gentlehome come leigne fitz est. By

this it appeareth, that gentry and armes is of the nature of gavelkinde; for they descend to all the sonnes, every sonne being a gentleman alike. Which gentry and armes do not descend to all the brethren alone, but to all their posterity. But yet *jure primogenitura*, the eldest shall beare, as a badge of his birthright, his father's armes without any difference; for that, as Littleton saith, section 5. he is more worthy of blood; but all the younger brethren shall give several differences, *& additio probat minoritatem*, and [b] *hereditas inter masculos jure civile est dividenda*.

Ou auterment peradventure il ne puissoit tielment creffer. The reason of this is rendered by the poet.

[b] Fortescue cap. 40.

Horace.

*Haud facile emergunt, quorum virtutibus obstat
Res angusta domi.*

31. H. 8. ca. 3. V. 18. H. 6. cap. 1. (1. Sid. 136.)

But now by the statute of 31. H. 8. a great part of Kent is made descendable to the eldest sonne, according to the course of the common law (2); for that, by the means of that custom, divers ancient and great families after a few descents came to very little or nothing.

*In plures quoties rivus deducitur amnis,
Fit minor, ac undâ deficiente, perit.*

Sect. 211.

Vide Sect. 165.

PER custome appel burgh English.

Of this custome Littleton hath spoken before in the chapter of Burgage. And in our bookes there is a special kind of Borough English [i]; as, it shall descend to the younger sonne, if he be not of the halfe blood, and if he be, then to the eldest sonne (3).

[i] 32. E. 3. tit. Age 81.

[2] Mich. 10. Ja. Eliot's case in Brieve de faux Judgement.

[k] Within the manner of B. in the county of Berke, there is such a custome, that if a man have divers daughters, and no son, and dieth, the eldest daughter shall only inherit; and if he have no daughters, but sisters, the eldest sister by the custome shall inherit, and sometime the youngest. And divers other customes there be in like cases. And herewith agreeth Britton, who saith, (l) *de terres des ancienes demeynes soit use solongue le antient usage del lieu, dount en aucun lieu le tient len per usage, que le heritage soit departable entre tous les enfans freres & sores, & en aucun lieu que le eigne avera tout, & en aucun lieu que le puisne frere avera tout.*

[l] Brit. 187. b.

Pur cause de son juventute poit le plus meins de tous ses freres luy mesme aider, &c. Hereby (&c.) are implied those causes wherefore a youth is lesse able to ayd himselfe, &c. which the poet briefly and pithily expresth thus:

Imberbis

ITEM, lou per custome appel

Burgh English en ascun burgh, le fits puisne inheritera tous les tenements, &c. ceo custome estoit ove ascun certaine reason; pur ceo que le fits puisne (sil fault pere & mere) per cause de son juventute poit le plus meins de tous ses freres luy mesme aider, &c.

ALSO where by the custome called

Burrough English in some burrough, the yongest son shall inherit all the tenements, &c. this custome also stands with some certaine reason; because that the yonger sonne (if he lacke father and mother) because of his yong age, may least of all his brethren helpe himselfe, &c.

(1) This extension of the custom of gavelkind, to *collaterals*, prevails universally in Kent. See Robins. on Gavelk. 91.—
(2) There are six other statutes for disgavelling particular lands in Kent, besides the 31. Hen. 8. though that is the only statute in print. They are mentioned in Mr. Robinson's book on Gavelkind, and the learned writer is very full in his explanation as well of them, as of the 31. H. 8. especially observing, that they are construed to alter only the partible quality of the customary descent to males, which agrees with lord Coke's manner of mentioning the 31. H. 8. See Robins. on Gavelk. p. 75.—
(3) The reader will find the chief instances of special kinds of Borough-English brought together in Mr. Robinson's Book on Gavelkind. See Append. p. 6.

*Imberbis juvenis, tandem custode remoto,
Gaudet equis, canibusque, & aprici gramine campi;
Cereus in vitium flecti, monitoribus asper,
Utilium tardus provisor, prodigus æris,
Sublimis, cupidusque, & amata relinquere pernix.*

Horace.

And againe, no living creature more infirme than man :

*Nil homine infirmum tellus animalia nutrit
Inter cuncta magis. ———*

Homer.

Sect. 212.

MES si home voile prescriber, que, si ascuns a-vers fueront sur les demesnes de son mannor là damage feants, que le seignior del mannor pur le temps esteant ad use eur de distreyner, & le distresse retainer tanque sine fuit fait a luy pur le damage a la volunt, cest prescription est void; pur ceo que il est encounter reason, que, si tort soit fait a un home, que il de ceo serroit son judge demesne; car per tiel voy, s'il avoit damages forsque al value d'un mail, il puiroit assesser & aver pur ceo C. l. que serroit encounter reason. Et issint tiel prescription, ou ascun autre prescription use, si ceo soit encounter reason, ceo ne doit (1) estre allow devant judges; quia malus usus abolendus est (2).

BUT if a man will prescribe, that, if any cattle were upon the demeans of the mannor there doing damage, that the lord of the mannor for the time being hath used to distreine them, and the distresse to retaine till fine were made to him for the damages at his will, this prescription is voyd; because it is against reason, that if wrong be done any man, that he thereof should be his own judge; for by such way, if he had damages but to the value of an halfpeny, he might assesse and have therefore C. li. which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not, nor will not bee allowed before judges; quia malus usus abolendus est.

EST encounter reason, que si tort soit fait a un home, que il de ceo serra son judge demesne.

For it is a maxime in law, *aliquis non debet esse iudex in propria causa.* And therefore a fine, levied before the baylives of Salop, was reversed; because one of the bailives was partie to the fine, *quia non potest esse iudex & pars* (3).

Malus usus abolendus est: and every use is evill, that is (as our author saith) against reason, *quia in consuetudinibus non diuturnitas temporis, sed soliditas rationis est consideranda* (4).

And by this rule cited by our author, at the parliament holden at Kilkenny in Ireland, Lionel Duke of Clarence being then lieutenant of that realme, the Irish customs called there the Brehon law, (for that the Irish call their judges Brehons) was wholly abolished; for that (as the parliament sayd) it was no law, but a lewd custome, & *malus usus abolendus est* (5).

But our student must know, that king John in the twelfth yeare of his reign went into Ireland, and there, by the advice of grave and learned men in the laws whom he carrieth with him, by parliament *de communi omni de Hibernia consensu*, ordained and established, that Ireland should be governed by the

10. E. 3. 23. 4. E. 3. 54. 7. E. 3. 24. 38. h. 3. 18. 2. H. 3. 4. 3. H. 4. 8. H. 6. 19. 5. H. 7. 9. b. Hil. 4. H. 4. coram rege Salop. (2. Ro. Abr. 92. 93. 1. Ro. Abr. 492. 496.)

(5. Co. 84)

An. 40. E. 3. at Kilkenny.

The Brehon law.

Vide sect. 265.

(Vaugh. 293.)

(1) Instead of *doit* it is *voet* in L. & M. Roh. & P.

(2) Sect. 174. is placed here in L. & M. as we have formerly noticed. See 117. b. note 2.

(3) See 14. Vin. Abr. 573. 4. Com. Dig. 6.

(4) See Dav. Rep. 32. & 7. Vin. Abr. 180. 185.

(5) Acc. 4. Inst. 358. So much of the Irish statutes of 40. E. 3. as relates to abolishing the Brehon law, is in Dav. on Ireland, fol. ed. 28. The other heads of these statutes are also given in the same book p. 44. What were the most exceptionable parts of the Brehon law, or Irish customs, are explained ibid. 36. in Spens. Irel. 1st. ed. 4. and Ware's Antiq. of Ireland. Har. 116's ed. 69.

Rot. Pat. 11. H. 3. 7. Co. 22. b.
Calvin's case.

Rot. Patent 18. H. 3. M. 17.
N. 21.

Rot. Patent 30. H. 3.

* Tri. 13. E. r. coram rege in
Thesaur. in longo placito.
[m] 2. R. 3. 12. In Camera Stel-
lata 1. H. 7. 3. (4. Inst. 350.)

the lawes of England (1), which of many of the Irishmen, according to their owne desire, was joyfully accepted and obeyed, and of many the same was soone after absolutely refused, preferring their Brehon law before the just and honourable lawes of England. Rex, &c. baronibus, militibus, & omnibus libere tenentibus salutem. Satis, ut credimus, vestra audivit discretio, quod quando bonæ memoriæ Johannes quondam rex Angliæ, pater noster venit in Hyberniam, ipse duxit secum viros discretos & legis peritos, quorum communi consilio, & ad instantiam Hybernensium, statuit & præcepit leges Anglicanas in Hyberniam, ita quod leges easdem in scripturas redactas reliquit sub sigillo suo ad Scaccarium Dublin.

Rex comitibus, baronibus, militibus, & liberis hominibus & omnibus aliis de terra Hiberniæ salutem. Quia manifeste esse dinoscitur contra coronam & dignitatem nostram & consuetudines & leges regni nostri Angliæ, quas bonæ memoriæ dominus Johannes rex pater noster, de communi omnium de Hyberniam consensu, teneri statuit in terra illa, quod placita teneantur in curia Christianitatis de advectionibus ecclesiarum & cepellaram, vel de laico feodo, vel de catallis, quæ non sunt de testamento, vel matrimonio: vobis mandamus, prohibentes quatenus hujusmodi placita in curiæ Christianitatis nullatenus sequi præsumatis in manifestum dignitatis & coronæ nostræ præjudicium, scitari pro certo, quod si feceritis, dedimus in mandatis justiciario nostro Hyberniam, statuta curiæ nostræ in Anglia contra transgressionem hujus mandati nostri cum justitia procedat, & quod nostrum est exequatur. In cujus, &c. teste rege apud Winchcomb, 28 die Octobris, anno regni nostri 18. Et mandatum est justicio Hyberniam, per literas causas, quod prædictas literas patentes publicè legi & teneri faciat.

Rex, &c. pro communi utilitate terræ Hyberniam, & pro unitate terrarum, provisum est, quod omnes leges & consuetudines, quæ in regno Angliæ tenentur, in Hibernia teneantur, & eadem terra eisdem legibus subiaceat, ac per easdem regatur, sicut Johannes rex, cum illic esset, statuit & firmiter mandavit. Ideo volumus, quod omnia brevicia de communi jure, quæ currunt in Anglia, similiter currant in Hyberniam sub novo sigillo regis. In cujus, &c. teste me ipso apud Woodstocke. Wherein it is to be observed, that union of lawes is the best meanes for the unity of countries. * Una & eadem lex esse debet tam in regno Angliæ quam Hyberniam. [m] Terra Hyberniam inter se habet parliamentum & omnimodas curias prout in Anglia, & per idem parliamentum facit leges & mutat leges, & illi de eadem terra non obligantur per statuta in Anglia, quia hi non habent milites parliamenti (2).

By an act of parliament (called Poyning's law) holden in Ireland in the tenth yeare of Henry the seventh, it is enacted, that all statutes, made in this realme of England before that time, should be of force and be put in use within the realme of Ireland (3); which (though it be by way of digression) is not unnecessary for our student to know. But now let us heare our author (4).

CHAP. 12.

Of Rents.

Sect. 213.

SOME have divided rents into foure kinds, viz. rent service, rent charge, rent disreynable of common right, (whereof somewhat shall be said in this chapter) and rent secke.

Rent. In Latine reditus, (a) by some dicitur à redeundo, quia retroit, & quotannis redit. * And others say it is derived of redere, for that the rent is reserved out of the profits of the land, and is not due till the tenant or lessee take the profits; for redelendo inde or solvendo, or reservando inde, or the like, [b] is as much to

TROYS maners de rents y sont, cessascavoir, rent service, rent charge, & rent secke. Rent service est, pou le tenant tient sa terre de son seignior per fealty & certaine rent, ou per homage fealty & certain rent, ou per autres services & certaine rent. Et si rent service

THREE manner of rents there be, that is to say, rent service, rent charge, and rent secke. Rent service is, where the tenant holdeth his land of his lord by fealtie and certaine rent, or by homage fealty and certaine rent, or by other services and certaine rent. And if rent service at any day, that soit

[a] Fleta lib. 3. ca. 14. Britton ca. 41. Mirror ca. 2. sect. 16. Pl. Com. 132. b.

* 10. Co. 127. Clun's case.

[b] Pl. Com. 138. 139. &c. in Browning's & Belling's case. 35. H. 6. 34.

The continuation of the note on the origin of feuds, left unfinished in fol. 71. a. and intended to have been inserted here, is further postponed to the end of the work. See post. fol. 395. a.

(1) Some think, that the laws of England were introduced into Ireland before this charter of John by his father Henry the second. This opinion is strongly enforced by the testimony of an historian of the reign of Henry the third; for Matth. Paris writes, that rex Henricus, antequam ex Hibernia rediret, apud Lismore concilium congregavit, ubi leges Angliæ sunt ab omnibus grante receptæ, & juratoria cautione prestita, confirmata. Molyn. Case of Irel. Lond. ed. of 20. p. 14. & Matth. Par. ad ann. 1172. vit. H. 2. ibid. cit. The other authorities to establish the same fact are well collected by Mr. Harris in his edition of Ware's Antiquities of Ireland. See p. 78. See further 1. 1. el. Hist. Irel. 76. & Vaugh. 291.

For the remainder of the notes to this title of fol. 141. see post. fol. 143. a.

soin a ascun jour, que it ought to be payed,
doit estre pay, ade- be behinde, the lord
rere, le seignior poit may distraine for that
distrainer pur ceo de of common right.
common droit.

say as the tenant or lessee shall
 shall pay so much out of the
 profits of the lands; for *red-*
dere nihil aliud est, quam accep-
tum, aut aliquam partem ejusdem,
restituere. Seu reddere est quasi
retro dare, and hereof com-
 meth *redditus* for a rent.

Here note for the better understanding of ancient records, statutes, charters, &c. *gavel*, or *Domesday*. *gavell*, *gablum*, *gabellum*, *gabelletum*, *gabelletum*, and *gavilletum*, doe signifie a rent (1), cus- Statutum de gavilletto anno 10.
 tome, duty, or service, yeelded or done to the king or any other lord; as *Wallingford con-* E. 2.
 tinent 276 bagas i. e. domos reddentes 9 libras de gablo i. de redditu. And Oxford, *hac urbs reddebat* (Ante 87. h. Post. 144. 2. Ro.
pro theolonio et gablo regi 20. p. & sextarios mellis, comiti Alpharo 10 libras. And this is the Abr. 446.)
 legall signification thereof (2).

Rent service. It is called a rent service, because it hath some corporall service inci-
 dent unto it, which at the least is fealty, as here it appeareth.

Sa terre. [c] A rent service cannot be reserved out of any inheritance but such as Vide sect. 218. (Ante 47. a.)
 is manurable, whereinto the lord may enter and take a distresse, as in lands and tenements, [c] 44. E. 3. 45. 5. Co. 4.
 reversions, remainders, and as some have said, out of the herbage of lands, and regularly Seignior Mountjoye's case 9. Aff.
 not out of any inheritances incorporeall, or that lye in grant. [d] By act of law one 24. 30. Aff. 5. 17. E. 3. 75. 7.
 rent or service may issue out of another, as if A, before the statute of *quia emptores terrarum* Co. 23. But's case. Pl. Com.
 had given lands to B, to hold to him by fealty and ten shillings rent, and B had made a feoff- 139.
 ment in fee to C, &c. whereby there was a mesnalty created, in this case C should hold of B, [d] 3. H. 6. 21. 5. H. 7. 16.
 either by the same services the law created, or such as he specially reserved, and B did by 21. H. 7. 39. 1. H. 4. 82. 10. H.
 operation of law hold those services of A by fealty and ten shillings rent, that is to say, rent 6. 12. 19. E. 3. tit. Gard. 40.
 and service out of rent and service; and if the rent be behinde, the lord paramount may dis- 21. H. 6. 11.
 traine upon the land for his rent, for both mesnalty and feigniorie doe issue out of the land,
 the mesnalty immediately, and the feigniorie mediately, which is worthy of due consideration
 and observation.

Certaine rent. [e] For the rent must be certaine, or which may bee reduced to a [e] Britton fol. 100. a.
 certainty, for *id certum est, quod certum reddi potest.* [f] *Continetur carta reddendo inde annua-* (Ante 96. a.)
tim ad tales terminos, vel faciundo inde talia servitia, vel tales consuetudines, quæ omnia debent esse [f] Fleta lib. 3. ca. 14.
certa & in carta expressa &c. But of this I have spoken sect. 136. And the rent may as well (Ante 91. b.)
 be in delivery of hens, capons, roses, spurres, bowes, shafts, horkes, hawkes, pepper,
 comine, wheat, or other profit that lyeth in render, office, attendance, and such like, as in
 payment of money. [g] But a man upon his feoffment or conveyance cannot reserve to him [g] 38. H. 6. 38. a.
 parcell of the annuall profits themselves, as to reserve the vesture or herbage of the land or (Ante 47. a. 4. b.)
 the like (3); for that should be repugnant to the grant, *non debet enim esse reservatio de proficuis*
ipsis, quia ea conceduntur, sed de redditu novo extra proficua.

Poet distreiner pur ceo. For where there is fealty, &c. incident to the rent, there
 is a distresse incident also thereunto. [h] But it is to be understood, that for a rent or service, [h] Mirror ca. 2. sect. 16. 10.
 the lord cannot distreine in the night, but in the day time; and so it is of a rent charge. But E. 3. Avowry 137. 11. H. 7. 5.
 for damage feaunt one may distreine in the night, otherwise it may bee the beasts will be
 gone before he can take them.

De common droit. Of common right, [i] that is, by the common law so called; [i] W. 1. ca. 1. 2. H. 4. ca. 1.
 because the common law is the best and most common birth-right, that the subject hath for 7. H. 4. ca. 1. 4. H. 8. ca. 8.
 the safeguard and defence, not onely of goods, lands and revenues, but of his wife and chil-
 dren, his body, fame, and life also. So as the meaning of Littleton in this particular case is,
 that the lord may distreine for this rent of common right, that is, by the common law, with-
 out any particular reservation or provision of the party. And it is to be observed, that the com-
 mon law of England sometime is called right, sometime common right, and sometime
communis justitia. In the grand charter the common law is called right. *Rectum nulli ven-*
demus; nulli negabimus aut differemus justitiam vel rectum. In the statute of W. 1. c. 1.
 it is called *common droit.* *En primes voet le roy, & commande, que le peace de f. esglise*
& de la terre soit bien garde & maintaine en tous points, & que common droit soit fait a tous,
auxibien aux riches, sauns regard de nulluy; which agreeth with the ancient law in the
 time of king Edgar. *Porro autem has populo, quas servet, proponimus leges. Primum publici*
juris beneficio quisquam frutor, idque ex aquo & bono, sive is dives sive inops fuerit jus Lamb. fo. 78. inter Leges Regis
redditor. And Fleta saith, *Item quod pax ecclesie et terre inviolabiliter observetur, & quod com-* Edgari. Fleta lib. 1. c. 29.
munis justitia singulis pariter exhibeatur. And all the commissions and charters for execution of
 justice are, *facturi quod ad justitiam pertinet secundum legem & consuetudinem Angliæ.* So as in
 truth justice is the daughter of the law, for the law bringeth her forth. And in this sense
 being

(1) See Acc. ante 140. a. note 4.

(2) But though in old deeds *gavellet* may often signify *rent*, and this use of the word may best agree with its origin,
 yet it is not the only legal signification. On the contrary, the word is now most usually applied to a remedy or process,
 peculiar in denomination to Kent and London, by which the lord of the fee, when his tenant is in arrear for rent or
 service, may force him to pay the arrears and damages, by seizing the land and holding it till payment. In Kent this remedy
 is founded on immemorial usage; Mr. Robinson learnedly deducing it as well from the general law of fiefs, as from the practice
 of our Anglo-Saxon ancestors; and the passages cited by another eminent writer, in treating of forfeiture by *cesser*, tending to
 the same point. Robins. on Gavelk. 243. Wright's Ten. 197. The *gavellet*, thus prevailing by the custom of Kent, may be used
 whether there is a sufficient distress on the land or not, but is restricted to gavelkind tenure. Robins. on Gavelk. 243. To
 London a writ of the same denomination was given for rent-service generally by the 10. of Edward the second, which is there-
 fore called the statute of *gavellet*. But by the words of the statute this latter *gavellet* only lies, where the lord cannot obtain pay-
 ment by distress. From this account of the *gavellet* in Kent and London, it appears that Sir Henry Spelman was well justified,
 when, after giving the etymon of *gavellet*, and describing it sometimes to signify the tenure of *gavelkind*, he adds, *gavelletum juris*
etiam processus est huic dicatus tenuræ, casu quo tenens redditus & servitia ultra modum subducit; quod & Londoniensibus ceditur statuto an.
 10. Edwardi 2. de *gavileto*. Spelm. Gloss. voc. *Gaviletum*. We take notice of this passage from Spelman, because the learned
 and ingenious observer on our ancient statutes, seems to have misunderstood the *gavellet* thus described, for though the word
 originally imported *rent*, yet our explanation shews, that it also means a *process for the recovery of rent*, technically called *gavellet*
 both in Kent and London. See Barr. on Ant. Stat. ad. ed. 149.—Besides the two remedies thus called *gavellet*, there is another
 very similar one for rents-service in all parts of the kingdom; and this is the writ of *cessavit*, which is regulated by, if it did
 not wholly originate from the statutes of Gloucester and Westminster the second. 6. E. 1. c. 4. 13. E. 1. ft. 1. c. 21. 41. But lord
 Coke, in his comment on the statute of Gloucester, mentions his having read the record of the proceedings on a *cessavit*
 in

Vide sect. 214. 216. 226. 232. being largely taken, as well the statutes and customes of the realme, as that which is properly the common law; is included within *common droit*. Littleton in this his treatise nameth *com-mon droit* fixe times.

Sect. 214.

35. H. 6. 34.
(Cro. Eliz. 33. Post. 225. b.)

Vide sect. 131. 132.

SAUNS fait.

For it is a rule in law, that a rent service may be reserved without deed.

En mesme le manner, si lease soit fait, &c.

For these be rents services, because fealty is incident to these rents; for (as it hath bin said before) a lessee for life or years shall doe fealty. And if a man make a lease at will, reserving a rent, the lessee shall not doe fealty, and yet the lessor shall distreine for the rent of common right.

Rendant commeth of the word *reddo*, i. *rem pro re dare*, and signifieth yeelding or repaying; but of this I have spoken before in this chapter. Sect. 213.

ET si home voyloit

doner terres ou tenements a un auter en taile, rendant a luy certain rent per an (1),

il de common droit poit distreiner pur le rent

aderere, coment que tiel done fuit fait sans fait; pur ceo que tiel rent est rent service.

En mesme le maner est, si lease soit fait a un home

pur terme de vie, ou d'auter vie (2), rendant al lessor certaine rent,

ou pur terme de ans rendant certaine rent.

AND if a man will

give lands or tenements to another in the taile, yeelding to him certaine rent by the yeare,

hee of common right may distreine for the rent behind, though that

such gift was made without deed; because that

such rent is rent service. In the same manner it is,

if a lease be made to a man for life, or the life of another, rendring to

the lessor certaine rent, or for tearme of yeares rendring rent.

Sect. 215.

(Ante 22. b. Plowd. 151. a. 162.
a. Cro. Cha. 400. 548. 2. Ro.
Abr. 60.)

REversion.

Reversio commeth of the Latine word *revertor*, and signifieth a returning againe; and therefore *reversio terre est tanquam terra revertens in possessione donatori, sive heredibus suis, post donum finitum, &c.* as in the cases that Littleton here hath put.

Il covient, que le reversion &c. soit en le donor ou lessor &c.

This is not to be understood only of a reversion immediately expectant upon the gift or lease. For if a man maketh a gift in taile, the remainder in taile reserving a rent, and keepe the reversion in himselfe, this is a rent service.

Reservant. *Reserver* commeth of the Latine

MES en tiel cas,

ou home sur tiel done ou lease voile reserver a luy rent

service, il covient, que le reversion de les terres & tenements soit

en le donor ou lessor. Car si home voile faire

feoffement en fee, ou voile doner terres en

taile, le remainder oustre en fee simple sans fait, reservant

a luy certaine rent, tiel reservation est void; pur ceo que nul

reversion remaine en le donor, & tiel tenant

BUT in such case,

where a man upon such a gift or lease will reserve to him a

rent service, it behoveth, that the reversion of the lands and

tenements be in the donor or lessor. For if a

man will make a feoffment in fee, or will give lands in taile, the

remainder over in fee simple without deed, reserving to him a

certain rent, this reservation is void; for that no reversion remains

in the donor, and such

tient

(1) *Per an* not in L. & M. or Roh. but in P. & Red.

(2) *Ou d'auter vie* not in L. & M. or Roh. but in P. & Red.

in the reign of king John. 1. Inst. 295. Yet this seems strange, because, in the reign of this prince, the lord of the fee had a much more easy way of recovering his tenant's land for default of service, than by a *cessavit* in the court of the king; namely, a distress of the land by a process of seizure in his own court. The latter mode continued till the 52. of Hen. 3. took it away, by prohibiting distress of the freehold except by the king's writ, and so leaving the tenant's chattels as the only subject for the lord's distress. It was this alteration of the old law, which, as we apprehend, gave occasion to introducing the *cessavit* by the statutes of Gloucester and Westminster; nor at the utmost can we account for an earlier use of the *cessavit* than the 52. of Hen. 3. Perhaps, therefore, lord Coke's case of king John was nothing more than a process of *cesser* in the lord's court, and he might only call it a *cessavit* by reason of the resemblance, between the proceedings on the writ of *cessavit* in the king's court and those on the process of *cessavit* in the court of the lord.—These remedies of *gavellet* and *cessavit* are now fallen wholly into disuse, Mr. Lambard not remembering an instance of resorting to the customary *gavellet* of Kent in his time, and the cases in our books on both the *gavellets* and the *cessavit* being all of ancient date; from which it may be presumed, that distress of the tenant's goods is now usually a very sufficient, or at least a preferable remedy. Lamb. Perambulatio. ed. 1596. p. 554. Nor whilst the others continued in use, were they applicable, except when the tenure was in fee. Booth on Real Act. 133. But in imitation of them, it hath long been the practice to reserve a power of re-entry for nonpayment of rent on granting leases for lives or years; and the legislature have also interposed against lessees, as well to obviate the difficulty from the niceties of an entry for forfeiture at common law, by enabling landlords to recover possession by ejectment in a special manner, as to qualify and prevent an abuse of the tenant's remedy of injunction in equity. 4. Geo. 2. c. 28. Further, on a like principle of convenience, a summary jurisdiction is given to justices of the peace, enabling them to restore the possession to the landlord, where the tenant deserts the premises in lease, without leaving a sufficient distress. 11. G. 2. c. 19. See further as to the *cessavit* and other remedies for subtraction of

(3) See Bro. Abr. Reservation 46. Dr. & Stud. Dial. 2. c. 22.

*tient la terre immedi-
atement de le seignior,
de que son donor te-
noit, &c.*

tenant holds his land
immediately of the
lord, of whom his
donor held, &c.

word *reserve*, that is, to pro-
vide for store; as when a
man departeth with his land,
he reserveth or provideth for
himselfe a rent for his owne
livelihood. And sometime it

hath the force of *saving* or *excepting*. So as (k) sometime it serveth to reserve a new thing, viz. a rent, and (l) sometime to except part of the thing in *esse* that is granted. (1)

And it is to be understood, that in the case of the gift in taile, lease for life or years, the fealtie is an incident inseparable to the reversion, so as the donor or lessor cannot grant the reversion over, and save to himselfe the fealty or such like service. But the rent he may except; because the rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in taile without any reservation, the donee shall hold of the donor by the same services that he held over. (m) But otherwise it is of an estate for life or years; for there if he reserveth nothing, he shall have fealty onely, which is an incident inseparable to the reversion, as hath been said.

Le remaindre oustre en fee simple sans fait. Here it appeareth, that if a man maketh a gift in taile, the remainder in fee, without deed, (n) the remainder is good, and passeth out of the donor by the livery of seisin: and so it is of a lease for life or yeares, the remainder over in fee; for the particular estate and the remainder, to many intents and purposes, make but one estate in judgement of law. *Vide sect. 60.*

Remainder, in legall latine, is *remanere*, coming of the latine word *remaneo*; for that (o) it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time, as in the cases here of *Littleton* appeareth. (2)

(4) 8. E. 4. 48.
26. Aff. Pl. 66. (Ant. 47. a.)
(l) 35. H. 6. 34.

(Post. 317. a.)

(Ant. 23. a.)
(m) Litt. fo. 4.
Old tenures 5.
38. E. 3. 7. 33. H. 6. 7.

(n) 40. E. 3. 10. 10. E. 4. 1.
12. E. 4. 16. 15. E. 4. 18.
18. E. 4. 12. 18. H. 8. 4. 3. H. 7.
13. F. N. B. 219. 11. H. 4. 39.
38. E. 3. 36. 44. E. 3. 8.
(Ant. 49. b.)
(o) 2. Co. 51. Cholmelies case.
(Ant. 49. a. Plowd. 25. a.
35. a.)

Sect. 216.

*ET ceo est per force
de le statute de quia
emptores terrarum.
Car devaunt le dit es-
tatute si bone fesoit un
feoffment en fee simple,
per fait ou sans fait,
rendant a luy & a ses
heires certaine rent,
ceo fuit rent service,
& pur ceo il pouvoit
distreine de common
droit; & s'il fuit nul
reservation d'ascun
rent ne d'ascun service,
uncore le feoffee tenust
del feoffor per autiel
service, que le feoffor
tenust ouster de son
seignior procheine pa-
ramont.*

AND this is by force
of the statute of
*quia emptores terra-
rum*. For before that
statute, if a man had
made a feoffment in
fee simple, by deed or
without deed, yeeld-
ing to him and to his
heires a certaine rent,
this was a rent service,
and for this hee might
have distrained of
common right; and if
there were no reserva-
tion of any rent, nor
of any service, yet the
feoffee held of the
feoffor by the same
service, as the feoffor
did hold over his lord
next paramont.

*Quia emptores terra-
rum.*

Hereof is spoken before in
the chapter of *Frankalmoigne*,
sectione 140.

*Per fait ou sans fait,
&c.* For all rent service
may be reserved without deed
(as hath been said) and as it
appeareth here.

And at the common law if
a man had made a feoffment
in fee by parol, he might upon
that feoffment have reserved
a rent to him and his heires;
because it was a rent service,
and a tenure thereby created.

*Et s'il fuit nul re-
servation, &c. le feoffee
tenust del feoffor per au-
tiels services, &c.* This
is evident, and agreeth with
our bookes (*) that in this
case the law created the te-
nure; wherein it is to be ob-
served, how the law regardeth
equity and equalitie without
any provision or reservation
of the party.

(2. Inst. 500. Ant. 98. b.)

(Ant. 142. b.)

(Dy. 146. b. Ant. 23. a.)

(*) Britton fol. 100. 2. E. 3. 33.
25. E. 3. gard. 21. 49. E. 3. 10.
22. Aff. pl. 53. 7. H. 4. 14.
23. E. 3. avowrie 255. 4. H. 6.
Litt. cap. taile Sect.

Ipsæ etenim leges cupiunt, ut jure regantur.

Sect.

(1) In a preceding note lord Coke asserts, that reservation is *always* of a thing newly created out of the land demised. Ant. 47. a. But here he is more qualified in expression, and allows the word to be *sometimes* used to except part of the thing granted. However, the former is the more technical use of the word; *exception* being a more proper term than *reservation* for the latter purpose. The learning on this subject will be found under the title *reservation* in Viner's Abridgment.

(2) See Fearn's Eff. on Conting. Rem. 3d. ed. p. 5. to 11.

Continuation of notes to 141. b.

(2) From citing this passage of the year-book of Richard the Third, according to which English statutes do not bind Ireland, and from this manner of mentioning the same passage in his 12th report, one might infer, that lord Coke was of that opinion. 12. Co. 111. 12. But in Calvin's case referring to the same year-book, he explains it to mean, where Ireland is not *specially named*; and so he states the rule to be in the 4th Institute. 7. Co. Calvin's case 22. b. 4. Inst. 350. 351. Here also he cites the year book of 1. Hen. 7. which controuls the year-book of R. 3. Lord Coke's explanation in Calvin's case evinces his sentiments more strongly; because Ireland, if considered as quite distinct in government from England, would have been a more apt instance to support his doctrine in favor of the post-nati of Scotland. We do not, however, mean by this to offer any opinion on the controversy about the political connection between England and Ireland. It is a subject of too much importance and delicacy, as well as of too much extent, to be discoursed of in a note. See 6. Geo. 1. c. 5. 22. G. 3. c. 53. and 23. G. 3. c. 28. The first of these statutes asserts the legislative power of Great-Britain over Ireland, and also the appellat jurisdiction. By the twolatter both are annihilated.

(3) Irish stat. 10. H. 7. c. 22.

(4) The statute for taking away military tenures leaves the tenure by villenage, as it was before; one of the provisos declaring, that the act shall not be construed to alter or change any tenure by copy of court-roll, or any services incident thereunto. 12. Cha. 2. chap. 24. f. 7.

Sect. 217.

Britton fol. 100. Fleta lib. 3. ca. 14. Vide Sect. 370.
Post. 229. 2.
(5. Co. 20. b. 2. Ro. Abr. 22.
3. Leon. 16. 2. Infl. 672.)

(p) 8. E. 4. 8. 11. H. 7. 22.
35. H. 6. 34. 20. E. 4. 13.
17. E. 3. 12. H. 4. 17.
(2. Ro. Abr. 449.)

(q) Fleta lib. 3. ca. 14.
Britton fol. 100.

(r) 12. E. 4. feoffments 8. 18. E. 2.
Afl. 381.
(Ant. 47. 2. 2. Ro. Abr. 447.
Cro. Cha. 289.)

(f) 35. H. 6. 36.
(2. Ro. Abr. 447. 425. Mo. 93.
168.)

Oldtenures. Britton cap. 66. 164.
F. N. B. 210. Bracl. 86.

PER fait endent. It cannot be a deed indented unless it be actually indented; for albeit the words of the deed be *hæc indentura*, &c. yet if it be not indented indeed, it is no indenture. But if the deed be indented, albeit the words of the deed be not *hæc indentura*, yet it is an indenture. (3)

And it is holden that (p) if a feoffment in fee be made by deed poll reserving a rent, this reservation is good; for when the feoffee accepts the deed and livery of the land, he agreeth to the rent, and the rent is reserved by the words of the feoffor, and not by the grant of the feoffee. But of this more hereafter. In the mean time it is to be noted, that of ancient time a deed indented was called *charta cyrographata*; (4) or *charta communis*, because each party had a part. And a deed poll was called *charta de unâ parte*. (q) *Chartæ autem de purâ donatione et simplici penes donatorium & ejus hæredes debent remanere. Communes vero duplicari debent, ita quod quilibet habet partem suam; vel si una sit tantum, tunc in æquâ manu communis amici utriusque ponatur, salvo custodienda, dum cuilibet partium necesse fuerit exhibendum.*

Reservant a luy.

(r) Note, it is a maxime in law, that the rent must be reserved to him from whom the state of the land moveth, and not to a stranger. (f) But some doe hold, that otherwise it is in the case of the king.

Et tiel rent est rent charge. It is called a rent charge, because the land for payment thereof is charged with a distresse. If it be to the whole value of the land, or to the fourth part of the value, then the rent is called a fee farme. (5) Here Littleton putteth his case, and so did he

MES si home, per fait endent, a cel jour fait tiel done en fee taile, (1) le remainder ouster en fee, ou lease a terme de vie, le remainder ouster en fee; ou un feoffment en fee; & per meme l'indenture il reserve a luy & a ses heires un certaine rent, & que si le rent soit aderere, que bien liroit a luy & a ses heires a distreiner &c. tiel rent est rent charge; pur ceo que tielx terres ou tenements sont charges ove tiel distresse per force de le scripture tantsolement, & nemy de common droit. Et si tiel home, sur fait endent, reserve a luy & a ses heires certain rent, sans aucun tiel clause mise en le fait, que il poit distreiner, donque tiel rent est rent secke; pur ceo que il ne poit vender de aver le rent, si ceo soit deny, per meane de distresse; & s'il ne fuit unques en cest cas seisie de le rent, il est sans remedie, come sera dit apres.

BUT if a man, by deed indented, at this day maketh such a gift in fee taile, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture hee reserveth to him and to his heires a certaine rent, and that if the rent be behind, it shall be lawfull for him and his heires to distreine, &c. such a rent is a rent charge; because such lands or tenements are charged with such distresse by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heires a certaine rent, without any such clause put in the deed, that he may distreine, then such rent is rent secke; for that hee cannot come to have the rent, if it be denied, by way of distres; and if in this case hee were never seised of the rent, he is without remedie, as shall be said hereafter. (2)

(1) See not in L. and M. Roh. and Redm.

(2) See post. sect. 341.

(3) The indenting or cutting in *modum dentium*, which is usually at the top, ever supposes two parts, being made in order that the parts when joined may be authenticated by the sameness of the cutting. See as to the use and origin of indenting charters in England, Mad. Formular. Anglican. p. 28, 29. of the dissertation prefixed.

(4) Mr. Madox objects to lord Coke's treating the *chirographum* as altogether the same thing with the *indenture*; because anciently many *chirographa* were not indented, but cut in the rectilinear form. Mad. Formul. Anglic. Dissert. p. 29. In fact, the name of *chirograph* properly belonged to those deeds, which were at first of two parts written on the same paper or parchment, with the word *chirographum* in capital letters between the two parts, and were afterwards divided by a cut through the middle of those letters; and thus whether the cutting was indented or in a strait line, such deeds were equally *chirographa*. Ibid. 28. 29. Cangii Gloss. voce *chirographa*. Spelm. Gloss. voce *indentura*. Mabill. de Re Diplomat. lib. 1. c. 2. Some indeed apply this explanation to the *syngrapha*, and only describe the *chirographa* as deeds of one part, and so called from being written with the party's own hand. Lyndw. tit. de offic. Archidiacon. c. 1. in not. But the same persons allow, that sometimes *syngrapha* and *chirographa* are used promiscuously; and in the opinion of others, they are more commonly so applied. Ibid. & Mad. ubi supra. Both the *chirograph* and the *indenture*, then, usually importing to be a deed of two parts, they are so far the same; and we do not apprehend, that lord Coke meant to carry the resemblance farther. Consequently he is not affected by Mr. Madox's observation, which seems to suppose, though too hastily, that lord Coke had considered the *chirograph* and the *indenture* as wholly the same.

(5) The

he in the next section before, of a clause of distress generally granted. (r) A man granted a rent out of certaine land, *pro consilio impenso & impendendo*, to have and to hold to him and to his assignees for terme of his life, payable at four feasts in the yeare, and for default of payment upon demand it should be lawfull for him to distrayne; the grantee granted the rent over; the assignee after one of the dayes demanded the rent, and distreyned, and the distresse adjudged lawfull; for he needs not make a demand at any of the dayes; as in the case of re-entry, but he may demand it when he will, for it is only to entitle him to his remedy for his meere duty (1).

Distreyner, &c. Hereby (&c.) is implied what things are distreynable, which elsewhere is expressed at large. Also where the distresse is to be taken in the same land, and in some other, which with many differences is set downe in his proper place.

Il serra sans remedie. Note, that upon a reservation of a rent upon a feoffment in fee by deed indented, (w) the feoffor shall not have a writ of annuity, because the words of reservation, as *reddendo, solvendo, faciendo, tenendo, reservando, &c.* are the words of the feoffor, and not of the feoffee, albeit the feoffee by acceptance of the state is bound thereby.

And where *Littleton* putteth his case, when a reservation is made upon an estate that passeth by livery, the same law it is, if a man at this day doe bargain and sell his land by deed indented and inrolled according to the statute, a rent may be reserved thereupon; for albeit an use had only passed by the common law, yet now by the statute of 27. H. 8. cap. 10. the use and possession passe together, and so it was adjudged. * And so it is of a grant of a reversion or remainder, and any other conveyance of lands or tenements, whereby any estate doth passe.

(r) 7. Co. 28. b. Maund's case H. 43. El. in Com. Banco. Rot. 1108. inter Maund & Gregory. M. 40. & 41. El. in Com. Banco inter Stanly & Read. 18. El. Dyer 348. (Hut. 23. 42. Post. 153. b. 2. Ro. Abr. 426. Dy. 2. Post. 202. a. 204. a. Dy. 51. Plowd. 7. Perk. f. 101. Mo. 5. March 149.) (Vide sect. 221. Ant. 47. a.)

(w) 33. E. 3. Annuity 52. 1. H. 4. 5. 26. Aff. Pl. 66. 21. E. 4. (1. Ro. Abr. 226.)

* Mich. 39. & 40. El. in Com. Banco inter Wicks & Tillard:

Sect. 218.

AUxy, si bone fuisse de certain terre graunt, per un fait polle, ou per indenture, un annual rent issuant hors de mesme la terre, a un auter en fee, ou en fee taile, ou pur terme de vie, &c. ouesque clause de distresse, &c. donques ceo est rent charge; & si le grant soit sans clause de distresse, donques il est rent secke. Et nota, que rent secke idem est quod redditus siccus; pur ceo que nul distresse est incident a ceo.

ALSO if a man feigned of certaine land grant, by a deed poll, or by indenture, a yearely rent to be issuing out of the same land, to another in fee, or in fee taile, or for terme of life, &c. with a clause of distresse, &c. then this is a rent charge; and if the grant be without clause of distresse, then it is a rent secke. And note, that rent secke idem est quod redditus siccus; for that no distresse is incident unto it.

This needs no explanation, for *Littleton* expounds it himselfe.

Seisse de terre. (x)

Note, that a rent cannot be granted out of a piscary, a common, an advowson, or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreyn, or which may be put in view to the recognitors of an assise, as hath bene said before in this chapter. And though it be out of lands or tenements, (z) yet it must be out of an estate that passeth by the conveyance, (as by all *Littleton's* examples appeareth) and not out of a right: as if the disseisor release to the disseisor of land, reserving a rent, the reservation is void, *Et sic de similibus.*

Grant per fait. * Also a man may have a rent by prescription.

Rent secke idem est quod redditus siccus.

(x) 32. E. 3. tit. scir. fac. 100. 40. E. 3. Pl. Com. 139. (Ant. 47. a. 142. a. Vaugh. 202. 204.)

Vide sect. 213.

(z) 10. E. 4. 3. b. 33. H. 6. 5. 50. E. 3. 9. 8. E. 4. 8. 5. E. 3. Fines 1. 9. E. 3. 7. 46. E. 3. 27. 21. H. 6. 8. Temp. E. 1. Aff. 42.

* 19 E. 3. Title 34. (Ant. 114. a. 6. Co. 58.)

Sect.

(1) See further as to this difference between a re-entry to avoid an estate and an entry to distrain, the second point in Maund's case above cited, and Gilb. on rents 73.

(5) The true meaning of *fee-farm* is a perpetual farm or rent; the name being founded on the *perpetuity* of the rent or service, not on the *quantum*. See *Mad. Firm. Burg.* 3. Here indeed lord Coke seems to intimate the contrary, by confining the denomination of *fee-farm* to rents at least equal to the fourth part of the value of the land; and the word is explained in a like manner by Sir Henry Spelman and the author of the book of *Old Tenures*, with this difference only, that the latter restricts the value to a *third*. See *Spelm. Gloss. voce feodi-firma*, and *Old Ten. tit. fee-firme*. But it would be wrong to understand any of these writers, as intending *absolutely* and *universally* to exclude all rents of *less* value; for the word *fee-farm* most certainly imports every rent or service, whatever the *quantum* may be, which is reserved on a grant in fee; and so lord Coke himself agrees in another work, citing Britton and other books for authorities. 1 *Inst.* 44. Britton 164. b. The sometimes confining the term of *fee-farm* to rents of a certain value probably arose, partly from the statute of Gloucester, which gives the *cessavit* only where the rent amounts to one fourth of the value of the land; and partly from its being most usual on grants in *fee-farm* not to reserve less than a third or fourth of such value. See 6. E. 1. c. 4. F. N. B. 210. C. Ant. 142. a. note 2.—After the statute of *quia emptores* granting in *fee-farm*, except by the king, became impracticable; because the grantor parting with the fee is by operation of that statute without any reversion, and without a reversion there cannot be a rent-service, as *Littleton* himself writes in section 216. Yet I have seen a modern grant in fee of a large estate in Ireland, reserving a perpetual rent of great value. But such rent, considered as a *fee-farm* rent, I thought clearly void. However, as in the case I allude to, the conveyance contained a power for the grantor and his heirs and assigns to distrain for the rent when in arrear, and also a power to enter and receive the profits till all arrears should be paid, the rent might be good as a rent-charge: and so on being consulted I held it to be.—Since writing the preceding part of this note, a most valuable collection of new Reports has been published; and in one of the cases, the learned reporter has given a note relative to *fee-farm* rents, which well deserves attention. See the case of *Bradbury v. Wright*, in Mr. Douglas's Rep. of Ca. in B. R. 602. However, I so far differ from the last mentioned note, as to continue of opinion, that the term of *fee-farm* is not properly applicable to any rents except *rents-service*.

Sect. 219.

(7. Co. 84. 1. Ro. Abr. 227.)

RENT charge. Here it appeareth by *Littleton*, that this *primâ facie* is a rent charge, whereof in this chapter shall be spoken more at large.

And so it is of a rent secke.

Home grant. Put case, that *A.* be seised of lands in fee, and he and *B.* grant a rent charge to one in fee, this *primâ facie* is the grant of *A.* and the confirmation of *B.* but yet the grantee may have a writ of annuity against both.

(a) 16. 2. E. tit. Annuity 47. Vide sect. 314.

(a) Two men grant an annuity of twenty pounds *per annum* to another, although the persons be severall, yet he shall have but one annuity. But if the grant be, *obligamus nos, & utrumque nostrum*, the grantee may have a writ of annuity against either of them; but he shall have but one satisfaction.

(5. Co. 86. 1. Ro. Abr. 295. Hob. 59. Plowd. 439.)

Briefe de annuitie

is a writ for the recovery of an annuity. (b) An annuity is a yearly payment of a certaine summe of money, granted to another in fee for life or yeares, charging the person of the grantor onely.

(b) Doct. & Stud. ca. 3. 17. El. Dyer. 344. b. 45. E. 3. Executor 72.

(Finch's Law 301. F.N.B. 152. 2.)

(c) But not only the grantee, but his heire and his and their grantee (1) also shall have a writ of annuity. (d) But if a rent charge be granted to a man and his heires, he shall not have a writ of annuity against the heire of the grantor, albeit he hath assets, unless the grant be for him and his heires. (2)

(c) 3. E. 6. Dyer 65. And Sergeant Bendloes reporteth, that so was the opinion of the Court.

(d) 2. H. 4. 13.

Dyer 17. Eliz. 344. b.

(10. Co. 128. Hob. 58. Plowd.

457. 2. 1. Ro. Abr. 226.)

ITEM si home granta per son fait un rent charge a un autre, et le rent est arriere, le grantee poet eslier, s'il voet fuer un briefe de annuitie de ceo envers le grantor, ou distreyner pur le rent arrere, & le distresse retainer tanque il soit de ceo pay. Mes il ne poit faire, ne aver, ambideux ensemble, &c. Car s'il recover per briefe d'annuity, donques la terre est discharge de le distresse, &c. Et s'il ne fust briefe de annuitie, mes distreine pur les arrearages, & le tenant fust son replegiare, & donques le grantee avowa le prisel de le distresse en le terre en court de record, donques est la terre charge, & la person del grantor discharge d'action d'annuity.

ALso if a man grant by his deed a rent charge to another, and the rent is behind, the grantee may chuse, whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behinde, and the distresse detain until he be payd. But he cannot doe, or have, both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress, &c. And if he doth not sue a writ of annuity, but distreine for the arrearages, and the tenant sueth his replevin, and then the grantee avow the taking of the distresse in the land in a court of record, then is the land charged, and the person of the grantor discharged of the action of annuity.

Poet eslier. The grantee hath election to bring a writ of annuity, and charging the person onely to make it personall; or to distreine upon the land, and to make it real.

(9. Co. 26. and Mo. 83.)

But if a man grant a rent charge to a man and his heires, and dieth, and his wife bring a writ of dower against the heire, the heire in barre of her dower claimes the same to be an annuity, and no rent charge; yet the wife shall recover her dower; for he cannot determine his election by claime, but by suing of a writ of annuity (as *Littleton* saith) neither can the heire have after the endowment an annuity for the two parts; for that should not be according to the deed of grant, for either the whole must be a rent charge, or the whole an annuity. But *Littleton* is to be understood with some limitation: (e) for of a rent granted for owelty of partition, a writ of annuity doth not lie, because it is of the nature of the land descended

(e) 19. Aff. p. 23.

(1) Formerly it was doubted, whether an annuity was assignable, though *assigns* were mentioned in the grant; the argument being, that it was a mere personal contract, and therefore a *chose in action*. See the cases in 2. Vin. Abr. 515. and 3. Vin. Abr. 151. But in a case in C. B. 3. Cha. 1. this objection, which in strictness of law carried force with it, was over-ruled. *Gerrard v. Boden* Hetl. 80. It seems too, that naming *assigns* is not essential to the making an annuity assignable, the principle of the objection to its being so being the same, whether *assigns* are mentioned or omitted. However, Perkins in the special case of an annuity *pro consilio impendendo* requires naming of *assigns*. Perk. l. 101. Even then too he questions the annuity's being assignable. But this was settled in *Maund's case* 7. Co. 28. b. one point resolved being, that express words would make such an annuity assignable.

(2) The reason is; because our law presumes, that it is not intended to include the heir in the obligation, where he is not named; and consequently, in the case supposed by lord Coke, it is too late to elect to make the rent-charge an annuity after the death of the grantor. See post. 383. b. 384. b. 386. a 10. Co. 128. a. Vin. Abr. Annuity B. But this reasoning fails in application, if the grantor of the annuity is a body politic, and as such hath perpetual continuance. Therefore an annuity granted by the king will bind his heirs and successors, though not named, his political capacity never dying, but having continuance in his successor; and so it was adjudged the 15th of Elizabeth in Sir Thomas Wroth's case. Plowd. 455.

scended. Also of such a rent as may be granted without deed a writ of annuitie doth not lie, though it be granted by deed.

[f] And here is to be noted, that here is no election given of two severall things, as if the grant were of an annuitie or a robe yearly, &c. for there the grantor had election at the day to deliver which he would. But here is two remedies given for one yearly summe, and consequently the grantee shall at any time have election to take which of the remedies hee will; for in all cases where severall remedies be given, the party to whom the law giveth the remedies, it giveth him withall election to take which of the remedies he will.

Mes il ne poet faire ou aver ambideux ensemble. For then he should recover one thing twice, which should be a double charge to the grantor.

Note, as to elections, these diversities following: (1)

First, when nothing passeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an estate or interest passeth immediately to the feoffee, donee, or grantee, there election may be made by them, or by their heirs or executors.

Secondly, when one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this, there the interest passeth immediately, and the partie, his heirs, or executors, may make election when they will.

Thirdly, when election is given to severall persons, there the first election made by any of the persons shall stand.

Fourthly, in case an election be given of two severall things, alwaies he, which is the first agent, and which ought to doe the first act, shall have the election. As if a man granteth a rent of twentie shillings or a robe to one and to his heirs, the grantor shall have the election; for he is the first agent, by payment of the one, or deliverie of the other. So if a man maketh a lease, tending a rent or a robe, the lessee shall have the election *causa qua supra*. And with this agree the bookes in the *margent. [g] But if I give unto you one of my horses in my stable, there you shall have the election; for you shall be the first agent by taking or seisure of one of them. And if one grant to another twentie loads of hazill or twentie loads of maple to be taken in his wood of D. there the grantee shall have election; for he ought to doe the first act, s. to fell and take the same.

Fifthly, when the thing granted is of things annuall, and are to have continuance, there the election remaineth to the grantor, (in case where the law giveth to him election) as well after the day, as before. Otherwise it is when the things are to be performed *unicuique vice*. And therefore if I grant to another for life an annuitie or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuitie in the disjunctive; for if he bring his writ of annuitie for the one onely, and recover, this judgement shall determine his election forever; for he shall never have a writ of annuitie afterwards, but a *scire facias* upon the said judgement. Which reason, *Fitzherbert*, in his *Natura Brevium*, (2) not observing, held an opinion to the contrarie. But if I contract with you to pay unto you twentie shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one or for the other.

Sixthly, the feoffee by his act and wrong may lose his election, and give the same to the feoffor. As if one infeoffe another of two acres, to have and to hold the one for life, and the other in taile, and he before election maketh a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the act and wrong of the feoffee. (3)

Sil recover en brieve de annuitie donques est la terre discharge de distresse. Here is to be observed, that this determination of the election of the grantee must be by action or suit in court of record; [b] for albeit the grantee distreine for the rent, yet hee may bring a writ of annuitie and discharge the land. And *Littleton* putteth his case here surely upon a recoverie in a writ of annuitie. [i] But if the grantee doth bring a writ of annuitie, and at the returne thereof appeare and count, this is a determination of his election in court of record, albeit he never proceedeth any further. [k] As if a wife be endowed *ex assensu patris*, and the husband dieth, the wife hath election either to have her dower at the common law or *ex assensu patris* (4); if she bring a writ of dower at the common law, and count, albeit she recover not, yet shall she never after claime her dower *ex assensu patris*.

[l] So if the grantee bring an assise for the rent, and make his plaint, he shall never after bring a writ of annuitie. But the purchasing of a writ of annuitie, and entrie of it in court of record, or of an assise, is no determination of the election; because an estranger may purchase a writ in the name of the grantee, and enter it of record: but if the grantee appeare thereunto, &c. then this doth amount to a determination of his election, as hath been said.

Son

(1) Lord Coke extracts the six following rules concerning election *verbatim* from his own Reports. See 2. Co. 36. b.

(2) See F. N. B. 152. G.

(3) But if the grant be to hold one acre for life and the other in fee, and donee makes feoffment of one acre only, it is an election to have the fee of that; and this being lawful nothing is forfeited. Perk. f. 78. Plowd. 6. b.

(4) See acc. before sect. 41.

[f] Sir Rowland Heyward's case, 2. Co. 36. 28. E. 3. 98. 41. E. 3. 10. a. 2. H. 4. 12. 6. H. 4. 10. 36. H. 6. 10. 9. E. 4. 46. 21. E. 4. 55. b. 1. E. 5. 1. F. N. B. 121. (Plowd. 439. Post. 310. b. 1. Ro. Abr. 446. 447. 725. Hob. 58.)

2. Co. 36. 37. in Sir Rowland Heyward's case.

(1. Ro. Abr. 725. Ant. 46. b. Plowd. 6. Post. 146. a. Hob. 174.)

* 9. E. 4. 36. b. 13. E. 4. 4. b. 1. 5. E. 4. 6. b. 11. E. 3. annu. 27. 11. Aff. p. 8. 29. Aff. 55. 3. E. 3. tit. Aff. 175. 43. E. 3. tit. Barre 194. (5. Co. 25. 41.) [g] 2. H. 7. 23. a.

(Ant. 90. b. 6. Co. 45.)

9. E. 4. 36. 13. E. 4. 4. and the other above said bookes. (Plowd. 6. 1. Ro. Abr. 726.)

[k] 17. El. Dyer. 344. b.

[i] F. N. B. 152. a.

5. H. 7. 33. b.

[k] 12. b. 2. Dower 158.

[l] 10. E. 4. 17.

(s. Inst. 139.)
Glanvill. lib. 12. ca. 12.
Marlbr. ca. 21.
W. 1. ca. 15. 17. W. 2. ca. 39.
Fleta, lib. 2. ca. 40.

Marlbr. ca. 21.
(Doctr. Plac. 314.)
21. H. 6. Returne de Vic. 17.
(Post 161. a.)
[m] W. 2. ca. 2. Fleta, lib. 4.
ca. 5. 4. H. 6. 15.

* Registr. F. N. B. 68.
[r] 3. E. 3. 74. 6. H. 4. 2. &
39. 9. H. 6. 39. 20. H. 6. 19.
[v] 33. E. 3. Replev. 43. 42. E.
3. 18. 9. H. 6. 25. F. N. B. 69.
F. 6. H. 7. 9. 19. E. 3. Repl.
32.
[p] 42. E. 3. 18. 11. H. 4. 17.
23. 47. E. 3. 12. 48. E. 3. 20.
7. H. 4. 17.
(2. Ro. Abr. 430. Plowd. 524.)
Marlbr. ca. 21.

[q] 30. E. 3. 22. 31. E. 3.
Repl. v. 35. & 4.
7. H. 4. 26. 28. 31. H. 6.
Prop. Prob. 5. 1. E. 4. 9.
21. E. 4. 64. 2. Eliz. Dyer 173.
21. E. 4. 66.
(2. Ro. Abr. 431.)

[r] 5. E. 3. 38. 11. H. 4. 4.
17. E. 2. Prop. Prob. 6.

34. H. 6. 47.

31. E. 3. Gage deliver. 5.

(Post. 282. b. Doct. & Stud.
129. b.)

Bracton, lib. 4. fo. 133. a. & b.

28. E. 3. 92. 3. H. 4. 12.
34. H. 6. 37. 2. E. 4. 23.
(5. Co. 19. a.)

Registr. fol. 133. Bract. fo. 121.
& 154. W. 1. ca. 11. Fleta,
lib. 2. ca. 2. F. N. B. 66. b.

Son replegiare. Littleton spake immediately before of *un breife d'annuity*, but here he saith *son replegiare*; because goods may be replevied two manner of wayes, *viz.* by writ, and that is by the common law, or by pleint, and that is by the statutes for the more speedy having againe of their cattell and goods. A *replegiare* lyeth, as Littleton here teacheth us, where goods are distreined and impounded, the owner of the goods may have a writ *de replegiari facias*, whereby the sherife is commanded, taking sureties in that behalfe, to redeliver the goods distreined to the owner, or upon complaint made to the sherife he ought to make a replevy in the countrey. *Replegiare* is compounded of *re*, and *plegiare*, as much as to say, as to redeliver upon pledges or sureties; and in the statute of *Marlebridge*, *deliberare* is used for *replegiare*. [m] And the sherife ought to take two kinde of pledges, one by the common law, and they be *plegii de proseguendo*, and another by the statute, *viz.* *plegii de retorno habendo*. *Vide sect. 58.* what things may lawfully be distreyned, whereupon a *replegiare* may be sued. The formes of the writ you shall reade in the Register and F. N. B. *

[n] It is a generall rule, that the plaintife must have the property of the goods in him at the time of the taking. [o] But yet if the goods of a villeine be distrayned, the Lord of the villeine shall have a replevy; because the bringing of the replevy amounts to a clayme in law, and vests the property in the plaintife. But in that case if the goods of the villeine be taken by a trespasser, the lord shall have no replevy; because the villeine had but a right.

[p] But there is two kinde of properties; a generall propertie, which every absolute owner hath; and a speciall propertie, as goods pledged or taken to manure his lands or the like; and of both these a *replegiare* doth lye.

And albeit it be provided by the statute of *Marlebridge*, cap. 21. *quod vicecomes post querimoniam inde sibi factam ea, sine impedimento vel contradictione ejus qui dicta averia cepit, deliberare possit, &c.* [q] yet where the defendant claimes property, the sherife cannot proceed; for it is a rule in law, that property ought to be tryed by writ. And therefore in that case where the tryall is by pleint, the plaintife may have a writ *de proprietate probanda* directed to the sherife to trie the propertie; and if thereupon it be found for the plaintife, then the sherife to make deliverance, (for so be the words of the writ) and if for the defendant, he can no further proceed. But that is but an enquest of office; and therefore if thereby it bee found against the plaintife, yet he may have a writ of replevy to the sherife; and if he returne the claime of propertie, &c. yet shall it proceed in the court of common pleas, where the propertie shall be put in issue and finally tried. And the sherife may take a pleint upon the said act out of the county, and make replevyn presently; for it should be inconvenient for the owner to forbear his cattell till the county day.

[r] It is to be noted, that a man cannot claime property by his bailife or servant; and the reason is, for that if the clayme fall out to be false he shall be fined for his contempt, which the lord cannot be unlesse he maketh clayme himselfe; for *nemo punitur pro alieno delicto* (1).

In a speciall case a man may have a replevyn of goods not distreyned. As if the mesne put in his cattell in lieu of the cattell of the tenant paravaile, that he is bound to acquite, he shall have a replevyn of those cattell that never were distreyned.

If a man by his deed grant a rent with claufe of distresse, and grant further, that hee shall keep the goods distreyned against gages and pledges, untill the rent be payd, yet shall the sherife replevy the goods distreyned; for it is against the nature of such a distresse to be irreplevifable, and by such an intention the currant of replevyns should be overthrowne to the hindrance of the common wealth; and therefore it was disallowed by the whole court, and awarded that the defendant should gage deliverance, or else goe to prison. And *Bracton* is of the same opinion; for he saith, *Eodem modo de via obstructa, per breve quod iusticiet propter communem utilitatem, ne transientes ire diu impediatur, quia hoc esset commune damnum; & in hoc vicecomes & iusticiarii faciant sicut super detentionem averiorum contra radium plegii, propter communem utilitatem, ne animalia diu inclusa pereant*; which in mine opinion is an excellent point of learning.

If the beasts of divers severall men be taken, they cannot joyne in a *replev*. but every one must have a severall replevyn (2). And so in a replevyn it is a good plea to say, that the property is to the plaintife and to a stranger; and where there be two plaintifes, that the property is to one of them.

There is also a writ *de homine replegiando*. But Littleton is ready to give you further instruction: therefore heare him.

Et avowia le prise, &c. en court de record. Here it appeareth, that an avowry in court of record, which is in nature of an action, is a determination of his election before any judgement given (3). And this is a good prooffe of that, which hath bene formerly said of the writs of annuity and assise (4).

Elkio

(1) This is explained to be intended only in respect to the county court; for in the king's bench the bailiff is not liable to a fine; and therefore it has been held, that there one may make conuance and claim property by a bailiff. Adj. in Hamstead. v. Oldham, 1. Lev. 90. and 2. Keb. 441.

(2) But in favor of liberty, the law permits two to join in suing the writ *de homine replegiando*. F. N. B. 66. F.

(3) Acc. post. 268. a. F. N. B. 152. A.

(4) See ante 145. a.

*Electio semel facta & placitum testatum non patitur regressum.
Quod semel placuit in electionibus amplius displicere non potest.*

21. H. 6. 24. per Newton.
27. H. 6. 4.

If a rent charge be granted to *A.* and *B.* and their heires; *A.* distreyneth the beasts of the grantor, and he sueth a replevin; *A.* avoweth for himselfe, and maketh conufance for *B.*; *A.* dyeth and *B.* surviveth: *B.* shall not have a writ of annuity; for in that case, the election and avowry for the rent of *A.* barreth *B.* of any election to make it an annuity, albeit he assented not to the avowry.

But here is another diversity to be observed betweene the case aforesaid of the grant of the rent where he (as hath beene said) may make it either reall or personall, and when a man may have election to have severall remedies for a thing that is meerly personall or meerly reall from the beginning. As if a man may have an action of account or an action of debt at his pleasure, and he bringeth an action of account and appeare to it, and after is nonsuite, yet may he have an action of debt afterwards; because both actions charge the person. The like law is of an assise and of a writ of entry in the nature of an assise, and the like.

(2. Co. 36. b.)

28. E. 3. 68. b.
27. E. 3. 89. b.
(6. Co. 7. a. Ant. 139. a.)

Sect. 220.

ITEM, si homo voile qu'un autre auroit un rent charge issuant hors de sa terre, mes il ne voile que sa person soit chargee en aucun maner per briefe d'annuitie, donques il doit aver tiel clause en la fine de son fait: Proviso semper, quod præfens scriptum, nec aliquid in eo specificatum, non aliquid extendat ad onerandam personam meam, per breve vel actionem de annuitate, sed tantummodo ad onerandum terras & tenementa mea de annuali redditu predicto, &c. (1) Donques la terre est chargee, & le person del grantor dischargee.

ALSO if a man would that another should have a rent charge issuing out of his land, but would not that his person bee charged in any manner by a writ of annuity, then hee may have such a clause in the end of his deed: *Provided alwaies, that this present writing, nor any thing therein specified, shall any way extend to charge my person by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent aforesaid, &c.* Then the land is charged, and the person of the grantor discharged.

BY this section it appeareth, that when in a generall grant the law doth give two remedies, that the grantor may provide that the grantee shall not use one of them and leave the party to the other (2). But where the grantee hath but one remedy, there that remedy cannot be barred by any proviso; for such a proviso should be repugnant to the grant.

28. H. 8. Dier 9. b.

(Hob. 72.)

De annuali redditu, &c. Here by (&c.) and the consequent of this section bee implied divers excellent points of learning, viz. If a man by his deede granteth a rent charge out of the mannour of Dale (wherein the grantor hath nothing) with such a proviso that it shall not charge his person; albeit the repugnancie doth not appeare in the deed, yet the proviso taketh away the whole effect of the grant, and therefore is in judgement of law repugnant; for upon the matter it is but a grant of an annuity, provided that it shall not charge his person (3). For which cause our author putteth his case of a rent charge issuing truly out of land. But if a man by

(1. Ro. Abr. 227. Hutt. 33.)

So it was resolved by the justices in 11. H. 8. as justice Spilman reporteth.
9. H. 6. 53.

his deed grant a rent charge out of land, provided that it shall not charge the land, albeit the grantee hath a double remedy, as hath beene said, yet the proviso is repugnant; because the land is expressly charged with the rent, but the writ of annuity is but implied in the grant, and therefore that may bee restrained without any repugnancie, and sufficient remedy left for the grantee; for which cause our author putteth his case of the restraint of bringing a writ of annuity. And yet in some case where there is a proviso

in

(1) For the operation of this sort of proviso, see Dy. 222. a. and 2. Co. 72. a.

(2) See post. 286. a. & b. 393. a.

(3) Acc. in Brediman's case, 6. Co. 38. b.

6. Eliz. Dier 227.
(4. Co. 49. a. 7. Co. 39. b.
6. Co. 41. b. Polt. 162. a.)

(Polt. 203. b. 2. Co. 72. a.)

32. Aff. p. 1.
Vide sect. 384.
(Cro. Eliz. 837. 1. Ro. Abr.
390. Mo. 811.)

* Lib. 9. cap. de condic.
sect. 362.
(10. Co. 139. a. Hob. 191. Cro.
Cha. 555.)

in the deed that the grantee shall not in any sort charge the person of the grantor generally, notwithstanding the person of the grantor shall be charged. As if a man grant a rent charge out of certaine lands to another for life, with such a *proviso*; the rent is behinde; the grantee dyeth; the executors of the grantee shall have an action of debt against the grantor, and charge his person for the arrerages in the life of the grantee; because the executors have no other remedy against the grantor for the arrerages; for distreine they cannot, because the estate in the rent is determined, and the proviso cannot leave the executors without remedy, as appeareth by that which hath beene said. (1) And therefore our author putteth his case of a rent charge continuing. And here is to be observed, that this word (*proviso*) hath divers operations. Sometime it worketh a qualification or limitation, and so it is taken here, and often in our bookes; sometime a condition; and sometime a covenant: whereof you shall reade more hereafter, *sect.* 320.

En le fine de son fait. Here *Littleton* putteth his case of one deed. But though the grant be generally, and want such a proviso, yet may the grantee by another deed by way of defeasance grant, that he shall not charge the person of the grantor, and that if hee bring a writ of annuity that the rent shall cease.

Nec aliquid in eo specificatum non aliquoliter se extendat, &c. Here is to be observed a double negative, *nec*, and *non*, which in grammaticall construction amounteth to an affirmative; for *Negatio destruit negationem, & ambo faciunt affirmativum*. Yet the law, that principally respecteth substance, doth judge the proviso to be a negative according to the intent of the parties, and not according to grammaticall construction, to the end the proviso may take effect; and the like you shall finde hereafter in *Littleton*. * *Mala grammatica non vitiat cartam*. Here our author putteth his case of one grantor. Put then the case, that *A.* and *B.* being joynttenants of lands in fee by their deed grant a rent charge out of those lands, provided that the grantee shall not charge the person of *A.* In this case if the grantee bringeth a writ of annuity, he must charge the person of *B.* only.

Sect. 221.

(2. Ro. Abr. 424.)

QUE si *A.* de *B.* Here wanteth words to precede these, viz. *que il grant al A. de B. &c. que si A. de B. &c.* as it appeareth in the original, (2) and so it appeareth in the close of this section, viz. *Mes granta tant-solement que il peut distreiner*. And without such a grant the clause should be imperfect.

Pur ceo que le man- nor est charge ove le rent per voy de distresse. And yet no rent is expressly granted out of the mannor. But, by the grant that he shall distreine for such a yearely summe of money, in judgement of law the mannor is charged with the rent; but the person of the grantor cannot be charged, because he expressly granteth no rent, for that would charge his person, but that the grantee should distreine, &c. which only chargeth the land.

ITEM, si home fait *tiel fait en tiel maner, que si A. de B. ne soit annuellement pay al feast de Noel pur terme de sa vie xx.s. de loyal mony, que adonques bien lirroito a meme cestuy A. de B. a distreiner pur ceo en le manor de F. &c. ceo est bone rent charge; pur ceo que le manor est charge ove le rent per voy de distres (3); & uncore la person de celuy, que fait tiel fait, est discharge en tiel case de action d'annuitie, pur ceo que il ne granta per son fait aucun*

ALSO, if one make a deed in this manner, that if *A.* of *B.* be not yearely payed at the feast of Christmasse for terme of his life xx.s. of lawfull money, that then it shall be lawfull for the said *A.* of *B.* to distreine for this in the mannor of *F.* &c. this is a good rent charge; because the mannor is charged with the rent by way of distresse; and yet the person of him, which makes such deed, is discharged in this case of an action of annuitie, because he doth annuitie

(1) At first this may seem contradicted by the statute of 32. H. 8. c. 37. according to the recital of which the executors of tenant for life of a rent charge had no remedy at common law for arrears due to their testator. But Lord Coke in another place observes, that the preamble of 32. H. 8. should be understood to apply not to tenant for his life only, but to tenant *per autre vie*, so long as *cestuique vie* lives. Polt. 162. a.

(2) The words, here stated by Lord Coke to be in the original, are not in L. & M. or Roh.

(3) In L. & M. and in Roh. &c. is added.

annuitie ale dit A. de B. mes granta tant-solement, q'il poit distreiner pur tiel annuitie, &c. not grant by his deed any annuitie to the said *A.* of *pur tiel annuity, &c.* but granteth only that he may distreine for such annuitie, &c.

and lands to the payment of a yearly rent to *A. de B.* this is a good rent charge with power to distreine, albeit there be no expresse words of charge, nor to distreine. Or in these words, *Obligo manerium meum de C. & omnia bona in dicto manerio existent' A. de B. in annuo redditu de xx.s. ad distringend' per balivum domini regis pro redditu predicto.* By this grant a rent charge issueth out of the mannor; and where the words be, *ad distringendum per balivum domini regis*, this is for the advantage of the grantee. And therefore the king's baily should be but his minister to distreine for his rent; and that which he may doe by his servant, he may doe by himselfe, or by any other of his servants (2).

If a man by deed grant a rent of forty shillings to another out of his mannor of *Dale*, to have and to perceive to him and his heirs, and grant over by the same deed, that if the rent be behind, that the grantee shall distreine in the mannor of *Sale* (be the mannor of *Sale* in the same county or in another county, and bee this grant by one deed or divers deeds) the rent is onely issuing out of the mannor of *D.* and it is but a paine that he shall distreine in the mannor of *S.*; but both the mannors are charged, the one with the rent, and the other with a distresse for the rent; the one issuing out of the land, and the other to be taken upon the land. And whereas our author puts his case of a grant for life; so it is if I grant to you, that you and your heirs, or the heirs of your body, shall distreine for a rent of forty shillings within my mannor of *S.* this by construction in law shall amount to a grant of a rent out of my mannor of *S.* in fee simple or fee taile; for if this shall not amount to a grant of a rent, the grant shall be of little force or effect, if the grantee shall have but a bare distresse and no rent in him; for then he shall never have an assise of this, &c. And this is the reason, that it is so often ruled and resolved*, that this amounts to a grant of a rent per construction of law, *ut res magis valeat.* And all this is necessarily implied in the (3c.) and in this case the grantee shall not have a writ of annuity, as our author faith. And whereas our author putteth his case where the distresse is to be taken in the same land out of which the rent by construction of law is issuing, hereby is implied, that if a rent be granted out of the mannor of *D.* and the grantor grant over, that if the rent be behinde, the grantee shall distreine for the same rent in the mannor of *S.* this is but a penalty in the mannor of *S.* for three causes.

First, the law needs not to make construction that this shall amount to a grant of a rent, for here a rent is exprestly granted to be issuing out of the mannor of *D.* and the parties have exprestly limited out of what land the rent shall issue, and upon what land the distresse shall be taken, and the law will not make an exposition against the expresse words and intention of the parties when this way stands with the rule of the law. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*

Secondly, if in this case this shall amount to a grant of a rent out of the mannor of *S.* then the grantor shall be twice charged. For if the grantee bringeth a writ of annuity, this shall extend onely to the mannor of *D.*; for upon the grant of a distresse in the mannor of *S.* no writ of annuity lyeth, because the mannor of *S.* is only charged, and not the person of the grantor as to this (3); and for this cause the bringing of the writ of annuity cannot discharge the mannor of *S.* of any rent; and so the law by construction against the words and the intention of the parties shall doe injury to the grantor to charge him twice.

Thirdly, if in such case the mannor of *S.* in which the distresse is only limited, shall be in another county, then it hath beene often adjudged, that the rent shall not issue out of the same, but the distresse shall be as a meane and remedy to compell the tenant of the land to pay the rent. And it was said, that there was no diversity in reason, that the law in construction shall make the rent to be issuing out of this, when it lyeth in the same county, and not when it lyeth in severall counties; for the words in both cases are all one, and there is no reason to say that he shall faile of a recovery by assise (4). And the bookes in 1. Aff. p. 10. and 1. E. 3. 21. and other bookes doe not say that the rent issueth in this case out of both, but that the land in which the distresse shall be taken is charged; and this is true, for it is charged with the distresse. And inasmuch as it was charged with the distresse, their opinion was, that the tenants of both of them shall be named in the assise. And the opinion of *Finchden*, in 41. E. 3. 13. was affirmed to be good law, that if the mannor of *D.* out of which the rent is granted, be recovered by an elder title, that all the rent is extinct (5); but if the mannor of *S.* in which the distresse is limited, be extinct, yet all the rent remains*. So if the grantee purchase parcell of the mannor of *S.* the rent is not extinct; for that the rent issueth onely out of the man-

Que il poest distreiner pur tiel annuity, &c.

Here by (3c.) many points worthy of observation are implied, viz. if a man seised of lands in fee bindeth his goods

18. Aff. p. 1. 18. E. 3. 32. 3. Aff. 7. 3. E. 3. 12. 10. Aff. 24. 31. Aff. p. 17. 33. Aff. (1) Annuity 52. 16. E. 3. grant 64.

7. Co. 23. 24. in Butts his case.

* 3. E. 3. 12. 3. Aff. p. 7. 14. Aff. p. 14. 16. E. 3. tit. granta 64. 18. E. 3. 32. 26. Aff. 38. 30. Aff. 12. 46. E. 3. 18. 32. 8. H. 4. 19. 9. H. 6. 9. 22. H. 6. 11. (5. Co. 55. Post. 213.)

Vide Bulwar's case.

7. Co. 3. 1. Aff. p. 10. 1. E. 3. 21. Vide 9. E. 3. 13. 31. Aff. 27. 17. E. 4. 6. 10. Aff. 4. 10. E. 3. 18. 2. E. 2. Aff. 360. 1. Aff. 10. 3. Aff. 7. 32. H. 6. 27. 22. Aff. 66. 31. Aff. 27. 29. E. 3. Assise 366. 41. E. 3. 13. per Finchden.

* Vide 17. E. 4. 6. semblable case. Vide Sect. prox. sequen.

(1) Instead of *Aff.* it should be *E. 3.*

(2) What follows on this side of the folio is taken almost verbatim from Butts' case, in 7. Co. 23. a.

(3) Acc. ant. 146. b.

(4) How the remedy by assise is affected where the rent issues out of land in severall counties, is explained by lord Coke post. fol. 153. b. 154. a.

(5) See post. 148. a. and 349. a. where the same doctrine is exprest; but it is added, that the grantee shall have a writ of annuity.

ner of *D* (1). And it is said, that if a man grant a rent out of three acres, and grant over, that if the rent be behind, that he shall distreine for the rent in one of the acres, this rent is entire, and cannot be a rent secke out of two acres, and a rent charge out of the third acre, and therefore it is a rent secke for the whole; and yet hee shall distreine for this in the third acre. So if a rent be granted to two and to their heires out of an acre of land, and that it shall be lawfull for one of them and his heires to distreine for this in the same acre, this is a rent secke; for inso much as they stand joyntly seised of one intire rent, it cannot be as to the one a rent secke, and as to the other a rent charge, and this distresse is as an appurtenant to the rent; and therefore if he which hath the rent dieth, the survivor shall distreine; and if both grant over the rent to another, he shall distreine for this. But if a man grant a rent out of blacke acre to one and to his heires, and grant to him that he may distreine for this in the same acre for terme of his life, this is a rent charge for his life, and a rent secke after, *diversis temporibus*. Otherwise it is if the distresse be limited for certaine yeares in the same land, there this remaines a rent secke intirely, for that the fee and the freehold is seck in such case.

(7. Co. 23.)

(Plowd. 524. b. 525. a.)

22. H. 6. 10. b.

If a man seised of lands in fee (2), and possessed of a terme for many yeares, grant a rent out of both for life in taile or in fee, with clause of distresse out of both, this rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distresse (3). But if he had granted the rent only out of the lands in lease for terme of the life of the grantee, this had issued out of the terme, and the land had bene charged during the terme, if the grantee lived so long.

If a man be seised of twenty acres of land, and grant a rent of twenty shillings *per annum de quolibet acra terre mee* (that is) out of every one acre of my land, this is a severall grant out of every severall acre, and the grantee shall have twenty pounds in all.

(Cro. Cha. 110. 217. Cro. Jam. 52. 53.)

A. doth bargain and sell land to *B.* by indenture, and before inrolment they both grant a rent charge by deed to *C.* and after the indenture is inrolled: some have said, that this rent charge is avoided; for say they, it was the grant of *A.* and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at that time. But the grant is good, and after the inrolment by the operation of the statute (4), it shall be the grant of *B.* and the confirmation of *A.* But if the deed had not bene inrolled, it had bene the grant of *A.* and the confirmation of *B.* and so *quacunque via data* the grant is good (5).

Sect. 222.

Extinct commeth of the verbe *extinguere*, to destroy or put out; and a rent is said to be extinguished, when it is destroyed and put out.

(2. Infl. 503. 504.)

Apportion This cometh of the word *partio*, *quasi partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent; common, &c. or a making of it into parts.

[2] Doct. & Stud. lib. 2. cap. 16. 21. H. 7. 2. 21. E. 3. 58.

(1. Ro. Abr. 234.)

[3] 30. Aff. 12. 9. Aff. 22.

[4] 46. E. 3. 32. 14. Aff. p. 24. 26. Aff. 38.

[a] The reason of this extinguishment is; because the rent is intire, and against common right, and issuing out of every part of the land, and therefore by purchase of part it is extinct in the whole, and cannot be [b] apportioned (7). But by act in law it may, as hereafter (8) shall be said. [c] If the grantee of a rent charge purchase parcell of the land, and the grantor by his deed

Item, si home ad un rent charge a luy & a ses beires issuant hors de certain terre, sil purchase ascun parcel de cel a luy & a ses beires, tout le rent charge est extinct & lannuitie auxy (6); pur ceo que rent charge ne poit per tiel maner estre apportion. Mes si home, que ad rent service, purchase parcel de la terre dont le rent est issuant, ceo n'extiendra tout, mes pur le parcel; car rent service en tiel cas poit

Also if a man hath a rent charge to him and to his heires issuing out of certaine land, if hee purchase any parcell of this to him and to his heires, all the rent charge is extinct, and the annuitie also; because the rent charge cannot by such manner bee apportioned. But if a man, which hath a rent service, purchase parcell of the land out of which the rent is issuing, this shall not extinguishall, but for the parcell. For

(1) See further as to extinguishment of rent, infra.

(2) The case here stated is Butts' case, 5. Co. 23.

(3) See post. 196. b. & 197. a.

(4) 27. H. 8. c. 16.

(5) See 1. Com. Dig. 544. where most of the authorities on the relation of the inrollment of a bargain and sale to its execution are referred to. See also post. 186. a. and Hynde's case, 4. Co. 71. a.

(6) In L. & M. and also in Roh. it is *annuity* instead of *annuitie* *issui*; and so the sense requires.

(7) Acc. S. v. 69. Noy. 5. the same doctrine prevails as to conditions and common appurtenant, and for a like reason. Post. 215. a. Ante. 122. a.

(8) See post. fol. 224. and fol. 164. a.

poit estre apportion a rent service in such
solonque le value de case may be apportion-
la terre. Mes si un ed according to the
tient sa terre de son value of the land. But
seignior per le ser- if one holdeth his land
vice de render a son of his lord by the ser-
seignior annuellement a vice to render to his
tiel feast un cheval, lord yearly at such a
ou un esperon d'or, ou feast a horse, a golden
un clove, gylofer, & speare, or a clove,
hujusmodi; si en tiel gilliflower, and such
cas le seignior pur- like; if in this case the
chase parcel de la lord purchase parcell
terre, tiel service est of the land, such ser-
ale; par ceo que tiel vice is taken away;
service ne poit estre because such service
sever, ne apportion. cannot be severed nor
apportioned.

that which is his owne, *viz.* the rent, and dealeth not with the land as in case of purchase of part. And so was it holden in the common place, *Hil. 14. Eliz.* which I myselfe heard and observed. So [c] if the grantee of an annuity or rent charge of 20 pound grant 10 pound parcell of the same annuity or rent charge, and the tenant attorne, hereby the annuity or rent charge is divided. (3)

And [f] when the rent charge is extinguished by his purchase of part of the land, he shall never have a writ of annuities; because it was by the grant a rent charge, and he hath discharged the land of the rent charge by his owne act by purchase of part. And therefore he cannot by writ of annuity discharge the land of the distresse, as *Littleton* hath before (4) said. But if the rent charge be determined by the act of God or of the law, yet the grantee may have a writ of annuity. As if tenant for another man's life by his deed grant a rent charge to one for 21 yeares, *cessy que vie* dieth, the rent charge is determined; and yet the grantee may have during the yeares a writ of annuity for the arrearages incurred after the death of *cessy que vie*, because the rent charge did determine by the act of God and by the course of law. *Actus legis nulli facit injuriam.* The like law is, if the land out of which the rent charge is granted be recovered by an elder title, and thereby the rent charge is voyded, yet the grantee shall have a writ of annuity; for that the rent charge is avoyded by the course of law; and so it was holden in *Ward's* case above remembred against an opinion *obiter* in *9. H. 6. 42. a.*

Car rent service in tiel case poit estre apportion. Whether this apportionment was at the common law, or by the force of the statute of *quia emptores terrarum*, hath bene a question in our bookes. * And it appeareth by *Littleton*, that it was so at the common law; for when he citeth any thing provided by any statute, he citeth the statute, as he hath done this very act before. *Littleton* speaketh here indefinitely of rent service, and there be divers kindes of rent services which are not within that statute; and yet such rent services are apportionable by the common law. As if a man maketh a lease for life or yeares reserving a rent, and the lessee surrender part to the lessor, the rent shall be apportioned. So if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned.

[g] So likewise if the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for the rent is incident to the reversion. [h] So it is if tenant by knights service by his last will and testament in writing deviseth the reversion of two parts of the lands, the devisee shall have two parts of the rent.

And these cases are in mine opinion rightly adjudged against a sudden opinion in *Hil. 6.* and *7. E. 6.* reported by serjeant *Bendish* to the contrary. Note, what inconvenience should follow, if by the severance of the reversion the rent should be extinct.

Purchase parcell de la terre. This is intended of a fee simple, for

reciting the said purchase of part granteth that hee may distreyne for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent or the same in quantity. And so it is [d] if a man by deed granteth a rent charge out of his land to a man for life, and granteth further by the same deed that hee and his heires may distreyne in the land for the same rent, this amounteth to a new grant of a rent in fee simple. (1)

But yet a rent charge by the act of the partie may in some case be apportioned. As if a man hath a rent charge of 20 shillings, he may release to the tenant of the land 10 shillings or more or lesse, and reserve part; (2) for the grantee dealeth onely with

(Ant. 146. b.)

[d] 8. H. 4. 19.

(Post. 308. b.)

(1. Ro. Abr. 235.)

Hil. 14. Eliz.

[c] 9. H. 6. 12. 53.

E. N. B. 152. D. E.

[f] 14. E. 4. 4.

22. E. 4. le darrein case 51.

7. H. 6. 9. H. 6. 1. 5. H. 7. 33.

Ward's case cited in 2. Co. in Heyward's case fo. 26.

9. H. 6. 42.

* Brookes tit. apportionment 58.

18. E. 3. 49. 22. Aff. 52.

3. Aff. 18. 18. E. 2. Avow-

rie 218. Vid. 6. Co. 1. 2. in

Buerton's case. Vid. 8. Co. 105.

106. in Talbot's case.

(1. Ro. Abr. 234. Post. 215.)

[g] 14. H. 8. 12. Vid. 8. Co.

79. in Wilde's case. Pasch.

39. Eliz. Rot. 233. So it was

adjudged inter Collins and Har-

ing.

(13. Co. 57.)

[h] Trin. 43. Eliz. Rot. 243.

inter West & Laffels. & Hil.

42. Eliz. Rot. 108. in communi

banco inter Ewer & Moyle.

(1) Acc. Dy. 257. a. for there is a case, in which it was held, that a rent charge should go to the heir, though heirs were not mentioned, except in the clause of distress.

(2) See acc. in the comment on sect. 537. post. fol. 305. a.

(3) But Hobart, who *arguendo* puts the like case, observes, that the tenant is not compellable to attorn. Hob. 25.

(4) This seems a mistake; at least I cannot find any passage of the kind in *Littleton*. In one copy which I have of the *Coke* upon *Littleton*, the whole of this passage is struck through with a pen; and in another it is scored under as doubtful.

(5) Ant. sect. 216.

[1] 32. H. 8. tit. Extinguishment. Br. 48. 11. Ed. 3. Cefavit 21. 17. E. 3. 37. a. (Goldsb. 44. 1. Ro. Abr. 938. 9. Co. 135. 1. Ro. Abr. 235.)

* 21. E. 4. 29. 9. E. 4. 1. 7. H. 6. 26. 4. H. 7. 6. b. 11. E. 3. Cefavit 21. (1. Ro. Abr. 235.) * 33. E. 3. Dower 138.

* 30. Aff. p. 12.

* 27. E. 3. 88.

[k] 12. H. 4. 17. 17. Ed. 2. Dower 164. 30. Aff. p. 12.

[l] 20. H. 6. 3. 9. E. 4. 1. 2. 35. H. 8. Dyer 56. 7. E. 6. Dyer 82. 9. E. 3. 6. H. 4. 17. (1. Ro. Abr. 235.)

[m] Doct. & Stud. li. 2. c. 17.

* Dyer Mich. 7. & 8. Eliz. Manuscript. The earle of Huntingdon's case. Vid. F. N. B. 234. b. Briefe de deonerando pro rata port.

for if there be a lord and tenant of 40 acres of land by fealty and 20 shillings rent [i], if the tenant maketh a gift in taile, or a lease for life or yeares, of parcell thereof to the lord, in this case the rent shall not be apportioned for any part, but the rent shall be suspended for the whole: for a rent service (saith Littleton) may be extinct for part, and apportioned for the rest; but a rent service cannot be suspended in part by the act of the partie, and in esse for other (1) part. So it is if the lessor enter upon the lessee for life or yeares into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned for any part. And where our bookes * speake of an apportionment in case where the lessor enters upon the lessee in part, they are to be understood where the lessor enters lawfully, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct in part. And yet by act in law a rent service may be suspended in part, and in esse for part. * As when the guardian in chivalrie entreth into the land of his ward within age, now is the seignorie suspended: but if the wife of the tenant be endowed of a third part of the tenancie, now shall she pay to the lord the third part of the rent. * And so it is if the tenant give a part of the tenancie to the father of the lord in taile, the father dieth, and this descends to the lord; in this case by act in law the seignorie is suspended in part and in esse for part, and the same law is of a rent charge.

Likewise a seignorie may be suspended in part by the act of a stranger. * As if two joynt-tenants or coparceners be of a seignorie, and one of them disseise the tenant of the land, the other joyntenant or coparcener shall distreine for his or her moitie.

Concerning the apportionment of rents, there is a difference betweene a grant of a rent, and a reservation of a rent: for [k] if a man be seised of two acres of land, of one in fee simple, and of another in taile, and by his deed grant a rent out of both in fee; in taile, for life, &c. and dieth, the land intailed is discharged, and the land in fee simple remaines charged with the whole rent; for against his owne grant he shall not take advantage of the weakness of his owne estate in part. [l] But if he make a gift in taile, a lease for life or for yeares of both acres, reserving a rent, the donor or lessor dieth, the issue in taile avoydeth the gift or lease, the rent shall be apportioned; for seeing the rent is reserved out of and for the whole land, it is reason that when part is evicted by an elder title, that the donee or lessee should not be charged with the whole rent, but that it should be apportioned ratably according to the value of the land, as Littleton here saith.

[m] If a man grant a rent charge out of two acres, and after the grantee recovereth one of the acres against the grantor by a title paramount, the whole rent shall issue out of the other acre: but if the recoverie be by a faint title by covine, then the rent is extinct for the whole, because he claimeth under the grantor.

If a man infeoffeth B. of one acre in fee upon condition, and B. being seised of another acre in fee granteth a rent out of both acres to the feoffor, who entreth into the one acre for the condition broken, the whole rent shall issue out of the other acre; because his title is paramount the (3) grant. But if a man maketh a lease for life of blacke acre and white acre, reserving two shillings rent, upon condition that if the lessee doth such an act, &c. that then he shall have fee in blacke acre, the lessee performes the condition, albeit now by relation he hath the fee simple *ab initio*, yet shall the rent be apportioned; for that the reversion of one acre whereunto the rent was incident is gone from the lessor; and so note a diversitie betweene a rent in grosse and a rent incident to a reversion, concerning the apportionment thereof. And yet in some cases a rent charge shall not be wholly extinct, where the grantee claimeth from and under the grantor. As if B. maketh a lease of one acre for life to A. and A. is seised of another acre in fee, A. granteth a rent charge to B. out of both acres, and doth wast in the acre which he holdeth for life, B. recovereth in wast; the whole rent is not extinct, but shall be apportioned; and yet B. claimeth the one acre under A. And so it is if A. had made a feoffment in fee, and B. had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct: and the reason hereof is, for that it is a maxime of law, that no man shall take advantage of his owne wrong, *nullus commodum capere potest de injuria sua propria*; (4) and therefore seeing the wast and forfeiture were committed by the act and wrong of the lessee, he shall not take advantage thereof to extinguish the whole rent: and the whole rent cannot issue onely out of the other acre, because the lessor hath the one acre under the estate of the lessee, and therefore it shall be apportioned. * If the king give two acres of land of equall value to another in fee, fee taile, for life or yeares, reserving a rent of two shillings, and the one acre is evicted by a title paramount, the rent shall be apportioned.

Mes si un home tient sa terre, &c. per service de render annuelment, &c. un chival ou un esperon d'or, &c. si en tiel case le seignior purchase parcel de la terre, tiel service est ale. (5)

Chival.

(1) This position is denied by lord Hale and the court of king's-bench in the case of *Hodgkins v. Robson and Thornborow*, Mich. 27. Cha. 2. See the report of that case in 1. Vent. 277. 2. Lev. 143. and Pollexf. 141.

(2) Acc. in *Alcough's case*, 9. Co. 135. b. and there the reason is expressed, namely, that one coparcener shall not be prejudiced by the tortious act of the other. See also acc. post. 188. a.

(3) See the case of *dower*, post. 150. a.

(4) So also by the tortious act of the lessee a condition may be apportioned; though in general it is not divisible by act of the parties. Post. 275. a. & 4. Co. 120. a. 8. Co. 79. b.

(5) What services shall be extinguished by the lord's purchase of part of the land, and what shall be apportioned or remain, is explained much at large in *Talbot's case*, 8. Co. 105. and in *Bruceton's case*, 6. Co. 1.

Chival. *Nota*, in Latine *destrarius* is a great horse or horse of service, of the French word *destrier*; *palfridus* a horse to travell on (1), of the French word *palfray*; and *run-cinus* a nagge (you shall often read of them in record) it commeth of the Italian word *ron-cino*. But admit that parcell of the land holden by such entire service come to the lord by descent, whether shall the entire service wholly remaine, or be extinct? And it is holden, that in some case it shall be extinct for the whole, as suit service, and such other entire annuall suit services. But if the service be to render yearly at such a feast a horse, or the like, and the tenant infeoffe the father of the lord of part, which descends, yet the feoffor shall hold by a horse, because the service was multiplied, and each of them, *viz.* the feoffor and the feoffee, held by a horse.

A. hath common of pasture *sauns nombre*, in twenty acres of land, and tenne of those acres descend to *A.*: the common *sauns nombre* is entire and incertaine, and cannot be apportioned, but shall remaine. But if it had beene a common certaine (as for ten beasts), in that case the common should be apportioned. And so it is of common of estovers, of turbarie, of piscarie, &c. And yet in none of these cases, the descent, which is an act in law, shall worke any wrong to the *terre-tenant*; for he shall have that which belongeth to him, for the act in law shall worke no wrong (2).

If three joyntenants hold by an entire yearly rent, as a horse, or of a graine of wheat, and the tenants cease by two yeares, and the lord recover two parts of the land against two of them, and the third saves his part by tending of the rent, &c. and finding suretie; albeit the lord come to the two parts by lawfull recovery, grounded upon the default and wrong of the two joyntenants, yet shall the entire annuall rent be extinct (3).

If the tenant holdeth by fealty and a bushell of wheat, or a pound of comyn, or of pepper, or such like, and the lord purchaseth part of the land, there shall be an apportionment, as well as if the rent were in money: and yet if the rent were by one graine of wheat, or one seed of comyn, or one pepper corne, by the purchase of part, the whole should be extinct. But if an entire service be *pro bono publico*, as knights service, castle gard, cornage, &c. for the defence of the realme, or to repaire a bridge or a way, to keepe a beacon, or to keepe the king's records, or for advancement of justice and peace, as to ayd the sherife, or to be constable of England (4), though the lord purchase part, the service (5) remaines. So it is if the tenure be *pro opere devotionis sive pietatis*, as to find a preacher, or to provide the ornaments of such a church; or *pro opere charitatis*, as to marry a poore virgin, or to bind a poore boy apprentice, or to feed a poore man. And so note a diversity betweene these cases, and entire services for the private benefit of the lord.

Anno 6. R. 1. Rot. 5. War.
Bruerton's case. 6. Co. 2. 34. Aff.
15. 35. H. 6. Exec. 21. Pl. Com.
72. 40. E. 3. 40. 5. E. 2. tit.
Avowrie 206.
(2. Inst. 508. 8. Co. 105.)

F. N. B. 209. 40. E. 3. 40.

Vid. Litt. cap. tenant in common
71. b. 6. Co. 1. 2. in Bruer-
ton's case. Lit. f. 49. 11. H. 7.
12. b. 24. H. 8. Tenures 53.
Brooks. 35. H. 6. 6. 11. El. Dy.
285. 16. E. 3. Avowrie 93.

Sect. 223.

MES si un home
tient sa terre
dun auter, per ho-
mage fealtie & es-
cuage, & per certaine
rent, si le seignior
purchase parcel de la
terre, &c. entiel casle
rent sera apportion,
come est avant dit: mes
uncore en cest case
l'homage & fealty de-
murront entier a le
seignior; car le seignior
avera le homage &
fealtie de son tenant
pur le remnant de les

BUT if a man hold
his land of another,
by homage fealty and
escuage, and certaine
rent, if the lord pur-
chase part of the land,
&c. in this case the
rent shall be appor-
tioned, as is aforesaid:
but yet in this case
the homage and feal-
ty abide entire to the
lord; for the lord
shall have the homage
and fealty of his te-
nant for the rest of the
lands and tenements

PURCHASE parcel de la
terre, &c. Here, by

this &c. is implied, that the
reasons, wherefore homage and
fealty remaine and are not ex-
tinct in this case, are: First, be-
cause it can be no losse to the
tenant, as it might in the case
of an horse or other entire
service; for there it may bee
the remnant is not sufficient
in value to pay it. Secondly,
there is no land, but it must
be holden by some service or
other; and homage and fealty
are the freest and least charge-
able services to the tenant.

**Pur ceo que tiel ser-
vices ne sont passe an-
nual services, &c.** This
is *ratio una*, but not *unica*, as
it appeareth by that which
hath

Bruerton's case ubi supra.
(6. Co. 10.)

5. E. 2. Avowrie. 206.

(1) It is used in this sense in a writ in F. N. B. 93. l.

(2) This same maxim is cited and applied ant. fol. 148. a.

(3) A learned observer on the Coke upon Littleton, whose MSS. notes I have, objects to it as against reason, that the lord should lose his service from the third jointenant. However, the year-book of E. 4. cited by lord Coke, is an authority for the position; and further it should be considered, that the case supposed is of an *intire* rent, that is, of one incapable of division.

(4) See post. 165. a.

(5) Acc. post. 149. b.

(Plowd. 96. a.)
 Brerton's case 6. Co.
 Talbot's case 8. Co. 104.
 8. H. 7. 11.
 (Poll. 176. b. 183. b.)

hath been said. If there be lord and tenant by fealdie and herriot service, and the lord purchase part of the land, the herriot service is extinct, (and yet it is not annuall, but to be paid at the death of the tenant) because it is entire and valuable.

Solouque l'assurance & rate de la terre, &c. Here is by this (&c.)

implied, that in some case where it is entire and valuable, and not annuall, it shall not (as hath been said) be extinguished by purchase of parts: * as knights service which is to be performed by the body of a man, if the lord purchase part, yet the tenure by knights service remains for the residue, *quia pro bono publico & pro defensione regni*; (2) but the escuage shall be apportioned, as here *Littleton* saith, because that is for the benefit of the lord, and yet it is casuall, and not annuall. And where our author speaketh of services, it is implied, that a herriot custome, though it be entire, valuable, and not annuall, by the purchase of part shall not be extinct. On the other part, when the tenure is by an entire service, and the tenant alien part of the tenancie, in what cases the rent shall be multiplied (that is) where the feoffor and the alienee shall pay the entire rent severally, (3) (for regularly it holdeth, that *que in partes dividi nequeunt solida à singulis præstantur*) and where not, you may read at large in my * *Reports*.

And by this (&c.) is also implied, that the apportionment shall not be according to the quantity of the land, but according to the quantity or value thereof, (4) as by that which hath been said appeareth.

* 7. E. 3. 29. Talbot's case
 8. Co. 104.

* Brerton's case 6. Co. 1. 2.
 Talbot's case 8. Co. 104.

Sect. 224.

5. E. 2. Avowrie 200.
 21. E. 3. 58. b. 34. Aff. 15. tit.
 apportionment. b. 28. 9. Aff. 22.

30. Aff. Pl. 12.

(Ant. 148. b.)

24. H. 6. 41. b.

NOTE here a diversity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the course of law. (6)

Purchase parcel de les tenements charges en fee. And so it is if the tenant giveth to the father of the grantee part of the land in taile, and this descend to the grantee, the rent shall be apportioned; and so by act in law a rent charge may be suspended for one part, and in *esse* for another.

And so it is, if the father be grantee of a rent, and the son purchase part of the land charged, and the father dieth after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moitie.

Item, si home ad un rent charge, & son pier purchase parcel de les tenements charges en fee, & morust, & cel parcel descend a son firs, que ad le rent charge, ore cel (5) charge serra apportion solouque le value de la terre come est avantdit de rent service; pur ceo que tiel portion de la terre purchase per la pierre ne vient al firs per son fait demesne, mes per discent & per course del ley.

ALso, if a man hath a rent charge, and his father purchase parcell of the tenements charged in fee, and dieth, & this parcell descends to his sonne, who hath the rent charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the father commeth not to the sonne by his owne fact, but by descent and by course of law.

IF

(1) In L. & M. &c. is here added.
 (2) Acc. ant. 149. a.
 (3) Ant. 67. b.
 (4) Acc. infra, sect. 224.
 (5) The word *rent* is here inserted in L. & M.
 (6) Acc. ant. 147. b.

If a man hath issue two daughters, and grant a rent charge out of his land to one of them and dieth, the rent shall be apportioned; and if the grantee in this case enfeofeth another of her part of the land, yet the moiety of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent. But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity faileth; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath beene said, (1) bring it for the whole.

Annua nec debitum judex non separat ipsum.

9. Aff. 22.
5. R. 2. Annuity 21.

Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided. If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided; for the duty is personall, and cannot be divided by act in law (2).

Pl. Com. 72.
35. H. 6. tit. Execut. 21.
15. E. 4. 5.

Ne vient al fitz per son fait demesne, mes per descent & per course del ley.

If the father within age purchase part of the land charged, and alieneth within age and dyeth, the sonne recovereth in a writ of *dum fuit infra etatem*, or entereth: in this case the act of law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the sonne hath the land by descent.

So it is in case the sonne recovereth part of the land upon an alienation by his father, *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

A man seised of lands in a fee taketh wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land to the feoffor and his wife and to the heires of the husband, the husband dyeth, the wife recovereth the moiety for her dower by the custome; the rent charge shall be apportioned, and she may distraine for five pound, which is the moiety of the rent (3). In which case two notable things are to be observed. First, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, she shall not have her entire rent out of the residue; for a relation or fiction of law shall never worke a wrong or charge to a third person, but *in fictione juris semper est æquitas*. Secondly, that albeit her owne act doe concur with the act in law, yet the rent shall be apportioned.

5. E. 2. Avowry 206.

3. Co. 29. in Butler & Baker's case.

Sect. 225.

Item, si soit seignior & tenant, & le tenant tient de son seignior per fealty & certaine rent, & le seignior granta le rent per son fait a un autre, &c. reservant aluy le fealty, & le tenant atturna al grantee de le rent, ore tiel rent est rent seck a le grantee; pur ceo que les tenements ne sont tenus del grantor (5) de le rent, mes sont tenus del seignior que reserve a luy fealtie.

Also if there be lord and tenant, and the tenant holds of his lord by fealty and certaine rent, and the lord grants the rent by his deed to another, reserving the fealty to himselfe, and the tenant atturnes to the grantee of the rent, now this rent is rent seck to the grantee; because the tenements are not holden of the grantor of the rent, but are holden of the lord who reserved to him the fealty.

ET le seignior granta le rent, &c.

So it is if the lord release the rent to the tenant saving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure release all his right in the land saving his said rent, the seigniorie remaines, and he shall have the rent as a rent service, and the fealty incident to it; for the said rent is as much to say as the rent service whereunto fealty is incident.

12. E. 4. 11. 9. E. 3. 1. 40. E. 3. 22. b. 13. E. 3. tit. Releases 36. (Post. 151. a.)

And if the lord hath issue two daughters and dieth, and upon partition the fealty is allotted to the one and the rent to the other, she shall have the rent as a rent secke.

17. E. 3. 72. b.

If there be lord of a manor and tenant by fealty,

17. E. 3. 72. b.

the lord grant the fealty saving to him the suit of court and rent, the saving is good for the rent, but not for the suit to court; because the grantee

(1) Ant. 144. b. near the end.

(2) Acc. 2. Ventr. 327. For other instances of the indivisibility of debts and personal duties, see F. N. B. 46. a. Keilw. 106. a. Bro. Nov. Cas. pl. 32. 135. Heth. 53. March. 56. 61.

(3) This same case is cited and approved of in Alcoug's case, 8. Co. 135. b.

(4) See the case of condition ant. 148. b.

(5) Grantee instead of grantor in L. & M. & Roh. which is agreeable to the sense of the passage.

Lib. 2.

Cap. 12.

Of Rents.

Sect. 224.

(Plowd. 96. a.)
Brierton's case 6. Co.
Talbot's case 8. Co. 104.
8. H. 7. 11.
(Poll. 176. b. 185. b.)

hath been said. If there be lord and tenant by fealty and herriot service, and the lord purchase part of the land, the herriot service is extinct, (and yet it is not annuall, but to be paid at the death of the tenant) because it is entire and valuable.

Solouque l'afferance & rate de la terre, &c.

Here is by this (&c.) implied, that in some case where it is entire and valuable, and not annuall, it shall not (as hath been said) be extinguished by purchase of parts: * as knights service which is to be performed by the body of a man, if the lord purchase part, yet the tenure by knights service remains for the residue, *quia pro bono publico & pro defensione regni*; (2) but the escuage shall be apportioned, as here *Littleton* saith, because that is for the benefit of the lord, and yet it is casuall, and not annuall. And where our author speaketh of services, it is implied, that a herriot custome, though it be entire, valuable, and not annuall, by the purchase of part shall not be extinct. On the other part, when the tenure is by an entire service, and the tenant alien part of the tenancie, in what cases the rent shall be multiplied (that is) where the feoffor and the alienee shall pay the entire rent severally, (3) (for regularly it holdeth, that *quæ in partes dividi nequeunt solida à singulis præstantur*) and where not, you may read at large in my * *Reports*.

And by this (&c.) is also implied, that the apportionment shall not be according to the quantity of the land, but according to the quantity or value thereof, (4) as by that which hath been said appeareth.

terres et tenements tenus de luy, come il a voit adevant (1), pur ceo que tiels services ne sont pas annualls services, et ne poyent estre apportion, mes l'escuage poit, & serra apportion solouque l'afferance et rate de la terre, &c.

holden of him, as hee had before, because that such services are no yearely services, and cannot be apporportioned, but the escuage may and shall be apportioned according to the quantitie and rate of the land, &c.

* 7. E. 3. 29. Talbot's case 8. Co. 104.

* Brierton's case 6. Co. 1. 2. Talbot's case 8. Co. 104.

Sect. 224.

5. E. 2. Avowrie 200.
21. E. 3. 58. b. 34. Aff. 15. tit.
apportionment. b. 28. 9. Aff. 22.

30. Aff. Pl. 12.

(Ant. 148. b.)

24. H. 6. 41. b.

NOTE here a diversity, when the grantee of a rent charge commeth to a part of the land charged by his owne act, and when by the course of law. (6)

Purchase parcel de les tenements charges en fee. And so it is if the tenant giveth to the father of the grantee part of the land in taile, and this descend to the grantee, the rent shall be apportioned; and so by act in law a rent charge may be suspended for one part, and in *esse* for another.

And so it is, if the father be grantee of a rent, and the son purchase part of the land charged, and the father dieth after whose death the rent descends to the son, the rent shall be apportioned; and so it is if the grantee grant the rent to the tenant of the land, and to a stranger, the rent is extinct but for a moitie.

Item, si home ad un rent charge, & son pier purchase parcel de les tenements charges en fee, & morust, & cel parcel descend a son fits, que ad le rent charge, ore cel (5) charge serra apportion solouque le value de la terre come est avantdit de rent service; pur ceo que tiel portion de la terre purchase per la piere ne vient al fits per son fait demesne, mes per discent & per course del ley.

ALso, if a man hath a rent charge, and his father purchase parcell of the tenements charged in fee, and dieth, & this parcell descends to his sonne, who hath the rent charge, now this charge shall be apportioned according to the value of the land, as is aforesaid of rent service; because such portion of the land purchased by the father commeth not to the sonne by his owne fact, but by descent and by course of law.

If

(1) In L. & M. &c. is here added.
(2) Acc. ant. 149. a.
(3) Ant. 67. b.
(4) Acc. infra, sect. 224.
(5) The word *rent* is here inserted in L. & M.
(6) Acc. ant. 147. b.

If a man hath issue two daughters, and grant a rent charge out of his land to one of them and dieth, the rent shall be apportioned; and if the grantee in this case enfeofeth another of her part of the land, yet the moiety of the rent remaineth issuing out of her sister's part, because the part of the grantee in the land by the descent was discharged of the rent. But in all these cases where the rent charge is apportioned by act in law, yet the writ of annuity faileth; for if the grantee should bring a writ of annuity, he must ground it upon the grant by deed, and then must he, as it hath been said, (1) bring it for the whole.

Annua nec debitum judex non separat ipsum.

9. Aff. 22.
5. R. 2. Annuity 21.

Also in respect of the realty the rent is apportioned. But the personalty is indivisible, and by act in law shall not be divided. If execution be sued of body and lands upon a statute merchant or staple, and after the inheritance of part of those lands descend to the conusee, all the execution is avoided; for the duty is personall, and cannot be divided by act in law (2).

Pl. Com. 72.
35. H. 6. tit. Execut. 21.
15. E. 4. 5.

Ne vient al fitz per son fait demesne, mes per descent & per course delley.

If the father within age purchase part of the land charged, and alieneth within age and dyeth, the sonne recovereth in a writ of *dum fuit infra etatem*, or entereth: in this case the act of law is mixt with the act of the party, and yet the rent shall be apportioned; for after the recovery or entry the sonne hath the land by descent.

So it is in case the sonne recovereth part of the land upon an alienation by his father, *dum non fuit compos mentis*, the rent shall be apportioned for the cause aforesaid.

A man seised of lands in a fee taketh wife, and maketh a feoffment in fee, the feoffee grants a rent charge of x. pound out of the land to the feoffor and his wife and to the heires of the husband, the husband dyeth, the wife recovereth the moiety for her dower by the custome; the rent charge shall be apportioned, and she may distreine for five pound, which is the moiety of the rent (3). In which case two notable things are to be observed. First, albeit the dower be by relation or fiction of law above the rent (4), yet when the wife recovereth her dower, she shall not have her entire rent out of the residue; for a relation or fiction of law shall never worke a wrong or charge to a third person, but *in fictione juris semper est equitas*. Secondly, that albeit her owne act doe concur with the act in law, yet the rent shall be apportioned.

5. E. 2. Avowry 206.

3. Co. 29. in Butler & Baker's case.

Sect. 225.

Item, si soit seignior & tenant, & le tenant tient de son seignior per fealty & certaine rent, & le seignior granta le rent per son fait a un autre, &c. reservant aluy le fealty, & le tenant atturna al grantee de le rent, ore tiel rent est rent seck a le grantee; pur ceo que les tenements ne sont tenus del grantor (5) de le rent, mes sont tenus del seignior que reserve a luy fealtie.

Also if there be lord and tenant, and the tenant holds of his lord by fealty and certaine rent, and the lord grants the rent by his deed to another, reserving the fealty to himselfe, and the tenant atturnes to the grantee of the rent, now this rent is rent seck to the grantee; because the tenements are not holden of the grantor of the rent, but are holden of the lord who reserved to him the fealty.

ET le seignior granta le rent, &c.

So it is if the lord release the rent to the tenant saving the fealty, the rent is extinct. But if there be lord and tenant by fealty and rent, and the lord by his deed reciting the tenure release all his right in the land saving his said rent, the seigniorie remaines, and he shall have the rent as a rent service, and the fealty incident to it; for the said rent is as much to say as the rent service whereunto fealty is incident.

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If there be lord of a manor and tenant by fealty, the lord grant the fealty saving to him the suit of court and rent, the saving is good for the rent, but not for the suit to court; because the grantee

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(3) This same case is cited and approved of in Alcoug's case, 8. Co. 135. b.

(4) See the case of condition ant. 148. b.

(5) Grantee instead of grantor in L. & M. & Roh. which is agreeable to the sense of the passage.

tee can keepe no court, and there is no tenure of the grantor, and therefore the suit of court is lost and perished in that case.

If the donee hold of the donor by fealty and certaine rent, and the donor grant the services to another, and the tenant attorne, some have said the rent shall not passe, because the rent cannot passe but as a rent service being granted by the name of services; and the fealty cannot passe, because as hath beene saide (1) the fealty is incident inseparable to the reversion. But it seemeth, that the rent shall passe as a rent secke; (2) because at the time of the grant it was a rent service in the grantor, and therefore there be words sufficient to passe it to the grantee, and it is not of necessity that it shall be a rent service in the hands of the grantee.

If there be lord and tenant by fealty and certaine rent, and the lord by deed grant the rent in fee saving the fealty, and grant further by the same deed that the grantee may distreine for the same rent in the tenancy, albeit a distresse were incident to the rent in the hands of the grantor, and although a tenant attorne to the grant, yet cannot the grantee distraine; for the distresse remaines as an incident inseparable to the seignior, for then the tenant should be subject to two severall distresses of two severall men. (3) And so it is if the lord in that case grant the rent in tayle or for life, saving the fealty, and further grant that the grantee may distreine for it, albeit the reversion of the rent be a rent service, yet the donee or grantee shall have it but as a rent secke, and shall not distreine for it.

It is to bee observed, that where a rent service is become a rent secke by severance of the same from the seignior, that now the nature of the rent is changed; for if the grantee purchase part of the land, the whole rent shall be extinct. And whereas in an assise for a rent service, all the tenants of the land need not to be named, but such as did the disseisin; yet in assise for the rent secke, which sometimes was a rent service, all the tenants must be named, as in case of a rent charge, albeit he were disseised but by one sole tenant. * But if the lord of a manor release the fealty to his tenant saving the rent, or that a mesnalty become a rent by surpluse, (4) those that are now secke (and sometimes were service) are part of the manor; but a rent charge cannot be part of a manor.

Attorne, &c. Of attornement shall bee hereafter said in his proper chapter and place.

Sect. 226.

*SI le seignior voet
granter per son
fait le homage, &c.* It is

to be observed, that where the seignior is by homage fealty and rent, [a] if the lord grant away the homage, the fealty shall passe; for fealty is an incident inseparable to homage [b], and cannot by any saving in any grant be separated from it, for homage cannot be sole or alone. But the rent (though it be not saved) shall not passe in that case; because the rent is not incident to homage: and so it is if there be lord and tenant by fealty and rent, and the lord grant over the fealty without any savings, the rent passeth not. But fealty hath an incident inseparable belonging to it, which by no saving can bee separated, and that is a distresse; for, as *Littleton* saith here, a service cannot be seck (that is) without some

*EN mesme le man-
ner est, l'ou home
tient sa terre per ho-
mage fealtie et cer-
taine rent, si le seignior
grant la rent, savant
a luy le homage, tiel
rent apres tiel grant
est rent secke. Mes
la ou terres sont te-
nus per homage fe-
alty et certaine rent,
si le seignior voet gran-
ter per son fait le ho-
mage de son tenant
a un autre, savant a luy
le remnant de les ser-
vices, et le tenant at-
turna a luy solonque
le forme del graunt;
en cest case le tenant*

*IN the same manner,
where a man holds
his land by homage
fealty and certaine
rent, if the lord grant
the rent, saving to him
the homage, such rent
after such grant is rent
seck. But there where
lands are holden by
homage fealty and
certaine rent, if the
lord will grant by his
deed the homage of
his tenant to another,
saving to him the
remnant of his ser-
vices, and the tenant
attorne to him accord-
ing to the forme of
the grant; in this case
tiendra*

. E. 3. b. Fitz Warren's case.

7. E. 3. 2. 3. Adjudged.

31. Aff. 31. 17. Aff. 10. 32.
Aff. pl. 10. F. N. B. 178. D.
22. H. 6. 3. b. 4. E. 2. Aff.
449. 28. H. 8. Dier 31.

* 31. Aff. 23. 22. Aff. 53.

(Mo. 190. 1. Leon. 14.)

[a] 40. E. 3. 22. per Curiam.

[b] 44. E. 3. 19. 20. 39. H. 6.
25. 29. Aff. pl. 20. 26. Aff.
p. 38.

(1) Ant. 143. a.

(2) See post. 152. a. the comment on sect. 230. and note 6. there.

(3) This only shews, that the tenant cannot be made liable to two severall distresses by *act of his lord*. But on *act of law* it is otherwise, of which lord Coke gives an instance post. 164. b.

(4) This passage being shortly expressed may to some be obscure. The case intended is that of lord mesne and tenant, where the rent from the tenant to the mesne is greater than the latter pays to the lord, and the lord purchases of the tenant; the consequence of which is, that the mesne becomes intitled to the surpluse rent from the lord, namely, to so much as the rent from the tenant to the mesne exceeds the rent to the lord from the mesne. See W. Jo. 234. and post. sect. 234. and fol. 154. b. and 309. b.

tiendra sa terre del grantee, & le seignior que grantast le homage n'avera forsque le rent come rent secke, & ne unques distreynera pur le rent (1), pur ceo que homage ne fealtie ne escuage ne poit estre dit secke, car nul tiel service poit estre dit secke. Car celui, que ad ou doit aver homage ou fealtie ou escuage de sa terre, poit per common droit distreyner pur ceo s'il soit aderer; car homage fealtie & escuage sont services, per queux terres ou tenements sont tenus, &c. & sont tiels, que en nul maner poient estre prises forsque come services, &c.

the tenant shall hold his land of the grantee, and the lord who granted the homage shall have but the rent as a rent seck, and shall never distrain for the rent, because that homage nor fealty nor escuage cannot be said secke, for no such service may be said secke. For he, which hath or ought to have homage fealty or escuage of his land, may by common right distrein for it, if it be behind; for homage fealty and escuage are services, by which lands or tenements are holden, &c. and are such services as in no manner can be taken but as services, &c.

distresse belonging to it, for then it were not a service, and so of homage and escuage.

Terres ou tenements

sont tenus, &c. By this (&c.) and out of this section it may be collected, that if [c] there be lord and tenant by fealty and rent, the annuall rent, which is a profitable service, is of higher and more respect in law than the fealty; and therefore by the grant of the rent the fealty shall passe as an incident thereunto; but it is an incident separable, and therefore may be by a saving, as *Littleton* hath (2) said, separated from it. And so when the tenure is by fealty and rent, and the rent be recovered, the fealty shall includedly be recovered. [d] And where the tenure is by homage fealty and rent, by the recovery of the rent with the appurtenances upon a former right, the homage and fealty also shall be restored by necessity and indulgence of the law; for seeing the law giveth no *præcipe* for the homage and fealty, but for the rent only, reason would, that by the recovery of the rent the whole entire seignior shall

[c] 44. E. 3. 19. 26. Aff. 38. 29. Aff. p. 20. 9. E. 3. 2. 39. H. 6. 24. 25. 27. H. 8. 20. 9. E. 4. 28.

[d] Temps H. 8. Br. tit. incidents 24. 44. E. 3. 19. 29. Aff. 20. 39. H. 6. 24. 25.

be inclusively restored (3) in that case. But if the recovery be without title (4), there the rent is recovered as a rent seck, for that worketh no more then a grant*; but by the recovery of a manor, whether it be by title or without title, homage fealty and all other services parcell of the manor are recovered. And albeit fealty cannot be divided from homage by grant (as hath beene said) yet by extinguishment it may [e]. As if there be lord and tenant by homage fealty and rent, and the lord release the seignior and services, or all his right in the land saving the fealty and rent, or saving the said rent, or if he by expresse words release the homage saving the fealty and rent, there the fealty and rent remain, for the homage is extinct. And so note a diversity betweene a grant and a release in that case. But so long as homage continues, the fealty cannot be divided from it.

(Ant. 148. b.)

* Vide sect. 149.

[e] 9. E. 3. 1. (Ant. 150. a.)

Forsque come services, &c. Here is implied a diversity betweene these corporall services of homage fealty and escuage, which cannot become secke or dry, but make tenure whereunto distresses escheats and other profits be incident, and other corporall services, as to plough, repaire, attend, and the like, and all rents whatsoever, for they may become secke or dry and make no tenure.

Sect. 227.

MES autrement est de rent, que fuit un foits rent service; pur ceo que quant

BUT otherwise it is of a rent, which was once rent service; because when it is severed

ET le seignior ne poet grant tiel rent oue distres, come est dit.

[f] For [f] 7. E. 3. 2. 3. the

(1) In L. and M. here follow these words, viz. *Pur ceo que sealte ne poet estre sevre de homage et.* But they are not in the Roh. edition.

(2) Sect. 225. fo. 150. a.

(3) So if land, to which common is appendant or appurtenant, be recovered in assise of novel disseisin, it is a tacit recovery of the common also. Post. 154. b. It is the same on recovery of a manor, to which a villein is regardant. Post. 306. b. So remitter to the principal is remitter to the accessory. Post. 349. b. All this is agreeable to the rule, that *accessorium sequitur suum principale*, which is cited in the next folio. See 152. a. and the case of trees in 11. Co. 49. b.

(4) Of recovery *without title*, where used to mean a common recovery, see ant. 104. a. Of recovery *without title*, as distinguished from a common recovery, read post. 362. a.

[L] 7. E. 4. 11. 3. H. 7. 4. 5.

the distresse is an incident inseparable to the fealty, as hath been said [g], and therefore a release of distresse is void.

Incident, Incident, a thing appertaining to or following another as a more worthy or principall; whereof you see here, and in divers other places of *Littleton* examples. And of incidents some be separable, and some inseparable (2), as hath been said.

il est sever per le grant le seignior de les autres services, il ne poet estre dit rent service, pur ceo que il ne ad a ceo fealty, que est incident a chescun manner de rent service; Et pur ceo est dit rent secke(1). Et le seignior ne poet grant tiel rent ove distresse, come est dit.

by the grant of the lord from the other services, it cannot bee said rent service, for that it hath not fealty unto it, which is incident to every manner of rent service; and therefore it is called rent seck. And the lord cannot grant such a rent with a distresse, as it is said.

Sect. 228.

Savant a luy le reversion, &c.

By this word (&c.) is to be observed [b], that this rent reserved is a rent service, and hath fealty incident to it; and both rent and fealty are incident to the reversion, viz.

[i] the rent incident to the reversion separably, but the fealty incident to the reversion inseparably; but by the grant of the rent, the fealty in this case shall not passe because the fealty is inseparably incident to the reversion, but the grantee shall have the rent as a rent secke. Also by this (&c.) is implied an attornment of the tenant; for without that, although by the grant the rent is turned to a rent secke, so as the tenant cannot be charged with any distresse, yet to the passing thereof there must be an attornment.

Attorne, &c. Here is implied by this (&c.) an attornment in the life of the grantee, and other incidents to an attornment, whereof you shall reade at large in the chapter of attornment (3).

Donques ad le grantee le rent come rent service; pur ceo que il ad le reversion pur terme de vie. And the reason hereof is, because the rent is incident to the reversion, as hath been said, and (as *Littleton* saith here) passeth away by the grant of the reversion as with the superior, without saying *cum pertinentiis*, (4) &c. for the reversion cannot be seck (5). But by the grant of the rent the reversion doth not passe (6).

Item si home lessa a un autre terres pur terme de vie, reservant a luy certain rent, s'il grant le rent a un autre person fait, savant a luy le reversion de la terre issint leste, &c. tiel rent nest forsque rent seck; pur ceo que le grantee nadiens en le reversion del terre, &c. Mes s'il grant le reversion del terre a un autre pur terme de vie, & le tenant attorne, &c. donques ad le grantee le rent come rent service; pur ceo que il ad le reversion pur terme de vie.

Also if a man lett to another lands for tearme of life, reserving to him certaine rent, if hee grant the rent to another by his deed, saving to him the reversion of the land so letten &c. such rent is but a rent seck; because that the grantee had nothing in the reversion of the land &c. But if he grant the reversion of the land to another for tearme of life, and the tenant attorne, &c. then hath the grantee the rent as a rent service; for that he hath the reversion for tearme of life.

[A] 41. E. 3. 16.

[i] 12. E. 4. 3. 32. H. 8. tit. Patents. Br. 26. Aff. 66. 48. E. 3. 9. b. Doct. & Stud. li. 2. ca. 9.

(1) The words which follow in this section are not in L. and M. or in the Rob. edition; nor in the two MSS.

(2) This distinction of incidents is made before fol. 93. a. For examples of incidents inseparable, see infra, and also ant. 99. a. b. 113. b. 150. b. 151. a. Bro. Nouv. Cas. pl. 7.

(3) Post. 309. a.

(4) Acc. ant. 121. b. post. 307. a.

(5) Lord Coke only means, that a reversion cannot be without fealty, and its inseparable concomitant the remedy of distress. In respect to present profit, a reversion may be dry and fruitless during the particular estates, and until it comes into possession. To a reversion of this latter kind, lord Coke himself gives the description of dry and fruitless, ant. 111. b. Hence it appears, that the word *seck* is used by our lawyers in two senses. According to one, it signifies *want of remedy by distress*, as *Littleton* expounds the word in section 218. In another, it imports *want of present fruit and profit*, as in the case of the reversion without rent or other service except fealty.

(6) See acc. from *Littleton* himself at the end of section 219.

Sect. 229.

ET issint est a entendue, que si home dona terre ou tenements en le taile rendant a luy & a ses heires certaine rent, ou lessa terre pur terme de vie rendant certaine rent, s'il granta le reversion a un auter &c. & le tenant atturna, tout le rent & service passe per cest parol (reversion) pur ceo que tiel rent & service en tiel cas sont incidents a le reversion, & passent per le grant de le reversion. Mes coment que il granta le rent a un auter, le reversion ne passa my per tiel grant, &c. (1) AND so it is to be intended, that if a man give lands or tenements in taile yeilding to him and to his heires a certaine rent, or letteth land for tearme of life rendering a certaine rent, if hee grant the reversion to another &c. and the tenant atturne, all the rent and service passe by this word (reversion) (2) because that such rent and service in such case are incident to the reversion, and passe by the grant of the reversion. But albeit that hee granteth the rent to another, the reversion doth not passe by such grant, &c. (3)

THIS needs no explication, but is evident by that which hath formerly beene said, saving by this (&c.) in the end is implied the old rule, That the incident shall passe by the grant of the principall, but not the principall by the grant of the incident. *Accessorium non ducit, sed sequitur suum principale.* (4)

Sect. 230. (5)

ISSINT nota le diversitie. Et issint est tenuis P. 21. E. 4. Mes il est adjudge, an. 26. lib. assisarum, ou les services del tenant en taile fueront grants, que ceo fuit bone grant, nient obstant que le reversion demurt. SO note the diversity. And so it is holden P. 21. E. 4. But it is adjudged 26. of the book of assises, where the services of tenant in taile were granted, that this was a good grant, notwithstanding that the reversion remaine.

THIS is added to *Littleton*. And therefore as I have done heretofore; and shall doe hereafter in like cases, I passe it over. And the case here cited in 26. *Ass. p. 66.* was *contra opinionem multorum*; and afterwards that judgement was reversed by writ of error, for that the services remained with the reversion as incidents (6) inseparable.

Sect. 231.

ITEM si soit seignior or mesne & tenant, & le tenant tient del mesne per service de v. s. & le mesne tient ouster per service ALSO if there bee lord mesne and tenant, and the tenant holdeth of the mesne by the service of five shillings, & the mesne *SI soit seignior mesne & tenant &c. si le seignior paramont purchase le tenancie en fee, &c.*

[4] Some have said, that [4] 20. E. 3. avowrie, 128. in

(1) The same distinction between granting the reversion and granting the rent is taken post. sect. 572.
(2) According to Bro. Nouv. Caf. pl. 192. this holds in the case of the king as well as in the case of a common person.
(3) See ant. 150. b. 2. Ro. Abr. 59. & infra note b.
(4) See ant. 151. a. note 3. and post. 349. b.
(5) No part of this section is in L. & M. Roh. or P.
(6) This reason is unexceptionable in respect to services, which in their nature are inseparable from the reversion, such as fealty. But it fails in respect to the rent, which Lord Coke has before represented to be a separable incident, ant. 151. b. The true construction of the grant supposed seems to be, that it is sufficient to pass the rent as a rent seek, but that for the other services it is void. It should be recollected too, that this construction is conformable to one by lord Coke on a similar case, which he states and explains in fol. 150. b. See the top of the page there.

2. E. 2. tit. Extinc. 6. 26. H. 6. ibid. 7.

[1] 7. Aff. 2. 7. E. 3. 20.

[m] 4. E. 3. 19.
See for this hereafter in the chapter of Confirmation, sect. (538.)

[n] 8. H. 6. 24.

(Post. 280. a.)
[o] 4. & 5. P. & M. Dy. 154.
(2. Co. 92. b.)

Vid. sect. 138. 139.

[p] 13. H. 4. 3. 40. Aff. p. 27.
12. R. 2. Vouch. 81.

in this case it were reason, that by the purchase of the lord paramount his feignory should be onely extinct, and that he should become tenant to the mesne, and the mesne to hold over as the lord paramount held. But that cannot bee; for that one man cannot be both lord and tenant, nor one land immediately holden of divers lords. [1] If the tenant infeoffe the lord paramount and his wife and their heires, in this case the mesnalty is but suspended; for if the wife survive, both mesnalty and feignory are revived.

It is said, that if there be lord mesne and tenant, each of them by fealty and fixe pence, the lord confirme the state of the tenant, to hold of him by fealty and three pence, that the mesnalty is extinct. (1) [m] And so in the same case, if the tenant bee an abbot, and the lord confirme his estate to hold of him in frankalmoigne, the mesnalty is (2) extinct. [n] So it is if the lord release to the tenant (3.) For whether the lord purchase the tenancie, or the tenant the feignory, the mesnalty is extinct. And albeit the mesne grant the mesnalty for life, and then the lord release to the tenant, both the reversion and the estate for life are drowned. [o] So if there bee lord and tenant, and the tenant make a gift in taile, the remainder to the king, the feignory is extinct. (4)

Que serra inconvenient. Here it appeareth, that *argumentum ab inconvenienti* is forcible in law, as hath been said before, (5) and shall be often observed hereafter.

[p] *Le ley voet plus tost suffer mischiese que inconvenience.* (6) *Lex citius tolerare vult privatum damnum, quam publicum malum.* Here be two maxims of the common law.

First, that no man can hold one and the same land immediately of two severall lords. Secondly, that one man cannot of the same land be both lord and tenant. And it is to be observed, that it is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer losse: for that by infringing of a maxime, not onely a generall prejudice to many, but in the end a publike incertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non (7) debet, et factum unius alteri nocere non debet*; which are true with this exception, unlesse an inconvenience should follow, as our author here teacheth us.

Sect. 232.

*IL avera le iiii. s. MES entant que BUT in as much as
come rent secke. le tenant te- the tenant holds
nus*

(1) In the preceding case lord Coke states the doctrine upon it as a mere *dictum*; and by his marginal reference to the chapter of Confirmation, he apparently reserves his own opinion for a future occasion. Afterwards when he resumes the subject, he holds, that, on account of *avant of privity* between the lord paramount and the tenant paravail, *confirmation* from the former to the latter cannot abridge the services due to the mesne, and so alter the tenure between the mesne and the tenant paravail. Post. 305. b.

(2) Lord Coke in a subsequent part of his Commentary gives a different decision of this case; for there he holds, that the lord cannot extinguish the mesnalty by *confirmation* to the tenant paravail, there being *no privity* between them. Post. 305. b. But this is not any contradiction of himself; because here he is apparently giving the *dictum* of others.

(3) It deserves consideration, whether the *release* of lord paramount is not as insufficient to pass the feignory to the tenant paravail, as a *confirmation*, both being conveyances in which *privity* is required. See post. sect. 461.

(4) The reason of this is elsewhere explained to be, that the feignory being extinct for the fee simple, it cannot remain for the particular estate either for life or in tail. See post. 312. b. Quick's case 9. Co. 129. b. a case in Gouldsb. 149. and Bingham's case 2. Co. 92.

(5) Ant. 97. b.

(6) It sounds harshly to prefer a mischief to an inconvenience, the greater evil to the lesser. But the true construction of the rule obviates this objection; for it certainly means, as lord Coke's addition explains, that the law prefers a *private* mischief to a *public* inconvenience.

(7) The same maxim is cited post. 319. a. In Wingate's Maxims 317. there is a great variety of cases for illustration of the rule.

nuist del mesne per v. s. & le mesne tenuist forf- que per xii. d. issint que il avoit plus en advantage per iiii. s. que il payast a son seignior, il avera les ditz iiii. s. come rent seck annuelment de le seignior que purchase le tenancie.

of the mesne by five shillings, and the mesne hold but by twelve pence, so as he hath more in advantage by foure shillings, than he paies to his lord, he shall have the said foure shillings as a rent secke yearely of the lord which purchased the tenancie.

And yet hee shall distreyn for it (1); for, seeing the fealtie is extinct, the law reserves the distresse to the rent & for, as it hath been said in the like case, seeing the fealtie is extinct, the distresse by act in law may be preserved, *Quia quando lex aliquid alicui concedit, concedere videtur & id sine quodres ipsa esse non potest* (2). [r] And therefore if a man maketh a lease for life, reserving a rent, and bind himselfe in a statute, and [the conusee] (3) hath the rent extended and delivered to him, he shall di-

streyn for the rent (4), because he commeth to it by course of law.

[s] But if a rent service be made a rent secke by the grant of the lord, the grantee shall not distreyn for it; for that the distresse remaines with the fealtie. [t] If there be lord mesne and tenant, and the mesnaltie is a manor having divers freeholders, and the lord purchase one of the tenancies, and there is a rent by surplusage, this rent albeit it be changed into another nature (as hath beene said) is parcell of the manor. But yet by purchase of part of the land, the whole rent is extinct, albeit the law did preserve it.

[r] 13. H. 4. Avowrie 237. (Post. 225. b. Mo. 36.)

[s] 28. E. 3. 93. (Ant. 150. b. 151. b. 309. b.)
[t] 31. Aff. 23. 22. Aff. 53. 2. H. 6. 14.

Sect. 233.

Item si home, que ad rent seck, est un foits seisi d'ascun parcel de le rent & apres le tenant ne voit payer le rent adere, ceo est son reme- die. Il covient de aler per luy ou per autres a les terres ou tene- ments dont le rent est issuant, & la demander les arerages del rent; & si le tenant denia ceo de payer, cest de- nier est un disseisin de le rent. Auxy si le te- nant ne soit adonques prist a payer, ceo est un denier, que est un dis- seisin de rent. (5) Auxy si le tenant, ne nul auter home, soit de- murrant sur les terres

Also if a man, which hath a rent secke, be once seised of any parcell of the rent, and after the tenant will not pay the rent be- hind, this is his reme- die. Hee ought to goe by himselfe or by o- thers to the lands or tenements out of which the rent is issuing, and there demand the arerages of the rent; and if the tenant denie to pay it, this deniall is a disseisin of the rent. Also if the tenant be not then readie to pay it, this is a denial, which is a disseisin of the rent. Also if the tenant, nor any other man, be remaining

SEisin, or *seison*, is com- mon aswel to the En- glish, as to the French, and signifies in the common law possession, whereof *seisina* a Latin word is made, and *seisire* a verbe.

D'ascun parcel. [u] A feisin of parcel is a sufficient feisin in law, to have an assise of the whole rent.

Concerning the generall (9. Co. 23.)

learning of feisins, you may reade *lib. 4. Bevil's case, fol. 8. lib. 5. fol. 98. lib. 6. fol. 57. lib. 7. fol. 24. 29. lib. 9. fol. 33.* And many authorities of law there cited, but sufficient is said here to explaine *Littleton*.

A les Terres, &c.

[w] For a demand of the tenant out of the land is not suffi- cient: but if there be a house and land, a demand on the land is sufficient; but for a condition broken, it ought to be at the house (6), as hath beene said before (7).

Arere. This word *arere* is to bee observed, for it is not necessary, that the

(Ant. 29. a.)

[u] 5. E. 4. 2. (Post. 315. a. Cro. Cha. 507.)

T. 18. E. 1. coram rege Nott. in Thesaur.

[w] 49. E. 3. 14. b. 14. E. 4. 4. Pl. Com. 71.

(1) If the rent may be distrained for, can it be properly called seck? Littleton in sect. 218. describes a rent to be seck, because distress is not incident to it. But if lord Coke is right here, a rent may be seck, and yet be distrained for. According to the resolution of the king's bench in W. Jo. 234. the rent, in a case such as is supposed by Littleton, is *quasi* a rent-service distrainable of common right. In other words, the distress is given, or rather saved, by the law, to prevent the mesne from being prejudiced by acts between lord and tenant to which the mesne is no party. This brings the case to a resemblance of a rent reserved for equality on a partition between coparceners; which by the implication of law is a rent-charge without aid of any clause of distress, and therefore called by Littleton a rent-charge distrainable of common right. See post. sect. 253.

(2) See same maxim ant. fol. 56. a. See also 11. Co. 52. a. Cro. Jam. 170. 189. and Oldfield's case, Noy 123.

(3) The words [the conusee] are not in the original, but are added by the editor as essential to the sense of the passage.

(4) Acc. Bro. Abr. Executions 143. Yet it has been said, that the reversion itself is not extendable. Bro. Nouv. Cas. pl. 227. See as to this 1. Ro. Abr. 888, pl. 6. and 7. Mod. 40. and Carth. 126.

(5) The words *de rent* not in L. and M. or Roh.

(6) Acc. F. N. B. 179. A.

(7) Acc. post. 201. b.

(Ant. 144. a.)

[x] 29. Aff. 51. B. II. 6. 11.
Lib. de Entries 79. b.
(5. Co. 56. 7. Co. 28. 1. Leon.
305. Cro. Jam. 9. 10. 145.)

[y] Mich. 41. E. 3. coram
Rege adjudge accordingly.

(Post. 201. b.)

[z] Vid. Bract. lib. 4. fol. 161.
262. 204. Brit. ca. 42. 43. &c.
f. 83. 106. 114. 115. 118. Mir.
ca. 2. Sect. 1.
* Flet. lib. 4. ca. 1. Bra. ubi
supra. (4. Leon. 48. a. Cro.
Cha. 303.)

Mirr. ca. 2. sect. 25. Bracton
lib. 4. ca. 4. Britton ca. 44. 45.
&c. Fleta, lib. 4. ca. 5. & 2. & 3.

Mirror ca. 2. sect. 25.

(7. Co. 3. b.)

the grantee of the rent should demand it at the very time when it becommeth due, but at any time after it is sufficient. For this is not like a demand of a rent upon a condition; because that is penall and overthroweth the whole state, and [x] therefore the time of demand must be certaine, to the end the lessee, donec, or scoffee may be there to pay the rent (2). But a demand of a rent secke or rent charge is but onely a formal meane to recover that which is due; [y] and therefore in that case it may be demanded after it is behinde at any time whether the tenant be present or no, for remedies for rights are ever favourably extended.

Ceo est un denier en ley. For wheresoever there is a lawfull demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a deniall in law, (3) albeit there be no words of denyall. It appeareth here, that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there can be no denial in deed, or in law.

Ceo est un denier en ley. For wheresoever there is a lawfull demand of a rent, and the same is not paid, whether the tenant be present or absent, yet this is a deniall in law, (3) albeit there be no words of denyall. It appeareth here, that the demand must be made upon the land, and albeit the tenant nor any for him be there, yet must the grantee demand it, because without a demand there can be no denial in deed, or in law.

Disseisin. (4) [z] *Disseisina* is a putting out of a man out of seisin, and ever implyeth a wrong. (5) But disseising or ejectment is a putting out of possession, and may bee by right or by wrong. * *Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo fortè ingrediatur fundum alienum, non quod sibi usurpet tenementum vel iura, non facit disseisina, sed transgressionem, &c. Querendum est à iudice quo animo hoc fecerit, &c.* (6) And of ancient time a disseisin was defined thus: *Disseisin est un personel trespassse de tortious ouster del seisin* (7).

Affise de novel disseisin. *Affisa nova disseisina.* *Affisa* properly commeth of the Latin word *affideo*, which is to associate or set together; so as properly affise is an association or sitting together. And the writ, whereby certaine persons are authorised and called together, is called *affisa nova disseisina*; so as *affisa* is but *cessio* (8). But because *cessio* is but a general word, therefore in this sense *affisa* is used in law for a particular cession by force of the writ *de affisa nova disseisina*; and accordingly it was anciently said *affise in un case n'est auer chose que cession des justices*. And it is called *affisa nova disseisina*; for that the justices of eire, before whom these affises were taken in their proper counties, did ride their circuits from 7 years to 7 years, and no disseisin before the eire if it were not complained of in the eire could be questioned after the eire; and therefore a disseisin committed before the last eire was called an ancient disseisin, and a disseisin after the last eire was called a new disseisin or *nova disseisina*. *Affisa* also signifieth a jury, of their sitting together, and also a cession of parliament, as *Littleton* hereafter in this chapter sheweth.

Et recovers le seisin del rent. Here, and by the (&c.) in the end of this section is implied, that our author intendeth his case where the rent issueth out of lands in one county. For if a man be seised of two acres of land in two severall counties, and maketh a lease of both of them reserving two shillings rent, in this case, albeit severall liveryes (9) be made at severall times, yet is it but one entire rent in respect of the necessity of the case, and he shall distreyn in one county for the whole, and make one avowrie for the whole. But he shall have severall affises in *consilio comitatus*, and in either countie shall make

- (1) The words between brackets not in L. & M. Roh. or P.
(2) Acc. as to condition of re-entry, post. 301. a. Acc. whether the condition be for re-entry or a sum *nomine pene*, 7. Co. 28. b. Hob. 82. 207. But the case of Thyn v. Cholmley Mo. 347. is *contra* as to a sum *nomine pene*.
(3) For disseisin of rent by denial, see post. sect. 238.
(4) See Littleton's description of disseisin, post. sect. 279.
(5) It also implieth force. Post. 237. b.
(6) The preceding passages in Latin are not from Bracton or Fleta in the places cited by lord Coke, but from Bract. 216. b.
(7) For other descriptions of disseisin besides those given or referred to by lord Coke, see post. 377. a. 6. Co. 58. The ancient authors cited by lord Coke, particularly Bracton and Fleta, are very full in explaining the various modes of disseisin. The additional marginal references to 4. Leon. and Cro. Cha. are to cases about disseisin by *election*, as to which see post. 306. b. and 323. a. See also the case of Taylor on demise of Atkyns v. Horde, 1. Burr. 60. In this last case it was attempted to support a common recovery by supposing the tenant to the præcipe to have gained a freehold by disseisin. The nature of a disseisin was therefore elaborately investigated by the counsel. Lord Mansfield, also, who had been recently made chief justice of the king's bench, and delivered the court's opinion in a very distinguished argument, expatiated on the same subject, in order to repel the arguments for a freehold by disseisin in the case before the court, by shewing, that the doctrine in our books about disseisins chiefly applies to disseisin by a person electing, and for the sake of certain remedies to suppose himself disseised. There will probably be occasion to refer to some points of the learning displayed in the course of this famous case in a subsequent part of the present work; especially where Littleton writes concerning disseisins by *election*. See post. sect. 588.
(8) It should be *cessio*, the word as Coke spells it tending to a wrong derivation.
(9) As to livery of lands situate in severall counties, see ant. sect. 61. 62.

ou les tenements pur payer le rent quaut il demaund les arrearages, ceo est un denier en ley & un disseisin en fait, & de tiels disseisins il poit aver affise de novel disseisin envers le tenant, & recovers le seisin del rent, & ses arrearages & ses dammages, & les costages de son breve & de son plea, &c. Et si apres tiel recovery [et execution ewe] (1) le rent soyt auter foits a luy denie, donque il avera un redisseisin, & recovers ses double dammages, &c.

ning upon the lands or tenements to pay the rent when he demandeth the arrearages, this is a deniall in law, and a disseisin in deed, and of such disseisins he may have an affise of novel disseisin against the tenant, & shal recover the seisin of the rent, & his arrearages, & his dammages, & the costs of his writ & of his plea, &c. And if after such recovery & execution had, the rent be againe denied unto him, then he shall have a redisseisin, and shall recover his double dammages, &c.

make his plaint of the whole rent; but there shall be but one patent to the justices. [a] And this assise in *confinio comitatus* is given by the statute of 7. R. 2. cap. 10. for no assise lay in that case at the common law, but the party might distreine. [b] But for a common of pasture, of turbary, of pischary, of estovers, and the like, in one county, appendant or appurtenant to land in another county, an assise in *confinio comitatus* did lye at the common law; [c] and so it is of a nufans done in one county to lands lying in another county, the like assise did lye at the common law.

[d] And albeit the counties doe not adjoyne, but there be 20 counties meane betweene them, yet the assise in *confinio comitatus* doth lye (1), and the justices shall sit betweene the said counties. [e] And where it is said before of two counties, the like law it is if the same extend into more counties. (2)

[f] If a man hold divers mannors or lands in divers severall counties by one tenure, and the lord is deforced of his services, he shall have severall writs of customes and services; for every county one writ returnable at one day in the court of common pleas, and thereupon count according to his case by the common law.

[g] But if the tenant in that case doe cease, the lord shall not have severall writs of *cessavit ut supra*; for the writ of *cessavit* is given by statute * and the forme and manner of the writ therein prescribed, and thereupon it is holden in our bookes that in that case a *cessavit* doth not lye. (3)

[h] *Il avera un redisseisin & recoversa ses double damages &c.* Here by this (3c.) is also to be understood, that a writ of redisseisin is given by the statute of Merton * (so called because the parliament was holden at Merton in Anno 20. H. 3.) the letter whereof is, *Item si quis fuerit disseisatus de libero tenemento & coram iudiciariis itinerantibus seisinam suam recuperaverit, per assisam novae disseisinae, vel per recognitionem eorum qui fecerint disseisinae, & ipse disseisatus per vicecomitem seisinam suam habuerit, si iidem disseisatores, postea post iter iudiciariorum, vel infra, de eodem tenemento iterum eundem conquerentem disseisaverint, & inde convicti fuerint, statim capiantur, &c.* (4) But the double damages are given by the statute of W. 2. cap. 26. (5)

And Littleton in few words hath made a good exposition of this statute; for where the statute saith, *disseisatus de libero tenemento*, Littleton expounds it [i] to extend to a rent secke or rent charge. (6) Albeit, as hath beene said, they be against common right, yet a man hath a freehold in them, [k] and he that granteth *omnia tenementa sua*, a rent charge or a rent secke doth passe. (7)

Coram iudiciariis itinerantibus, &c. saith the statute. But Littleton speaketh generally and so is the statute to be intended before any other justices that have authority to take assises, and justices itinerant are set downe but for an example, which is worthy of the observation, [l] being a penall law.

Recuperaverit per assisam, &c. saith the statute, here *assisam* is taken for the verdict of the assise, as Littleton hereafter in this chapter expoundeth the same. *Vel per recognitionem, &c.* or by confession. Then the question is, what if the recovery were upon a demurrer or by pleading of a record and failer of it, or by any other manner. And seeing Littleton speaketh generally, it must be understood of all manner of recoveries in an assise of *novel disseisin*; and so it is confirmed by the statute of W. 2. cap. 26. (8)

Recoverie. *Recuperatio* commeth of the verbe *recuperare*, i. *ad rem per injuriam extortam sive detentam per sententiam iudicis restitui*. And *recuperatio* in the common law is all one with *evictio* in the civill law, which is *alienius rei in causam alterius abductae per judicem acquisitio*.

Et execution erve. *Per vicecomitem seisinam habuerit*, saith the statute; but Littleton speaketh generally, (*et execution erve*) and execution had; so as whether it bee by the sherife or by the party, so as execution or possession be had, it sufficeth. (9)

Execution, Executio, and signifieth in law the obtaining of actuall possession of any thing acquired by judgement of law or by a fine executory levied, whether it be by the sherife, or by the entry of the party, whereof you shall reade more hereafter. (10)

Note, it appeareth here by Littleton, that [m] the recovery in a former writ must be in assise of *novel disseisin*, wherein these words (*vel recoverie*) are to be observed. And therefore if in a writ of right close in ancient demesne, the demandant maketh his protestation to sue in the nature of assise of *novel disseisin*, and after is redisseised, hee shall not have a writ of redisseisin; because the first recovery was not by writ of assise of *novel disseisin*. [n] And so it is, if the recovery were in assise of fresh force by bill according to the custome of some city or burrough. Also in ancient demesne there be no coroners. (11)

Si iidem disseisatores, saith the statute. [o] So as it must be the same disseisors: but here *iidem* [p] 9. H. 4. 5. F. N. B. 189. c. 23. Af. pl. 7. (Cro. Jam. 334.)

(1) Acc. Fine. Descript. del Com. L. 59. a. & 49. Aff. pl. 1. & 21. Hen. 6. 3. there cited.

(2) Fitzherbert in the place cited in the margin is a direct authority for this. But according to Finch, more than two counties cannot join. Fine. Descript. del Com. L. 59. a. See further on trial by two or more counties, 21. Vin. Abr. 103.

(3) Acc. F. N. B. 209. K.

(4) Acc. 2. Inst. 82. 115.

(5) See 2. Inst. 416.

(6) Acc. F. N. B. 178. D.

(7) So where lands and tenements are devisable by custome of a borough, both rent-charge and rent-service are within the custome. Post. sect. 385. But sometimes the word *tenement* is used in a more limited sense, and to exclude rents and other incorporeal hereditaments, as by Littleton in writing of descents to toll entries. See post. sect. 385.

(8) See further as to *redisseisin* Fitzherbert's comment on the writ of that name. F. N. B. 188. B.

(9) Acc. ant. 34. b. See also Dy. 278. b. March 95.

(10) Post. 289. a.

(11) This is an additional reason against a writ of redisseisin; because that writ requires that the coroners be taken to see it executed, and they are not officers of the court of ancient demesne. The same reason applies more strongly in respect of the sheriff, for the writ is directable to him, and he is judge as well as officer in it. See Kitch. 96. a. & Fulwood's case, 4. Co. 65. a. See also Dalt. Sher. 33. b. where the sheriff's duty in executing the writ of disseisin is explained.

[a] 10. Aff. pl. 4. 18. Aff. p. 1. & 18. E. 3. 32. 22. H. 6. 9. 10. [b] F. N. B. 180. a. (7. Co. 2. 3. 4.)

[c] F. N. B. 183. k.

[d] 5. E. 4. 2.

[e] F. N. B. 180. a.

[f] 30. E. 1. tit. Droit. F. N. B. 151. m.

[g] 18. Aff. pl. 1.

* W. 2. cap. 21.

[h] Bracton fol. 236. Britton 133. 246. Fleta lib. 4. cap. 29. Merton cap. 3. Regist. 206 207. * Mirror ca. 3. W. 2. c. 46. Vid. sect. 234.

Vide Regist. 206. b. (1. Ro. Abr. 571.)

[i] 40. Aff. 23. ac.

[k] 14. E. 4. 4. 11. H. 6. 22. (Ant. 6. a. 19. b.)

[l] Fitz. N. B. 180. h.

Vide sect. 504.

[m] 14. E. 2. tit. Rediff. 9. F. N. B. 189. g.

[n] 14. E. 3. tit. Rediff. 8. Vide the 2. part of the Institutes. Stat. de Merton, cap. 3.

(F. N. B. 188. c.)

[p] 33. E. 3. redisseisin 7.
(3. Co. 13. b. Post. 198. a.)

[q] 9. H. 4. 5. F. N. B. 188. E.

[r] F. N. B. 188. E. Registr.
9. H. 4. 5.

(Hob. 96.)

F. N. B. 188. G.

(Ant. 153. a.)

[s] 26. H. 6. tit. Aid 77.

8. E. 3. tit. Redisseisin 6.
F. N. B. 189. p.

idem is taken for *non alius*. And therefore if the recovery in the assise were against two disseisors, and one of them redisseise him againe, he shall have a redisseisin against him, for he is not *alius*. But if the recovery had been against one, and he and another redisseise the plaintife, he shall not have a redisseisin; for here is *alius*; and he cannot have a redisseisin against the former disseisor alone, because he is jointenant with another; [p] for joyntenancy in a writ of redisseisin is a good plea, and a stranger shall not be subject to double imprisonment and double damages.

[q] If a recovery be had against a woman in an assise of *novel disseisin*, and the plaintife recovereth and hath execution, the woman taketh husband, and both of them redisseise the plaintife, he shall not have a redisseisin, because the husband is *alius*. [r] And yet if a feme recover in an assise, and after take baron, and they are redisseised, the husband and wife shall have a redisseisin; because the husband joyneth for conformity, and it is in the right of his wife who was disseised before, so in effect it is *idem disseisitor* & *idem conquerens*. (1)

If two coparceners be disseised and recover in an assise, if after they make partition, and after they be severally disseised, they shall have severall redisseisins; and so it is of joyntenants, for they be *idem conquerentes*, & *non alii*. Also a redisseisin doth lye against the disseisor which doth redisseise, and against another to whom he made feoffment after the second disseisin; for otherwise the redisseisor might prevent the plaintife of his redisseisin. But in an assise against A and B, A is found disseisor, and B tenant, and the plaintife doth recover, and after he which was found tenant disseises the plaintife, he shall not have a redisseisin; because he did disseise him but once. (2)

De eodem tenemento, saith the statute. If the plaintife be redisseised of parcell of the tenement formerly recovered, he shall have a redisseisin.

If the mesne recovereth (3) a rent when it is a rent service, and after the rent becommeth a rent seck by surplussage, and doth redisseise him of the rent, he shall have a redisseisin; for the substance of the rent remaines, though the quality be altered. (4)

[s] If tenant in speciall taile recovereth in assise, and after becommeth tenant in taile after possibility of issue extinct, and then is redisseised, he shall have a redisseisin; for albeit the state of inheritance be altered, yet the same freehold remaineth. (5)

If a man recover land in an assise of *novel disseisin*, whereunto there is a common appendant or appurtenant, and after is redisseised of the common, hee shall have a redisseisin of the common, for it was tacitely recovered in the assise. (6)

Sect. 234.

Æquivocum. (7) For the better understanding hereof, of these there bee two kinds, viz. *equivocum æquivocans*; and *equivocum æquivocatum*.

Equivocum æquivocans est *plurivocum*, *polysemus*, a word of divers severall significations.

Equivocum æquivocatum est *univocum*, that is to say, reduced to a certaine signification. As here in Littleton's example, *assisa est nomen æquivocum æquivocans*; for sometime it signifieth a jury, sometime the writ of assise, and sometime an ordinance or statute. Now assise, *jurata*, (8) is *equivocum æquivocatum*; and so is *breve de assisa nova disseisine*, and *assisa panis*, &c. Even as *canis* est *nomen æ-*

ET memorandum, *que cest nosme* **AND memorandum,** that this name *assise* est *nomen* assise is *nomen* *æquivocum*; *car assise* *æquivocum*; *car assise* *æquivocum*; for sometimes *cun foits est prise* it is taken for a jurie; *pur un jurie*; *car le* for the beginning of *commencement de le* the record of an assise of *record de assise de* *novel disseisin* *issint* beginneth thus: *assisa* *venit recognitura* &c. which is the same, as *venit recognitura* &c. *jurata venit recognitura*. And the reason is, *quod idem est quod* for that by the writ *jurata venit recognitura* &c. *est, pur ceo que per le* of assise it is commanded to the sherife, *briefe de assise il est* *command a la vi-* *quod faceret duodecim* *cont,* *quod faceret* *liberos & legales homi-* *duodecim*

(1) So if a feme commits a redisseisin, and afterwards is married, the writ lies against both; because in that case the husband is named, not as the actor, but only in conformity to the law which will not suffer the wife to be sued alone, and to satisfy the damages. Hob. 96.

(2) See post. sect. 278.

(3) Recovery in assise must be understood.

(4) The reason is, because the alteration is made by the act of others, namely of the lord paramount and tenant paravaile. Acc. 4. Co. 9. a. and b. in Bevil's case. See ant. sect. 232. post. 309. b. ant. 152. b.

(5) Acc. 11. Co. 81. a. in Lewis Bowles's case.

(6) Other instances of tacit recovery are mentioned ant. fol. 151. a.

(7) See Hob. 303.

(8) Lord Coke means "taken for *jurata*."

duodecim liberos & legales homines devicinetos &c. videret tenementum illud, & nomina illorum imbreviare, & quod summoneat eos per bonos summonitores, quod sint coram iusticiariis, &c. parati inde facere recognitionem &c. *Et pur ceo que, per tiel original, un panel per force de mesme le briefe devoit estre retorne &c. il est dit en le commencement del record en le assise, assisa venit recognitura &c. Auxy en briefe de droit il est communement dit, que le tenant luy poit mitter en Dieu & grand assise &c. Auxy il y ad un briefe en le register, que est appel briefe de magnâ assisa eligendâ. Issint est ceo bien prove, que cest nosme assise aliquando ponitur pro jurat. Et ascun foits il est prise pur tout le briefe d'assise; & solonque cel entent il est plus properment & plus communement prise, sicome assise de novel disseisin est prise pur tout le breve de assise de novel disseisin. Et en mesme le maner assise de*

nes de vicineto, &c. videret tenementum illud, & nomina illorum imbreviare, & quod summoneat eos per bonos summonitores, quod sint coram iusticiariis &c. parati inde facere recognitionem &c. And because that, by such an originall, a pannell by force of the same writ ought to be returned &c. it is said in the beginning of the record in the assise, *assisa venit recognitura &c.* Also in a writ of right it is commonly said that the tenant may put himselfe on God and the great assise. Also there is a writ in the register which is called a writ, *de magnâ assisâ eligendâ.* So as this is well proved, that this name assise somtimes is taken for a jury. And somtimes it is taken for the whole writ of assise; and according to this purpose it is most properly & most commonly taken, as an assise of *novel disseisin* is taken for the whole writ of assise of *novel disseisin*. And in the same manner an assise of common of pasture is taken for the whole writ of assise

quivocum; canis latrabilis, canis marinus, canis caelestis, sunt equivoca equivocata.

Assise de novel disseisin. (2. Co. 70.)

Note [a] there be four assises, viz. this writ, an assise of mortdancester, of darreine presentment, and of utrum. (1)

Vicount. Vide (Ant. 109. b. Post. 168. a.) sect. 248. verbo (*Sbi-reve.*)

Quod faciat 12 liberos & legales homines de vicineto, &c.

[b] Albeit the words of the writ be *duodecim*, yet by ancient course the sheriff must return (2) 24: and this is for expedition of justice; for if 12 should onely be returned, no man should have a full jury appear, or be sworn in respect of challenges, without a tales, which should be a great delay of tryals. So as in this case usage & ancient course maketh law. And it seemeth to me, that the law in this case delighteth her selfe in the number of 12; for there must not onely be 12 jurors (3) for the tryall of matters of fact, [c] but 12 judges of ancient time for tryall of matters in law in the Exchequer Chamber. Also for matters of state there were in ancient time twelve Counsellors of State. He that wargeth his law must have eleven others with him, which thinke hee sayes true. And that number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, &c.

[d] He that is of a jury, must be *liber homo*, that is not only a freeman and not bond, but also one that hath such freedom of mind as he stands indifferent as hee stands unsworne. Secondly, he must be *legalis*. And by the law every juror, that is returned for the tryall of any issue or cause, ought to have three properties.

[d] 9. E. 4. 16.

(*) First,

(1) *Juris utrum.*

(2) See 3. G. 2. c. 25. f. 8.

(3) In a Coke upon Littleton in my possession, there is the following marginal note on the necessity of having 12 jurors.—“In the manor of Penryn Farrein in Cornwall, there was a custome to try an issue with six jurors; and this custome was adjudged no good custome, as Rolle cheife justice affirmed in Mich. terme 1652.”—The printed books also furnish two cases against such a custom; in the first of which cases Rolle appears to have argued for it, and to have noticed that there was a multitude of records in twenty several courts in Cornwall proving it's prevalency. See *Fredymock v. Perryman*, Cro. Cha. 259. 1. Ro. Abr. 564. and *Aike et Aimon v. Hunkin*, 1. Sid. 233. However in some special cases the jury may be less than twelve; and in some must or may be more.—1. They may be less. Thus it may be in Wales under the provision of the statute of 34. & 35. H. 8. concerning Wales, which allows of six. See 34. & 35. H. 8. c. 26. f. 74. Cro. Cha. 259. 1. Sid. 233. and 3. G. 2. c. 25. f. 9. So also it is in some special cases in England, as 6 or 8 in inquiry of damages on default, and in inquiry of waste, though this latter has been questioned and even denied. Spelm. Gloss. voce *jurata*, Fitzh. N. B. 107. C. Dunc. Trials per Pais, cap. 6. 1. Ventr. 113. Finch. Law 400. Further there is in Glanvil a writ for a jury of 8 to inquire into the age where infancy is alledged. Glanv. lib. 13. c. 14. 15. 16.—2. Instances, in which the law allows or requires more than twelve, are, attaint in which there must be 24, the great assise in which there must be 16, the grand jury for indictments which usually consist of some number between 12 and 23, and writ of inquiry of waste in which 13 have been allowed. Finch. Law 484. Spelm. Gloss. voce *jurata*. 2. Hal. Hist. Pl. C. 161. and Cro. Cha. 414.

(*) Artic. super Cart. ca. 9.
Regist. 178. 8. E. 3. 39.

(*) First, hee ought to bee dwelling most neere to the place where the question is moved. (2)

Secondly, he ought to bee most sufficient both for understanding, and competencie of estate. (3)

Thirdly, he ought to bee least suspicious, that is, to be indifferent as he stands unsworne: and then hee is accounted in law *liber & legalis homo*; otherwise he may be challenged & not suffered to be sworne. (4)

The most usual triall of matters of fact is by 12 such men; for *ad questionem facti non respondent iudices*: and matters in law the judges ought to decide and discusse; for *ad questionem juris non respondent iuratores*. (5)

Vid. sect. 162. 193.

9. H. 6. 37.

[2] Vid. Artic. super Cart. ca. 9. Fortesc. ca. 25. &c. 29.

[f] Glanvil. lib. ca. 14. 15.
Bracton lib. 3. fol. 116. a.

[g] Lamb. verb. Centuria.

[h] Lamb. fol. 91. 3.

[i] W. 2. ca. 31. Vid. Stat. de 12. E. 2. de effou. calumniandis. Fleta lib. 1. cap. 37.
Britton fol. 6. a. 12. a. 118. & 134. 12. Ad. 10.

[j] Bract. lib. 3. fol. 137.

[k] Bract. lib. 4. fol. 257. Vet. N. B. fol. 76.

[e] For the institution and right use of this triall by 12 men, and wherefore other countries have them not, and how this triall excellis others, see Fortescue at large, cap. 25. &c. 29. [f] And in ancient time they were 12 knights. This trial of the fact *per duodecim liberos & legales homines* is very ancient; for heere what the law was before the conquest. [g] *In singulis centuriis comitia sunt, atque liberae conditionis viri duodecim aetate superiores una cum praeposito sacra tenentes iurant, &c.* Nay the tryall in some cases, *per medietatem lingua*, (as we speake) was as ancient. [h] *Viri duodecim iure consulti, Angliae sex, Walliae totidem, Anglis & Wallis ius dicunt*; and of ancient time it was called *duodecim virale iudicium*. (6)

Now seeing we are justly occasioned, and the rather for the (&c.) herein, to speak of a challenge to jurors, to make the studious reader capable of the understanding of the bookes of law concerning this matter, it shall be necessary to say somewhat of challenges; and first what a challenge is.

Challenge is a word common as well to the English as to the French, and sometime signifieth to claime, and the Latine word is *vindicare*; sometime in respect of revenge to challenge into the field, and then it is called in Latine *vindicare* or *provocare*; sometime in respect of partiality or insufficiency, to challenge in court persons returned on a jury. And seeing there is no proper Latin word to signify this particular kind of challenge, they have framed a word anciently written [a] *calumniare*, and *calumpniare*, and *calumpnia*, which is derived of that, for that is of a quite other sense, signifying a false accuser, and in that sense [b] Bracton useth *calumniator* to be a false accuser: but it is derived of the old word *caloir* or *caloire*, which in one signification is to care for or foresee. And for that to challenge jurors is the meane to care for or foresee, that an indifferent triall be had, it is called *calumpniare*, to challenge, that is to except against them that are returned to be jurors, & this is his proper signification. [c] But sometimes a summons, *summonitio*, is said to be *calumpniata*, and a count to be challenged,

(1) The words *entre les auciens estatutes* are here added in L. & M. Roh. and P.

(2) See post. 157. a. ant. 125. a. n. 2. This qualification is now become unnecessary in civil cases, the 4. An. c. 16. f. 6. & 7. directing that in them the jury shall be taken from the body of the county. See ant. 125. a. n. 2. and a learned tract by the late mr. serjeant Wynne, intitled a Dissertation on the writ *de non ponendis in assis & juratis*. See also 2. Inst. 447. & 561.

(3) See post. 156. a.

(4) Of other modes of trying facts besides that by jury, see ant. 74. a.

(5) This *decanatum*, as lord chief justice Vaughan calls it on account of its frequency in the books, about the respective provinces of judge and jury, hath, since lord Coke's time, become the subject of very heated controversy, especially on prosecutions for state-libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a compleat and unqualified independence. On the trial of John Lilburne for treason in 1649 high words passed between the court and him, in consequence of his stating to the jury that they were judges both of law and fact, and citing passages in the Coke upon Littleton to prove it. 2. State Tr. 4th ed. 69. and post. 228. a. In the case of Penn and Meade, who in 1670 were indicted for unlawfully assembling the people and preaching to them, the jury gave a verdict against the directions of the court in point of law, and for this were committed to prison. But the commitment was questioned; and, on a habeas corpus brought in the court of common pleas, it was declared illegal; lord chief justice Vaughan distinguishing himself on the occasion by a most profound argument in favour of the rights of a jury. Bushell's case 1. Freem. 1. and Vaugh. 135. However the contest did not cease, as appears by sir John Hawles's famous dialogue between a barrister and a jurymen, which was published in 1680 to assert the claims of the latter against the then current doctrine decrying their authority. Since the revolution also many cases have occurred, in which there has been much debate on the like topic. See King v. Poole in Cal. B. R. temp. Hardwicke 23. Franklin's case 9. State Tr. 275. Peter Zenger's case 10. State Tr. p. 196. of Append. and Woodfall's case 5. Burr. 261. By attending to the cases before referred to, it will be easy to trace the progress of this controversy on the limits of the jury's province.

In respect to my own ideas on this subject, they are at present to this effect:

On the one hand, as the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable, that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who hereafter writes, that *if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally*. Post. sect. 368. and fol. 228.

But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.—1. If the parties litigating agree in their facts, the cause can never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury. Ant. 71. b.—II. Even when an issue in fact is joined, and comes before a jury

lenged, but this is improperly. And forasmuch as mens lives, names, lands, and goods, are to be tryed by jurors, it is most necessary, that they be *omni exceptione majores*; and therefore I will handle this matter the more largely.

A challenge to jurors is twofold, either to the array, or to the polls: to the array of the principall pannell, and to the array of the *tales*. And herein you shall understand, that the jurors names are ranked in the pannell one under another; which order or ranking the jurie is called the array, and the verbe, to array the jurie; and so we say in common speech, *bataille array*, for the order of the bataille. And this array we call *arraimementum*, and to make the array *arraire* derived of the French word *arroier*; so as to challenge the array of the pannell is at once to challenge or except against all the persons so arrayed or impannelled, in respect of the partialitie or default of the sherife, coroner, or other officer that made the returne.

And it is to be knowne, that there is a principall cause of challenge to the array, and a challenge to the favour.

Principall, in respect of partialitie. As first, if the sherife, or other officers be of [a] kindred, or affinitie (1), to the plaintife or defendant, or he himselfe (2) continue [b]. Secondly, if any one or more of the jurie bee returned at the denomination of the partie, plaintife or defendant, the whole array shall be quashed. So it is if the sherife returne any one, that he be more favourable to the one than to the other, all the array shall be quashed. [c] Thirdly, if the plaintife or defendant have an action of batterie against the sherife, or the sherife against either partie, this is a good cause of challenge. So if the plaintife or defendant have an action of debt against the sherife; (but otherwise it is if the sherife have an action of debt against either partie) or if the sherife have parcell of the land depending upon the same title [d]; or if the sherife, or his bailife which returned the jurie, be under the distresse of either party; or if the sherife or his bailife be either of counsell, attorney, officer in fee or of robes, or servant of either partie, gossip, or arbitrator in the same matter, and treated thereof. [e] And where a subject may challenge the array for unindifferencie, there the king being a partie may also challenge for the same cause, as for kindred, or that he hath part of the land, or the like: and where the array shall be challenged against the king, you shall reade in our bookes.

[f] By default of the sherife, as when the array of a pannell is returned by a bailife of a franchise, and the sherife returne it as of himselfe, this shall be quashed, because the partie should lose his challenges. But if a sherife returne a jurie within a libertie, this is good, and the lord of the franchise is driven to his remedie against him.

If a peere of the realme or lord of parliament be demandant or plaintife, tenant or defendant, there must a knight be returned of his jurie, be he lord spirituall or temporall, or else the array may be quashed [g]: but if he be returned, although he appeare not, yet the jurie may be taken of the residue. And if others be joynd with the lord of parliament, yet if there be no knight returned, the array shall be quashed against all. [h] So in an attaint there ought to be a knight returned of the jurie (3).

[i] And when the king is partie, as in travers of an office, he that traverseth may challenge the array, as hereafter in this *section* shall appeare; and so it is in case of life; and likewise the king may challenge the array: and this shall be tried by triors according to the usuall course. [k] The array challenged on both sides shall be quashed.

[l] And if two estrangers make a pannell and not in favourable manner for the one partie or the other, and the sherife returnes the same, the array was challenged for this cause, and adjudged good.

[m] If the bailife of a libertie returne any out of his franchise, the array shall be quashed, as an array returned by one that hath no franchise shall be quashed.

Challenge to the array for favour. [n] He, that taketh this, must shew in certaine the name of him that made it, and in whose time, and all in certainty. This kinde of challenge, being no principall challenge, must be left to the discretion and conscience of the triors. As if the plaintife or defendant be tenant to the sherife, this is no principall challenge; for the lord is in no danger of his tenant; but *de converso* it is a principall challenge; but in the other hee may challenge for favour, and leave it to triall. So affinitie betweene the sonne of the sherife and the daughter of the partie, or *de converso*, or the like, is no principall challenge, but to the favour: but if the sherife marrie the daughter of either partie, or *de converso*, this (as hath beene said) is a principall challenge, or the like. [o] But where the king is partie, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the king more (4). But if the sherife be a vadelect of the crowne, or other meniall servant of the king, there the challenge is good (5). And likewise the king may challenge the array for favour.

Note, upon that which hath been said it appeareth, that the challenge to the array is in respect of the cause of unindifferencie or default in the sherife or other officer that made the returne,

(1) In the case of Mounson and West 1 Leon. 88. it was argued, that affinity was a challenge to the *favour* only; and to this two judges inclined at first; but after time taken to consider the point, it was adjudged to be a *principal* challenge by three judges, the 4th hesitating.

(2) Having issue living by the wife, though she is dead, is sufficient to continue the husband's affinity. Nor is it necessary, that the issue should be inheritable to the land, where land is the subject of the action. Both of these positions I infer from the case of Mounson and West before cited from 1. Leon. 88.

(3) By a statute of the late king no challenge can now be taken to any pannell for want of a knight in it. See 18. G. 2. c. 18. f. 4. This provision is made in *general* terms; but the recital, which precedes it, is confined to the inconveniences of such challenges where *peers* are parties.

(4) Acc. Keilw. 102. a. But lord Hale is of a different opinion; for he expressly allows challenges for *favour* to prisoners in treason and felony, and consequently so far against the king. 2. Hal. Hist. Pl. C. 271. Though, too, lord Coke's doctrine should be admitted, the reason he gives for it, which is almost in the words of the case of 22. E. 4. cited in the margin from Fitzherbert's Abridgement, seems rather unsatisfactory. But a better principle to found the rule upon was not unobvious; namely, that from the extensive variety of the king's connections with his subjects through tenures and offices, if *favour* to him was to prevail as an exception to a juror, it might lead to an infinitude of objections, and so operate as a serious obstruction to justice in suits in which he is a party.

For the remainder of the notes of this page, see fol. 158. 2.

jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury; for in that case the law is reserved for the decision of the court from which the issue of fact comes, and the jury is either discharged, or at the utmost only ascertains the damages. Ant. 72. a. Dougl. Rep. 127. 213. Buller's Nisi Pri. 2d edition 313.—III. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge, who presides at the trial, to inform them what the law is; and, as a check to the judge in the discharge of this duty, either party may under the statute of Westminster the 2d. c. 31. make his exception in writing to the judge's direction, and inforce its being made a part of the record, so as afterwards to found error upon it. See post. 2. Inst. 426. Trials per Pais, 8th ed. 222. 466. Case of Fabrigas and Mostyn in xi. State Trials. Case of Money and others v. Leach 3. Burr. 1742. Buller's Law of Nisi Pri. 2d ed. 315.—IV. The jury is ever at liberty to give a special verdict, the nature of which is to find the facts at large and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases, in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in

[a] 12. Aff. 36. 26. Aff. 311.
3 E. 4. 12. 31. Aff. 7. 29. Aff.
2. 22. E. 4. 2. 12. E. 3. Chall.
114. 21. E. 3. 5. b. 3. H. 7.
5. Pl. Com. 73. 15. H. 7. 9.
7. E. 6. Dier 78. 12. H. 6.
Chall. 159. (Plowd. 425. 2.
Ro. Abr. 638.)
[b] 21. E. 4. 74. 49. E. 3. 1.
15. E. 3. 43. 22. E. 3. 12.
9. E. 4. 46. 8. H. 5. 5. 28. Aff.
22. 41. E. 3. Chall. 99. (2. Ro.
Abr. 640. Dy. 319.)
[c] 11. H. 4. 26. 22. E. 4. 1.
38. E. 3. 25. 38. H. 6. 6. (Mo. 3.)
[d] 14. E. 3. 5. & 38. 44. Aff.
23. 22. E. 4. 1. 3. H. 6. 39.
15. H. 7. 9. b. 27. Aff. 28.
7. H. 7. 10. 26. Aff. 56. 22.
20. H. 6. 34. 33. Aff. 12. 45.
Aff. 1. 9. Aff. 8. 8. Aff. 23.
7. E. 3. 56. 21. H. 7. 38. 2.
H. 4. 13. 44. E. 3. 43. 20. H. 6.
39. 44. Aff. 18. 3. H. 6. 24.
17. E. 2. Chall. 168. 4. E. 4. 11.
[e] 4. H. 7. 44. E. 3. 38. 38.
Aff. 19. 22. E. 4. Chall. 63.
Stamf. 162. c.
[f] 39. Aff. 2. 17. E. 3. 50.
17. Aff. 11. 30. Aff. 5. 8. Aff. 3.
[g] 13. E. 3. Chall. 115. Br.
Luquet. 100. 6. Co. 54.
Countess de Rutland's case Plow.
Com. 117. 27. H. 8. 22. 4 El.
Dier. 208. 8. Eliz. Di. 246.
14. Eliz. Dier 318. 10. Eliz.
Dier 265. b. (1. Leon. 5. 2. Ro.
Abr. 636.)
[h] 17. E. 2. Attain. 69.
[i] 32. E. 4. tit. Chall. 63. Stamf.
Pl. Cor. 19. Aff. 6. b. 4. H. 7.
8. 44. E. 3. 38. (2. Ro. Abr.
645.)
[k] 8. H. 4. 22. (Mo. 895.)
[l] 6. R. 2. Chall. 102. 13. E. 3.
ibid. 108.
[m] 32. E. 3. Chall. 110. 111.
32. Aff. 6. 38. Aff. 13.
[n] 31. H. 6. Chall. 69. 8.
H. 4. 22. 27. Aff. 20. 22. E. 3.
12. Vid. 26. Aff. 21. 38. H. 6.
9. 7. H. 6. 25. 19. H. 6. 48.
20. H. 6. 38. 20. E. 4. 2. 22.
E. 4. Chall. 62.
[o] 22. E. 4. Chall. 63. 4. H. 7. 8.

returne, and not in respect of the persons returned, where there is no unindifferencie or default in the sherife, &c. for if the challenge to the array be found against the partie that takes it, yet he shall have his particular challenge to the polls (1).

In some cases a challenge may be had to the polls, and in some cases not at all. Challenge to the polls is a challenge to the particular persons; and these be of foure kinds, that is to say, peremptorie, principall, which induce favour, and for default of hundredors.

[p] 1. H. 5. Chal. 162. 9. H. 5. 7. 15. E. 4. 32. 14. H. 7. 7. 19. Doct. & Stud. lib. 2. Fortescue cap. 27. 3. H. 7. 2. 2. R. 3. 13. 32. H. 6. 26. 17. Aff. 6. 37. H. 6. 8. 22. H. 8. ca. 14. 33. H. 8. tit. Chal. Br. 217. 33. H. 8. ca. 23. 1. & 2. P. & M. ca. 10. 23. H. 6. 26. 14. H. 7. 14. Stanf. Pl. Cor. 137. 138. (2. Inst. 227.)
* Hil. 1. Ja. R.

[p] Peremptorie, this is so called; because he may challenge peremptorily upon his owne dislike, without shewing of any cause; and this onely is in case of treason or felonie, in *favorem vite*. And by the common law the prisoner, upon an endictment or appeale, might challenge thirtie five, which was under the number of three juries. But now by the statute of 22. H. 8. the number is reduced to twentie in petite treason, murder and felonie; and in case of high treason, and misprision of high treason, it was taken away by the statute of 33. H. 8. but now by the statute of 1. & 2. *Phil. & Maria*, the common law is revived. For any treason, the prisoner shall have his challenge to the number of thirtie (2) five; and so it hath beene resolved * by the justices upon conference betweene them in the case of sir Walter Raleigh and George Brookes. But all this is to be understood when any subject that is not a peere of the realme is arraigned for treason or felonie. But if hee be a lord of parliament and a peere of the realme, and is to be tryed by his peeres, he shall not challenge any of his peeres at all; for they are not sworne as other jurors be, but finde the party guiltie or not guiltie upon their faith or allegiance to the king, and they are judges of the fact, and every of them doth separately give his judgement, beginning at the lowest. But a subject under the degree of nobilitie may in case of treason or felonie challenge for just cause as many as he can, as shall be said hereafter. In an appeale of death against divers they pleade not guiltie, and one joynt *venire facias* is awarded, if one challenge peremptorily, he shall be drawne against all. (3) Otherwise it is of severall *venire fac.*

9. E. 4. 27.

(1. Ventr. 309.)

[q] 33. E. 1. ordinatio de inquisitionibus. Stanf. Pl. Cor. 162.

Note that at the common law before the statute of 33. E. 1. the king might have challenged peremptorily without shewing cause, but only that they were not good for the king, and without being limited to any number. But this was mischievous to the subject, tending to infinite delays and danger. And therefore it is enacted, [q] *quod de cetero licet pro domino rege dicatur, quod juratores, &c. non sunt boni pro rege; non propter hoc remaneant inquisitiones, &c. sed assignentur certam causam calumnie sue, &c.* whereby the king is now restrained. (4)

Principall, so called, because if it be found true, it standeth sufficient of it selfe without leaving any thing to the conscience or discretion of the triors. Of a principall cause of challenge to the array, we have said somewhat already. Now it followeth with like brevitie to speake of principall challenges to the polles, (that is) severally to the persons returned.

Principall challenges to the poll may be reduced to foure heads: first, *propter honoris respectum*, for respect of honour: secondly, *propter defectum*, for want or default: thirdly, *propter affectum*, for affection or partialitie: fourthly, *propter delictum*, for crime or delict.

6. Co. 52. 53. Countesse de Rutland's case. 48. E. 3. 30. 48. Aff. 6. 35. H. 6. 46. 22. Aff. 24. F. N. B. 165. D. E. & 166. Regill. 179. (1. Sid. 277.)

I. *Propter honoris respectum*, as any peere of the realme, or lord of parliament, as a baron, viscount, earle, marquisse, and duke; for these in respect of honour and nobilitie, are not to be sworne on juries; and if neither partie will challenge him, he may challenge himselfe, for by *Magna Charta* it is provided, *quod nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum, aut per legem terre*. Now the common law hath divided all the subjects into lords of parliament, and into the commons of the realme. The peers of the realme are divided into barons, viscounts, earles, marquisse and dukes. The commons are divided into knights, esquires, gentlemen, citizens, yeomen, and burgessees. And in judgement of law any of the said degrees of nobilitie are peers to another. As if an earle, marquisse, or duke, be to be tried for treason or felonie, a baron or any other degree of nobilitie is his peere. In like manner, a knight, esquire, &c. shall be tried *per pares*; and that is by any of the commons, as gentlemen, citizens, yeomen, or burgessees; so as when any of the commons is to have a tryall either at the king's suit, or betweene partie and partie, a peere of the realme shall not be impanelled in any case.

[a] 7. Co. 18. Calvin's case. 10. Co. 104. 14. H. 4. 19. b.
[b] Bract. fo. 185. Brit. fo. 135. Flet. li. 4. ca. 8. 26. Aff. 28. 3. H. 6. 39. 9. E. 4. 16. b. 21. H. 6. 20. 10. H. 7. 20.
[c] Vid. sect. 464. 38. Aff. 19. 17. Aff. 15. 4. H. 6. 28. 9. H. 5. 5. 10. H. 6. 7. 8. 18. 2. H. 7. 1. 10. H. 7. 14. 19. H. 6. 9. 7. H. 6. 25. 40. 44. 12. E. 4. 13. 3. H. 4. 4.
(See the statutes of 23. H. 8. 13. and 4. & 5. W. & M. 24.)
* 9. H. 6. Chal. 27. 9. H. 7. 1. (2. Ro. Abr. 647. Post. 272. Fortesc. 56. 62. a.)

II. *Propter defectum*,

1. *Patriæ*, [a] as aliens borne.

2. *Libertatis*, [b] as villeins or bondmen, and so a champion must be a freeman.

3. *Anni census, i. liberi tenementi*. [c] First, what yearly freehold a juror ought to have that passeth upon triall of the life of a man, or in a plea real, or in a plea personal, where the debt or damage in the declaration amounteth to fortie markes, *vide sect. 464*. (5) * Secondly, this freehold must be in his owne right, in fee simple, fee taile, for terme of his owne life, or for another man's life, although it be upon condition, or in the right of his wife, out of ancient demesne, for freehold within ancient demesne will not serve. But if the debt or damage amounteth

(1) Nota, on writ of right the pannel returned by the four knights shall not be challenged, but challenge ought to be taken before the four knights before the pannel made. H. 30. El. B. R. Pigott and Clarke. Hal. MSS.—See acc. post. 158. a. 294. a. Mo. 67. and Gouldsb. 23.

(2) Agreed acc. in petty treason in Swan's case, Fost. 107.

(3) Adj. acc. Plowd. 100.

(4) But according to the construction made of this statute or ordinance the king is not bound to shew cause of challenge till all the pannel is called over, and not then unless from challenges or otherwise the jury is incompleat. See State Tri. 4th ed. v. 3. p. 468. v. 4. p. 423. v. 5. p. 195. See further on this point sir John Hawles's Remarks on Trials in State Tri. 4th ed. v. 3. p. 169.

(5) See also a learned dissertation on the writ *de non ponendis in assis et juratis* in the Miscellany of Law-Tracts by the late Mr. Serjeant Wynne, p. 62 to 74. See too 1. Ventr. 366. and sir John Hawles's Remarks on Trials, in State Trials 4th ed. v. 3. p. 169. 187.

in Dowman's case 9. Co. 11. b. and the rule now holds both in criminal and civil cases without exception. See post. 227. b. Staundf. Pl. C. 165. a. Major Onby's case 2. L. Raym. 1494.—V. Whilst arraints, which still subsist in law, were in use, it was hazardous in a jury to find a general verdict, where the case was doubtful, and they were apprized of it by the judges; because if they mistook the law, they were in danger of an attain. Post 228. a. Hob. 227. Vaugh. 144. 2. Hal. Hist. Pl. C. 310. Gilb. Com. Pl. 2d. edition 128.—VI. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on the judges; but they have a right to controul the verdict and declare the law as they conceive it to be. At least this is the language of some most respectable authorities. Staundf. Pl. C. 165. a. Plowd. 114. a. b. 4. Co. 42. b. Hal. Hist. Pl. C. v. 1. p. 471. 476. 477. and v. 2. p. 302.—VII. The courts have long exercised the power of granting new trials in civil cases, where the jury find against that which the judge trying the cause or the court at large holds to be law, or where the jury find a general verdict and the court conceives that on account of difficulty of law there ought to have been a special one. King v. Poole Caf. B. R. temp. Hardwicke 26. Though too in criminal and penal cases the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that *nemo bis puniatur aut vexatur pro eodem delicto*, or the hardship which would arise from allowing a person to be twice put in jeopardy for one offence; and if this be so, it only shews, that on that account an exception is made to a general rule. 4. Blackst. 5th ed. 361. 2. L. Raym. 1585. 2. Stra. 899. 4. Co. 40. a. and Wingate's Maxims, 695.

Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law is entrusted to the judges; that in a jury it is only incidental; that in the exercise of this incidental right the latter are not only placed under the superintendence of the former, but are in some degree controulable by them;

mounteth not to fortie marks, any freehold sufficeth. [d] Thirdly, he must have freehold in that countie where the cause of the action ariseth; and though he hath in another, it sufficeth not (1). [e] Fourthly, if after his returne he selleth away his land, or if *cessy que vie* or his wife dieth, or an entry be made for the condition broken, so as his freehold be determined, he may be challenged for insufficiencie of freehold (2).

4. *Hundredorum*. First, by the common law, in a plea recall mixt and perſonal, there ought to be foure of the hundred (where the cause of action ariseth) returned for their better notice of the cause; for *vicini vicinorum facta preſumuntur ſcire* (3). And now ſince *Littleton* wrote [f] in a plea perſonall, if two hundredors appeare, it ſufficeth (4); and in an attainr, [g] although the jury is double, yet the hundredors are not double. Secondly, [b] if he hath either freehold in the hundred, though it be to the value but of halfe an acre, or if he dwell there, though hee hath no freehold in it, it ſufficeth. [i] Thirdly, if the cause of the action riſeth in divers hundreds, yet the number ſhal ſuffice, as if it had come out of one, and not ſeverall hundredors out of each hundred. [k] Fourthly, if there be divers hundreds within one leet or rape, if he hath any freehold, or dwell in any of thoſe hundreds, though not in the proper hundred, it ſufficeth. [l] Fifthly, if the jury come *de corpore comitatũs*, or *de proximo hundredo*, where the one partie is lord of the hundred, or the like, there need no hundredors be returned at all. [m] Sixtly, if a hundredor after he be returned ſell away his land within that hundred, yet ſhall he not be challenged for the hundred, for that this notice remaines. Otherwiſe as hath bin ſaid for his insufficiencie of freehold; for his feare to offend, and to have lands waſted, &c. which is one of the reaſons of law, is taken away. [n] Seventhly, he that challengeth for the hundred muſt ſhew in what hundred it is, and not drive the other partie to ſhew it. Eightly, his challenge for the hundred is not *ſimpliciter* but *ſecundũ quid*; for, though it bee found that he hath nothing in the hundred, yet ſhall not he be drawne, but remaine *prater H.* that is, beſides for the hundred; and albeit he dwelleth or have land in the hundred, yet muſt he have ſufficient freehold.

III. *Propter affectum*: And this is of two forts, either working a principall challenge, or to the favour. And againe a principall challenge is of two forts, either by judgement of law without any act of his, or by judgement of law upon his owne act.

And it is ſaid that a principall challenge is, when there is expreſſe favor or expreſſe malice.

1. Without any act of his, as if the juror bee [a] of blood or kindred to either partie, *conſanguineus*, which is compounded *ex con & ſanguine, quaſi eodem ſanguine natus*, as it were iſſued from the ſame blood; and this is a principall challenge, for that the law preſumeth that one kiſman doth favour another before a ſtranger; [b] and how farre remote ſo ever he is of kindred, yet the challenge is good. And if the plaintife challenge a juror for kindred to the defendant, it is no counter plea to ſay that he is of kindred alſo to the plaintife, though hee bee in a neerer degree; for the words of the *venire facias* forbiddeth the juror to be of kindred to either partie.

[c] If a body politick or incorporate, ſole or aggregate of many, bring any action that concerns their body politick or incorporate, if the juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred) yet for that thoſe bodies conſiſt of naturall perſons, it is a principall challenge. [d] A baſtard cannot be of kindred to any, (5) and therefore it can be no principall challenge. And here it is to be knowne, that *affinitas*, affinity, hath in law two ſenſes. In his proper ſenſe it is taken for that neerneſſe that is gotten by marriage. *Cũ duæ cognationes inter ſe diſiſe per nuptias copulantur, & altera ad alterius ſines accedit, & inde dicitur affinis*. In a larger ſenſe *affinitas* is taken alſo for conſanguinitie and kindred, as in the writ of *venire facias*, and otherwiſe. [e] Affinity or alliance by marriage is a principall challenge, and equivalent to conſanguinity when it is betweene either of the parties, as if the plaintife or defendant marry the daughter or couſin of the juror, or the juror marry the daughter or couſin of the plaintife or defendant, and the ſame continues, or iſſue be (6) had. But if the ſon of the juror hath married the daughter of the plaintife, this is no principall challenge, but to the favour; becauſe it is not betweene the parties. Much more may be ſaid hereof; ſed *ſumma ſequor ſaſtigia rerum*.

[f] If there be a challenge for colinage, he that taketh the challenge muſt ſhew how the juror is couſin. But yet if the colinage, that is the effect and ſubſtance, be found, it ſufficeth; for the law preferreth that which is materiall before that which is formall.

[g] If the juror have part of the land that dependeth upon the ſame title. (7)

[h] If a juror be within the hundred, (8) leet, or any way within the ſeigniori immediately or mediately, or any other diſtreſſe of either party, this is a principall challenge. But if either party be within the diſtreſſe of the juror, this is no principall challenge, but to the favour.

[i] If a witneſſe named in the deed (9) be returned of the jury, it is a good cauſe of challenge of him. [k] So it is if one within age of one and twenty bee returned, it is a good cauſe of challenge.

[d] 19. H. 6. 9. 17. Aff. 15.

[e] 12. H. 7. 4. 21. H. 6. 38. 7. H. 4. 1. (Poſt. 272. b.)

(2. Ro. Abr. 636. Fortefe. 56. b. Poſt. 158. a.)

[f] 27. Eliz. ca. 6.

[g] 7. H. 4. 47.

[h] 16. E. 4. 7. 4. Mar. Br. Chal. 216. 21. E. 4. 74. 75. 9. H. 6. 66.

[i] 20. H. 6. 23. 4. Mar. Br. Chal. 216.

[k] 10. H. 6. 5. 12. H. 4. 14. 19. E. 4. 5.

[l] 37. H. 6. 11. 25. E. 3. 43. (Cro. Jam. 550.)

[m] 21. H. 6. 38. 12. H. 7. 4.

[n] 7. Eliz. Dyer 231.

Bract. fo. 185. Brit. fo. 134. 135. Fleta lib. 4. ca. 8. 21. E. 4. 11. 12.

[a] Britton fol. 135.

[b] Mirror ca. 3. de ordinance d'attaint.

Bracton } ubi ſupra.

Britton }

Fleta }

14. El. Dier 319. 21. E. 4. 75.

40. Aff. 20. Pl. Com. fo. 41. E.

3. Chal. 99. 21. E. 4. 75.

[c] 7. E. 4. 4. 17. E. 4. 7. 21.

E. 4. 20. 28. H. 6. 10. 28. Aff.

18. 34. Aff. 6. Hob. 87. 1. Saund.

344.

[d] 41. E. 3. Chal. 99. 41. E. 3.

9. 26. H. 6. Chal. 163.

[e] Mirror

Bracton }

Britton }

Fleta }

2. E. 4. 14. 21. E. 3. 5. 41. 49.

E. 3. Chal. 93. 43. Aff. 25. 26.

22. E. 4. 2. 14. H. 7. 2. 15. H.

7. 9.

[f] 19. H. 8. 7. 28. H. 8.

Dier 37. 1. Mariae Dyer 91.

2. Eliz. ibid. 177.

[g] Bracton }

Britton }

Fleta }

Mirror ubi ſupra.

[h] 9. H. 6. tit. Chal. 27. 38. E.

3. 25. 22. E. 4. Chal. 61. 4. H.

6. 25. 3. H. 6. 39. 36. H. 6.

Chal. 46. 22. E. 4. 1. 27. Aff.

28. 22. E. 3. 12.

[i] 23. Aff. 11.

[k] Mirror ubi ſupra.

2. Upon

(1) Vid. acc. per omnes juſticiarios M. 29. 30. Eliz. Clench 139.—Hal. MSS.

(2) See ant. 102. b.

(3) See Brownl. Rep. b. 194.

(4) And now by the 4. An. c. 16. & 24. G. 2. c. 18. the jury muſt be taken from the *body of the county* in actions or ſuits in the king's courts of record at *Weſtmiſter*, and in actions or informations on penal ſtatutes. But appeals of felony or murder, and indictments or preſentments of treaſon felony murder or other matter, are excepted from this proviſion; and therefore in them hundredors are ſtill in ſtriſtneſſe neceſſary.—It is obſervable, that the 24. G. 2. by which this alteration was made as to actions on penal ſtatutes, names the counties palatine of *Lancaster Cheſter* and *Durham*, and *Wales*, as well as *Weſtmiſter*. But in the 4. of An. only the latter place is mentioned.—See further on the ſubject of hundredors ant. 125. a. note 2. to which add 1. P. Wms. 207. and a caſe on the 4. Ann. in Mr. Serj. Wynne's Miſcell. Law Tracts 60.

(5) See ant. 123. a.

(6) But the iſſue muſt be *living*. See ant. 156. a. n.

(7) Here the ſenſe is incompleat; but I apprehend, that lord Coke means to give the exception as a principal challenge.

(8) Acc. Dy. 176. a.

(9) See ant. 6. a.

them; and therefore that in all points of law ariſing on a trial, juries ought to ſhew the moſt reſpectful deference to the advice and recommendation of judges. In favour of this concluſion the conduct of juries bears ample teſtimony; for to their honour it ſhould be remembered, that the examples of their reſiſting the advice of a judge in points of law are rare, except where they have been provoked into ſuch an oppoſition by the groſſneſſe of his own miſconduct, or betrayed into an unjuſt ſuſpicion of his integrity by the miſrepresentation and ill practice of others. In civil caſes, particularly where the title to *real* property is in queſtion, juries almoſt univerſally find a ſpecial verdict as often as the judge recommends their ſo doing; and though in criminal caſes ſpecial verdicts are not frequent, it is not from any averſeneſſe to them in juries, but from the nature of criminal cauſes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any ſmall merit in this arrangement, that in conſequence of it every perſon accuſed of a civil crime is enabled by the general plea of *not guilty* to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may be always enjoyed, except in ſuch ſmall

[1] 8. H. 5. 10. 33. H. 6. 1. 10.
H. 6. 24. 7. H. 4. 11. 18. E. 4.
12. 21. E. 4. 74. 11. R. 2. tit.
Challenge 106. 27. Aff. 13.
[m] 43. E. 3. Chal. 93. 8. H. 5.
10.

[n] Mirror ubi supra. Brit. fo.
12. 11. Aff. 36. 8. H. 4. 2.
7. E. 4. 4. 12. Aff. 26. 19. Aff.
6. 40. Aff. 10. 25. E. 3. c. 3.
[o] 40. Aff. 20. 2. H. 4. 15. 10.
H. 6. Chal. 40. 7. H. 6. 40. 19.
H. 6. 66. 4. E. 4. 11. 7. E. 4. 4.
[p] 20. H. 6. 39. 9. E. 4. 46. 35.
H. 6. 19. H. 6. 3. H. 6. 24. 7.
H. 7. 10. (2. Ro. Abr. 665.)
[q] 9. Co. 71. Peacock's case

[r] Mirror } ubi supra.
Bracton }
Britton } 12. Aff. 36.
16. Aff. 56. 28. Aff. 19. 31. Aff.
7. 44. Aff. 18.
[s] 13. H. 4. 13. 11. R. 2. Chal.
164.

[t] Bracton } ubi supra.
Fleta } 44. E. 3. 5. 38.
44. Aff. 23. 8. E. 3. 25. 43. E.
3. 31. 22. E. 4. 1. 38. H. 6. 6.
43. E. 3. Chal. 93. 11. H. 4. 26.
11. H. 6. 15. 32. E. 3. Chal. 189.
24. E. 3. 37. 39. Aff. 2. 20. Aff.
11. 43. Aff. 46.
[u] 17. Aff. 15.
[v] 8. E. 3. 39. 20. H. 6. 39.
33. H. 8. Dyer 48. (Post. 379. a.
Hob. 294.)

[x] 22. Eliz. Dyer 367.
Bracton } ubi supra.
Britton }
Fleta }
[y] 49. E. 3. 1.
[z] 9. E. 4. 6. 21. E. 4. 31. 22.
E. 4. 3. 14. H. 6. 2. 20. E. 4. 2.
3. H. 7. 5. 22. Eliz. Dyer 367.
(2. Ro. Abr. 644. 668. 669. Cro.
Jam. 547. Post. 320. b. Plowd.
74. a. Hob. 64.)

[b] Mirror ca. 3. d'ordinance
d'attaint. Bract. lib. 4. fol. 185.
Britt. fol. 134. 135. Fleta lib. 4.
c. 8. 7. H. 6. 25.
[c] 9. H. 7. 3. 10. H. 7. 20. 3.
H. 7. 2. 10. E. 4. 12. 15. E. 4.
18. 12. Aff. 23. (1. Ro. Rep.
328. Cro. Jam. 547.)

[d] 6. R. 2. Chal. 141. 19. Aff.
6. 38. Aff. 22. 11. R. 2. Chal.
165. 4. H. 5. ibid. 153.
(1. Sid. 244.)

[1] Upon his own act, as if the juror hath given a verdict before for the same cause, albeit it be reversed by writ of error, or if after verdict, judgement were arrested. So if hee hath given a former verdict upon the same title or matter though betweene other persons. [m] But it is to be observed, that I may speake once for all, that in this or other like cases, hee that taketh the challenge must shew the record if he will have it take place as a principall challenge; otherwise he must conclude to the favour (1), unlesse it be a record of the same court, and then he must shew the day and terme.

[n] So likewise one may be challenged, that he was inditor of the plaintife or defendant, either of treason, felony, misprision, trespassse, or the like in the same cause.

[o] If the juror be godfather to the child of the plaintife or defendant, or *à converse*, this is allowed to be a good challenge in our bookes (2).

[p] If a juror hath bene an arbitrator chosen by the plaintife or defendant in the same cause, and have bene informed of, or treated of the matter, this is a principall challenge. Otherwise if he were never informed, nor treated thereof; and otherwise if hee were indifferently chosen by either of the parties, though he treated thereof. But a [q] commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge; for he is made by the king under the great seale, (3) and not by the partie, as the arbitrator is; but he may upon cause be challenged for favour.

[r] If hee be of counsell, servant, or of robes, or fee of either partie, it is a principall challenge. (4)

[s] If any after he be returned do eate and drinke at the charge of either partie, it is a principall cause of challenge (5). Otherwise it is of a trior after he be sworne.

[t] Actions brought, either by the juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principall challenge; unlesse they be brought by covyn either before or after the returne; for if covin be found, then it is no cause of challenge. Other actions, which doe not imply malice or displeasure, are but to the favour.

[u] In a cause, where the parson of a parish is partie, and the right of the church commeth in debate, a parishioner is a principall challenge. Otherwise it is in debt, or any other action where the right of the church commeth not in question.

[v] If either partie labour the juror, and give him any thing to give his verdict, this is a principall challenge. But if either partie labour the juror to appeare and to doe his conscience, this is no challenge at all, but lawfull for him to do it. (6)

[x] That the juror is a fellow servant with either partie is no principall challenge, but to the favour.

[y] Neither of the parties can take that challenge to the polls, which he might have had to the array.

[z] Note, if the defendant may have a principall cause of challenge to the array, if the sherife returne the jury, the plaintife in that case may for his owne expedition alledge the same, and pray proceffe to the coroners; which he cannot have, unlesse the defendant will confesse it; but if the defendant will not confesse it, then the plaintife shall have a *venire facias* to the sherife, and the defendant shall never take any challenge for that cause (7), and so in like cases. But on the part of the defendant any such matter shall not bee alledged, and proceffe prayed to the coroners; because he may challenge the jury for that cause, and can be at no prejudice.

[b] Challenge concluding to the favour, when either partie cannot take any principall challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the triors upon hearing their evidence to finde him favourable or not favourable. But yet some of them come neerer to a principall challenge then other. [c] As if the juror be of kindred, or under the distresse of him in the reversion or remainder, or in whose right the avowrie or justification is made, or the like, these be no principall challenges; because he in reversion, remainder, or in whose right the avowrie or justification is, is not partie to the recorde; otherwise it is if they were made parties by aide, receipt, or voucher: and yet the cause of favour is apparent, so it is of all principall causes, if they were partie to the record. Now the causes of favour are infinite; and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the reader to the reading of our bookes concerning that matter. For all which the rule of law is, that he must stand indifferent as hee stands unsworne.

[d] The subject may challenge the polles, where the king is partie. And if a man bee outlawed of treason or felony, at the suit of the king, and the partie for avoyding thereof alledgeth imprisonment, or the like, at the time of the outlawry; though the issue bee joyned upon a collateral point, yet shall the partie have such challenges as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also (8).

IV. Propter

(1) Acc. 2. Brownl. 168.

(2) See Mo. 3.

(3) See an instance of such a commission in Cro. Jam. 65.

(4) See ant. 156. a. n. 4.

(5) The same thing avoids a verdict. Post. 227. b.

(6) Yet labouring a jury, though it be but to appear, is afterwards stated to amount to the crime of maintenance in a third person. Post. 369. a. Here indeed the author qualifies the labouring to appear by supposing it to be to do his conscience. But this addition of words seems a slight ground for a difference of construction.

(7) Held accordingly Hutt. 22.

(8) Staundford is of the same opinion, citing for authorities from Fitzherbert's Abridgement the cases of 11. R. 2. & 4. H. 5. here referred to by lord Coke. Staundf. Pl. C. 163. a. However the benefit of peremptory challenges on collateral issues in capital cases has been denied by the practice of latter times. Case of Okey and others East. 14. Ch. 2. 1. Lev. 61. Johnston's case Mich. 2. G. 2. Post. 46. Mr. Ratcliffe's case Mich. 20. G. 2. Post. 40.—In the report of the case last cited, lord Hale is referred to as an authority for disallowing such challenges. But lord Hale is not absolute in his opinion; and Staundford, whom lord Hale cites, not only writes with a *quære* in the part so cited, but in a subsequent passage gives an opinion in favour of the challenge. Staundf. Pl. C. 158. a. 163. a.

small offences as are left to the summary jurisdiction of a justice of the peace; which exception from the necessity of the times is continually increasing, but which however cannot be too cautiously extended to new objects.—Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two long continue to flourish, unspoiled, either by the proud incroachment of ill-designing judges, or the wild presumption of licentious juries.

It would be wrong to conclude this note, without referring the reader to the very forcible reasoning on the same subject, in a modern work, which contains much general legal instruction elegantly conveyed. See "EUNOMUS, or Dialogues concerning the Law and Constitution of England," vol. 3. p. 196.

(6) See further on the origin of English juries, Spelm. Gloss. voc. *jurata*, Dissertat. Epistolar. in Ling. Septentrion. Thesaur. Hicke. Stiernh. de jure Sueon. et Goth. vetust. lib. 1. c. 3. and Dr. Pettingal's Enquiry into the Use and Practice of Juries amongst the Greeks and Romans.

IV. *Propter delictum*. [a] As if the juror be attainted or convicted of treason, or felony, or for any offence to life or member, or in attain for a false verdict, or for perjury as a witness, or in a conspiracy at the suite of the king, or in any suite (either for the king, or for any subject) be adjudged to the pillory, tumbrell, or the like, or to be branded, or to be stigmatique, or to have any other corporall punishment whereby he becommeth infamous, (for it is a maxime in law *repellitur à sacramento infamis*) these and the like are principall causes of challenge. So it is if a man be outlawed in trespassse, debt, or any other action, (1) for he is *exlex*, and therefore is not *legalis homo*. And old bookes have said, that, if he be excommunicated, he could not be of a jury.

[f] See the statutes of W. 2. and artic. *supra* cartas, what persons the sherife ought to returne on juries. And see F. N. B. *breve de non ponendis in assisis & juratis*, (2) and the register in the same writ. And see there what remedy the party hath that is returned against law.

It is necessarie to be knowne the time when the challenge is to be taken. [g] First, hee that hath divers challenges must take them all at once, and the law so requireth indifferent trialls, as divers challenges are not accounted double. [h] Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to challenge him. [i] Thirdly, after challenge to the array, and triall duely returned, if the same party take a challenge to the polls, hee must shew cause presently. [k] Fourthly, so if a juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworne. [l] Fifthly, when the king is party or in an appeale of felony, the defendant, that challengeth for cause, must shew his cause presently. Sixthly, if a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the hundred must be taken before so many be sworne, as will serve for hundredors, or else hee loseth the advantage thereof. Eighthly, [m] in a writ of right, the graund jury must be challenged before the foure knights before they be returned in court; (3) for after they be returned in court, there cannot any challenge be taken unto them. Ninthly, *nota* [n] The array of the *tales* shall not be challenged by any one party, untill the array of the principall be tried; but if the plaintife challenge the array of the principall, the defendant may challenge the array of the *tales*. After one hath taken a challenge to the polle, he cannot challenge the array.

Now it is to be seene, how challenges to the array of the principall pannell, or of the *tales*, or of the polles shall be tried, and who shall be triors of the same, and to whom proceffe shall be awarded.

1. [o] If the plaintife alledge a cause of challenge against the sherife, the proceffe shall be directed to the coroners; if any cause against any of the coroners, proceffe shall be awarded to the rest; if against all of them, then the court shall appoint certaine elisors or esliors (so named *ab eligendo*) because they are named by the court, against whose returne no challenge shall be taken to the array, because they were appointed by the court; but hee may have his challenge to the (4) polles. [p] Note, if proceffe be once awarded for the partiality of the sherife, though there be a new sherife, yet proceffe shall never be awarded to him; for the entrie is, *Ita quod vicecomes se non intromittat*. But otherwise it is, for that he was tenant to either partie, or the like.

2. [q] If the array be challenged in court, it shall be tryed by two of them that be impannelled to be appointed by the court; for the triors in that case shall not exceed the number of two, unlesse it be by consent. But when the court names two for some speciall cause alledged by either partie, the court may name others. If the array be quashed, then proceffe shall be awarded, *ut supra*.

[r] If a pannell upon a *venire facias* be returned, and a *tales*, and the array of the principall is challenged, the triors, which try and quash the array, shall not try the array of the *tales*; for now it is as if there had beene no appearance of the principall pannell: but if the triors affirme the array of the principall, then they shall try the array of the *tales*. If the plaintife challenge the array of the principall, and the defendant the array of the *tales*, there the one of the principall, and the other of the *tales*, shall try both arrays. For other matter concerning the *tales*, see [s] in my Reports matters worthy of observation (5). [t] When any challenge is made to the polls, two triors shall be appointed by the court; and if they trie one indifferent, and he be sworne, then he and the two triors shall try another; and if another be tried indifferent, and he be sworne, then the two triors cease, and the two that be sworne on the jury shall try the rest. [u] If the plaintife challenge ten, and the defendant one, and the twelfth is sworne, because one cannot try alone, there shall be added to him one challenged by the plaintife, and the other by the defendant. When the triall is to be had by two counties, the manner of the triall is worthy of observation, and apparant in our [v] books. [x] If the foure knights in the writ of right be challenged they shall try themselves (6), and they shall choofe the

(1) It has been questioned, whether outlawry in a *personal* action is sufficient to disqualify from being a juror; and in Sir William Wirhepole's case, Mich. 3. Cha. 1. the court of king's bench was divided on this point. Cro. Cha. 135. W. Jo. 198. and Ley's Rep. 81.

(2) See the late Mr. Serj. Wynne's Dissertation upon this writ in his Miscellany of Law Tracts, p. 56.

(3) Acc. ant. 156. b. & post. 294. a.

(4) See further on awarding *venires* to coroners and on appointing *elisors*, Umfrev. Lex Coronator. 235. to 242.

(5) See also Trials per Pais, chap. 5.

(6) Acc. post. 294. a.

Continuation of the notes of fol. 156. a.

(5) Lord Coke having immediately before expressed, that the array shall not be challenged for *favor* against the king, he must be here understood to consider *being a vadelet or other menial servant of the crown*, as a *principal* challenge to the array; for otherwise he would be inconsistent; unless, indeed, he is supposed in the first instance to state a general rule and in the second an exception to it, which, as his words are, would be a strained construction. It is also strong evidence of lord Coke's intending to give this challenge to the array as a principal one, that he elsewhere represents *being a servant of either party* where the suit is between subjects as a principal challenge both to the array and to the polls. See *supra* and also post. 157. b. However, lord Hale will not allow this sort of exception to a juror to be more than a challenge to the *favor* in trials for treason or felony; citing for authority from Fitzherbert's Abridgement a case in 3. H. 6. which is a decision in point by the whole court; to which may be added the *dictum* in the Year-Book of 4. Hen. 7. 3. Also the practice since lord Hale's time seems to have accorded with his doctrine, there being subsequent instances in print in which such an exception when taken to the polls has been disavowed, but not one I believe of its being received. The instances of disallowing the exception as a principal challenge, to which I shall refer, are Mr. Hampden's trial in the king's-bench, Hill. 36. Cha. 2. for a misdemeanor, and Sir William Parkyns's at the Old Bailey in 1695 for high treason. See State Tri. 4th ed. v. 3. p. 825. and v. 4. p. 633. In the former the point was sharply argued on challenges by Mr. Hampden of two jurors for having offices in the king's forest; and as the counsel for Mr. Hampden relied on lord Coke and on Rolle's Abridgement of the Case of 22. E. 4. here cited by lord Coke in the margin as the ground of his doctrine, so the court adjudged against the exception as a principal challenge on the authority of the case of 3. H. 6. cited by lord Hale. In the latter Sir William Parkyns challenged two for being

[c] Mirror
Bracton } ubi supra.
Britton }
Fleta }

11. H. 4. 41. 12. H. 4. 10. 33.
H. 6. 21. (2. Ro. Abr. 650.)

[f] W. 2. ca. 38. Artic. super
cart. ca. 9. F. N. B. 165. & 166.
Registr.

[g] 9. E. 4. 16. 10. H. 5. 9. 37.
H. 6. 8. 3. H. 6. 38. Brooke tit.
Chal. 8. 7. H. 6. 40. 14. H. 7. 5.
6.

[h] 9. E. 4. 16. 27. H. 8. 2.

[i] 43. E. 3. Chal. 93. 20. E. 3.

ibid. 116. 22. E. 4. ibid. 61.

7. H. 4. 41. 3. El. Dower 201.

[k] 22. E. 4. 1. 9. H. 5. 6.

[l] 1. H. 5. 10. 38. Aff. 22.

(Ant. 157. 2.)

[m] 7. H. 4. 20. 15. E. 4. 1.

[n] 9. E. 4. 27. 9. H. 5. 11. 34.

Aff. 6. 13. E. 3. Chal. 108.

[o] 18. E. 4. 8. (Fortesc. 55.)

[p] 15. H. 7. 9. 14. H. 7. 31.

18. E. 4. 3.

[q] 29. Aff. 3. 19. H. 6. 48.

21. H. 6. Chal. 38. 33. H. 6. 21.

4. E. 4. 17. 43. E. 3. Chal. 95.

2. R. 2. ibid. 101. 34. Aff. 6.

27. Aff. 28. 43. Aff. 26.

[r] 9. E. 4. 46. 19. H. 6. 48.

34. Aff. 6. 7. E. 6. Dier 78. 9.

H. 5. 11.

[s] 10. Co. 104. 105. Denbawd's

case.

[t] 19. H. 6. 9. 22. E. 4. Chal.

61. 62.

[u] 7. H. 4. 41.

[v] 11. H. 4. 61. 48. E. 3. 30.

11. H. 4. 63.

[x] 22. E. 3. 18. 39. E. 3. 2.

[y] 49. E. 3. 1. 2. (Hob. 84. 1. Sid. 374. 232. Cro. Jam. 388. 1. Ro. Rep. 110.)

[z] 2. H. 4. 14. 4. E. 4. 3. 10. 1. 3. 32. 22. Aff. 28. 31. 31. H. 6. 56. 16. Aff. 1. 5. E. 5. 35. 36.

[a] 8. H. 5. tit. Chal. 167. 2. H. 4. 3. 34. E. 3. Chal. 175. 21. H. 6. 56. 8. E. 4. 3. 16. E. 4. 1. * Bracton lib. 4. fo. 185. (7. Co. 1. Bulwer's case.)

[b] Bracton lib. 5. fo. 333. 334. Mirr. cap. 2. sect. 19. Fleta lib. 6. cap. 6. Brit. cap. 121.

[c] Bracton } ubi supra
Britton }
Fleta }
Bracton }
Britton } ubi supra.
Fleta }
Mirror }
[d] Regist. judicial. 1. 2. 107.
43. E. 3. 32. 24. E. 3. 35. 3.
E. 3. 48. 50. E. 3. 16. 8. 11. 6.
1. b. F. N. B. 97.
[e] Mirror
Bracton } ubi supra.
Britton }
Fleta }

Register 223.

[f] Bracton lib. 5. fo. 372. Britton fo. 117. Fleta 1. 6. ca. 1. Glanvil lib. 1. c. 4. 5. &c. lib. 2. ca. 7. lib. 12. ca. 1. (1. Ro. Abr. 686.)

(Post. 265. a. 345. a.)

* Britton fo. 116. Fleta lib. 2. ca. 1.

[g] Fleta lib. 6. ca. 1.

[h] Mirror ca. 2. sect. 16. & cap. 5. sect. 2.

the ground assise, and try the challenges of the parties. [y] If the cause of challenge touch the dishonor or discredit of the juror, he shall not be examined upon his oath, (1) but in other cases he shall be examined upon his oath, to informe the triors. (2) [z] If an inquest be awarded by default, the defendant hath lost his challenge; but the plaintife may challenge for just cause, and that shall be examined and tried.

Wheresoever the plaintife is to recover *per visum juratorum*, there ought to be fixe of the jury that have had the view or knowne the land in question, so as he be able to put the plaintife in possession if he recover.

In a *proprietas probanda*, and a writ to inquire for waste, the parties have beene received to take their challenges. (3) [a] But passing over many things touching this matter, I will conclude with the saying of *Bracton. *Plures autem alia sunt causae recusandi juratores, de quibus ad praesens non recolo, sed quae jam enumeratae sunt sufficiant exempli causa.* (4) And so let us return to *Littl.*

De visneto, &c. It should be *vicineto*. *Vicinetum* is derived of this word *vicinus*, and signifieth neighbourhood, or a place neere at hand, or a neighbour place. And the reason wherefore the jury must be of the neighbourhood, is, for that *vicinus facta vicini praesumitur scire*; all which is implied in this word (&c.)

Quod summeat eos, &c. *Summeo* is compounded of *sub* & *moneo*, & *euphoniae gratia* it is said *summeo*, to warne or summon, as in this case the sherife must warne or summon the recognitors of the assise to appeare before the justices of assise, &c. And it is truly said [b], that in this case *legitimam summonitionem recipere in propria persona ubicunque inventus fuerit in comitatu in quo fuerit res petita; qui quidem si non inveniatur, sufficit, si ad domicilium fiat, dum tamen alicui de familia sua manifeste fuerit relata, &c.*

Per bonos summonitores. Here two things are to be observed. 1. that the summoners must be *boni* (i. e. *fide digni, ut valeant legitimam testimonium perhibere, cum inde per justiciarios fuerint requisiti.* [c] And another faith, *fems, ne serfs, ne enfans, ne nul enfans, ne nul que nest fife tenant, ne poest esse bone summoner.* 2. It is spoken in the plurall number, *per bonos summonitores*, and therefore there must be two at the least. *Nec sufficit quod summonitio fiat per unum tantum, &c. necesse est igitur quod per duos ad minus fiat, &c.* There is also a summons of a tenant in a reall action; whereof, and of perrors and veiors you shall reade [d] plentifully and plainly in our bookes, whereunto being matter of courie I referre you.

Item summonitionum alia est generalis, alia specialis. Whereof you shall finde excellent matter in our [e] old bookes, where you shall also reade at large de *summonitione, praesummonitione, & resummonitione.*

Facere recognitionem. *Cognitio* is knowledge, or knowledgement, or opinion, and recognition is a serious acknowledgement or opinion upon such matters of fact as they shall have in charge, and thereupon the jurors are called *recognitores assise*. *Vide Sect. 233. recognitionem* taken for the confession of the tenant.

Pannell is an English word, and signifieth a little part; for a pane is a part, and a pannell is a little part; as a pannell of waincot, a pannell of a saddle, and a pannell of parchment wherein the jurors names be written and annexed to the writ. And a jury is said to be impannelled, when the sherife hath entred their names into the pannell, or little peece of parchment, in *pannello assise*.

Briefe de droit, Breve de recto. Writs of right bee of two natures: 1. A writ of right, whereof *Littleton* here speaketh, which is the highest writ of all other reall writs whatsoever, and hath the greatest respect, &c. and the most assured and final judgement; and therefore this writ is called a writ of right; and this in [f] old books is called *dreit dreit*; and this writ *est darrein remede de tous recoveries enter tous ordres des pleas*; and the jury in this writ is called *magna assisa*, or *magna jurata*, as *Littleton* here faith. 2. Writs of right in their nature, as the *rationabili parte*, and *ne injuste vexes*.

De Recto. *Rectum* is a proper and significant word for the right that any hath; and wrong or injury is in French aptly called *tort*; because injury and wrong is wrested or crooked, being contrary to that which is right and straight. Now the law that is *linea recta est index sui & obliqui*. And *Britton* * faith, that *tort a la ley est contrarie*, and as aptly for the cause aforesaid is injury in English called wrong. And *injuria* is derived of *in* and *jus*, because it is contrary to right; so as *a faire tort* is *facere tortum*. And *Fleta* faith [g] *est autem jus publicum & privatum, quod ex naturalibus preceptis, aut gentium, aut civilibus est collectum; & quod in jure scripto jus appellatur, id in lege Angliae rectum esse dicitur*. And in the [h] *Mirror*, and other places of the law, it is called *droit*; as *droit defend*, the law defendeth.

En le Register. *Register* is a most ancient booke of the common law; and it is two-

(1) Held accordingly by the court in Cook's case Salk. 153.

(2) This is one instance of the examination called a *voir dire*; for as a witness is on a *voir dire* to try an objection to his competency to give evidence, so a juror may be sworn in like manner to try the cause of challenge to him. It is thought fit to take notice of this; because in some of our books, the *voir dire* is described, as if confined to the challenge of a witness, and only used to distinguish such a partial swearing of a witness from swearing of him *in chief*. For instances of examining jurors on a *voir dire*, see *Francia's case*, State Tri. 4th ed. v. 1. p. 59. and *Mr. Townley's* in Fost. 7. But in both of these the challenge not being to the favour was examined into by the court without triors.

(3) Some seem to understand it as a general rule, that challenges of jurors are excluded, where the inquest is for information merely, or not being so is without an issue joined between the parties; as in inquests of office before sheriffs coroners and escheators, and in writs of inquiry for damages. Office of executor, ed. 1676. p. 240. 1. Ro. Abr. 660. Umfrev. Lex Coronator. 174. 183. and in the Introduction. 51. Probably lord Coke here means to advert to this doctrine, and to give the *proprietas probanda* and the writ to inquire of waste, both of which are inquests without any issue joined, as instances of exception to it. Broke adds another exception; for in abridging the case of waste from the year book of 2. H. 4. 3. he observes, that the law is the same on a writ of redisseisin. Bro. Error 31.—As to the rule itself for thus excluding challenges, be it well or ill founded, the sheriff, or other officer taking the inquest, certainly ought not to accept any jurors but such as are legally qualified; and if such are received, it seems a just ground for quashing the proceeding or for error according to the nature of the case. See Sir William Withepole's case reported in W. Jo. 198. Cro. Cha. 134. and Ley 81. and noticed in 2. Hal. H. P. C. 60.

(4) See further on challenges of jurors Kitch. French ed. 91. a. Lamb. Just. ed. of 1602. p. 379. Dalt. Sher. 1st ed. 120. Trials per Pa. chap. 9. and title Trial in Viner.

being servants of the king; but was informed by lord Holt, that it was no cause of challenge. The first of these instances was a direct adjudication; but, however, it loses part of its weight, in consequence of having occurred in an ill time whilst lord Jeffries presided in the king's-bench, and of being accompanied with ungracious and unbecoming language from him in respect to both Coke and Rolle. The second was rather an extrajudicial opinion; because the counsel for the crown consented to put by the jurors objected to on the ground of being king's servants, unless there should be a defect of other jurors, which did not happen. But lord Holt declared against the challenge in the most absolute and unreserved terms, as if it would not bear arguing.

twofold, viz. *registrum brevium originalium*, and *registrum brevium judicialium*. It is a French word and signifieth a memoriall of writs. Sometimes the register of originall writs is called *registrum cancellariæ*; because all originall writs doe issue out of the chauncery, as *extra officinam justitiæ*, for the antiquity and estimation of which booke I referre the reader to the epistle before the tenth part of my commentaries. (1)

Magna assisa eligenda is a judiciall writ of the sherife to returne fourē lawfull knights before the justices there upon their oathes to returne twelve (2) knights of the vicinage to try the mise in a writ of right. (Cro. Cha. 511.)

Assise de common de pasture, &c. Of what things an *assise of novel disseisin* lay at the common law, and of what by the statute, you may reade at large in my [k] Reports in *John Webb's case*, where the authorities of law are plentifully cited, and they and the statute well explained. But since *Littleton* wrote, a man may have [l] an assise of *novel disseisin*, *assise of mord'anc'*, or any *præcipe quod reddat*, *quod ei de forceat*, writs of dower, or other writs originall, as the case shall require, of tythes, pensions, or other ecclesiasticall or spirituall profit, if he be disseised, deforced, wronged, or otherwise kept or put from the same, which by the lawes and statutes of the realme are made temporall or admitted to be or abide in temporall hands; so as by the said act a lay man, having tythes or offerings, may either sue for the subtraction or with-holding of the same in the ecclesiasticall court, or at the common law at his election. And seeing no speciall writ is given * by the statute, the party must have a generall writ of *assise de libero tenemento*, and make a speciall pleint. But his *præcipe* must be, *quod reddat omnes & omnimodas decimas majores, mixtas, & minutas, infra Dale quoquo modo crescen' contingen' ac annuatim renovan'*, or the like, according to his case. [m] But neither assise nor any *præcipe* did lye of them as of tythes or any other ecclesiasticall duty at the common law; for the assise brought of the tenth part of all manner of corne growing in an hundred acres of land, after the tythes of the parson taken, was a lay profit *apprender*, and no ecclesiasticall duty.

But tythes or other ecclesiasticall duties, that came to the crowne by the statutes [n] of 27. H. 8. 31. H. 8. 37. H. 8. and 1. E. 6. are by those statutes and this of 32. H. 8. and of 1. and 2. Ph. & Maria, in the hands of laymen temporall inheritances, and shall be accounted affets; and husbands shall be tenants by the curtesie, and wives endowed of them, and shall have other incidents belonging to temporall inheritances. Only this ecclesiasticall quality they have, that the owner or possessor thereof may sue for the subtraction of the same in the ecclesiasticall court.

But by another [o] statute, remedy is given aswell to the lay person as to the ecclesiasticall person, for subtraction of all manner of prediall tythes; and he shall recover the treble value if they be not justly divided or set forth; and albeit the treble value be not expressly given to the proprietary of the tythes, yet forasmuch as he is the party grieved, and he hath the propertie and interest in the tythes, the treble value is given to him; and whensoever a statute giveth a forfeiture or penalty against him which wrongfully detaineth or dispossesseth another of his duty or interest, in that case he that hath the wrong shall have the forfeiture or penalty, and shall have an action therefore upon the statute at the common law, and the king shall not have the forfeiture in that case. And so it was [p] adjudged in the exchequer upon conference with other judges in an information for the treble value for not setting out of tythes in *Islington* in the county of *Cambridge*. (3) And if the proprietary will sue for such subtraction of tythes in the ecclesiasticall court, then he shall recover but the double value by the expresse words of the act. Wherein it is to be observed, that the act of parliament doth give a temporall remedy at the common law to parsons and vicars and other ecclesiasticall persons for an ecclesiasticall duty, and to laymen proprietaries of tythes the like remedy; but, as it hath beene said, they have election either to sue for the treble value at the common law, or for the double value in the ecclesiasticall court, or for subtraction of tythes there also. (4)

Assise de mord'ancester. *Assisa mortis antecessoris.* [q] This writ a man may have after the decease of his immediate ancestor; as where his father, mother, brother, sister, uncle or aunt, dye seised of any lands, and an estranger abate, &c.

Assise de darreine presentment. *Assisa ultimæ presentationis*, whereof you shall read [r] plentifully in our bookes.

To these may be added *assisa utrum*, or *juris utrum* [s] which is the highest writ a parson, vicar, &c. can have for the recovering of the glebe land, &c. in right of his church. But it may be demanded, wherefore these originall writs are called by the speciall name of assises more than other originall writs; and here *Littleton* yeeldeth the reason, because that by these writs it is commanded to the sherife *quod summeat* 12, which is as much to say, as to summon a jury. So as in these cases, there is a jury returned the first day, and they are to appeare

(1) See also ant. 16. b. and 73. b.

(2) This is the number mentioned in the writ to the sheriff and also in the oath of the four knights. Booth on Real Act. 96, 97. But in Mo. 67. it is said, that sometimes fourteen have been returned. In *King v. Dryden*, being the case cited above in the margin from Cro. Cha. 511. twenty were returned by the four knights; on which it became a question, whether twelve only should have been returned, and whether the surplusage did not vitiate the whole return. But no adjudication appears in Croke's report. However in 2. Ro. Abr. 674. where the same case is shortly reported, it is mentioned, that the court held the return good, it being observed, that several precedents were cited in favour of such a return; and that it resembled the case of a common *venue*, on which it was usual to return twenty-four, though the writ is restrained to twelve.

(3) The same case is more fully stated by lord Coke in 2. Inst. 650. being part of his comment on the statute of 2. Ed. 6.

(4) Since lord Coke's time a third remedy for tithes, where they are of small value, has been given; for by the 7. & 8. W. 3. c. 6. tithes under 40s. may be recovered in a summary way before two justices of the peace; and by the 7. & 8. W. 3. c. 34. which was at first temporary, but is now made perpetual, tithes under ten pounds are made recoverable from *Quakers* in the same way. In London tithes by the 37. H. 8. c. 12. are recoverable before the lord mayor with an appeal to the lord chancellor. To these various modes of proceeding for tithes should be added the equitable remedy by bill either in chancery or the exchequer; both of which courts have long entertained suits for tithes. Formerly, however, the jurisdiction of chancery in this respect was questioned, it being so far from settled in lord Coke's time, that there are instances of controverting it even since the Restoration. 1. Freem. 303. 2. Cha. Cal. 237. But as to the exchequer, tithes are said to have been anciently cognizable there; though this is contradicted by lord chancellor Nottingham, who dates the origin of the proceeding by English bill, and consequently that court's equitable jurisdiction over tithes, from the statute of Hen. 8. erecting the court of augmentation. Hardr. 236. 1. Freem. 303. and 33. H. 8. c. 39. This equitable interference of chancery and the exchequer with tithes is generally considered as merely incidental and collateral; namely, as a consequence of their jurisdiction in account and in enforcing discovery. 3. Blackst. Com. 9th ed. 437. and the reasons of the appellant in *Whitehead and others v. Travis and others*, Dom. Proc. January 1779. But some give a broader foundation to this branch of exchequer jurisdiction; and in respect of extraparochoial tithes, which are part of the ancient inheritance of the crown, they insist, that suits for tithes must ever have fallen within the compass of the exchequer's direct and substantive jurisdiction as a court of revenue. See the case of respondent in the appeal before cited, and Hardr. 217. Perhaps it is upon this idea as well as on account of the greater frequency of suits for tithes in the exchequer, that lord Hardwicke calls that court the proper jurisdiction for them. 3. Atk. 247. Yet I confess, it seems to me, that the antiquity of the exchequer jurisdiction in the particular case of extraparochoial tithes is no proof of a jurisdiction as to tithes in general. See further, as to the jurisdiction of chancery and exchequer over tithes, Rayner's Cases at large, Introd. xiv. and Vin. Abr. tit. *dismers*.

* Mag. Chart. ca. 12. And W.
2. ca. 25.

appeare as soone as the defendant. And because by these writs a jury is to be returned, the law calleth them assises, *ab effectu*; because an assise (which in this sense signifieth a jury) is to be returned. But beside the signification of the writ * of assise, whereof *Littleton* here speaketh, it signifieth the whole proceeding upon the writ.

In other originall writs regularly no jury is to be returned before the appearance of the parties and an issue joyned between them; and therefore these other originalls are not called assises.

[r] 19. H. 3. Juris utrum 16.
39. E. 3. 1. 7. 42. E. 3. 38. 29.
E. 3. 7. Regist. orig. 189. 33.
E. 1. 5. R. 2. ca. 2. Vid. 8. Co.
le Princes case.

Pur un ordinance. Here *assisa* signifieth an ordinance, &c. Ordinance, *ordinatio*, is derived of the verbe *ordinare*, to ordaine or set in order. And note, an act [r] of parliament (as *Littleton* here proveth) is an ordinance; for it sets downe orders, which are to bee kept as lawes: and so is *ordinatio forestæ*, *ordinatio de inquisitionibus*, and *ordinatio contra servientes*, and other statutes many times called ordinances; and it is said almost in every act of parliament, 'Be it therefore ordained, &c. by authority of this parliament, or the like.' But *à converso*, every ordinance is not a statute, as that of 8. H. 6. cap. 29. (1) for every statute must be made by the king, with the assents of the lords and commons; and if it appeare by the act, that it was made by two of them onely, it is no statute. (2)

[s] Mir. ca. 1. sect. 13. & ca.
4. de Articles de Eirc. Bract.
li. 3. fo. 136.
[t] Stanf. fo. 118. Mir. ca. 2.
sect. 15. Hoveden 313. Regist.
orig. 279.
[u] Flet. li. 1. ca. 17.

The example put by *Littleton* is *assisa panis & cervisie*. [s] This ordinance was made at a parliament holden anno 51. H. 3. and the like ordinance was made, entituled *assisa cervisie*, which you may see in old *Magna Charta*, fol. 57. b. [t] And so *assisa de Clarendon*, which was in 10 H. 2. and *assisa forestæ* ordained in anno 34. E. 1. and such like. And apply an ordinance of parliament antiquity hath called an assise, for that an act of parliament doth ordaine such a certaine order, as nothing can be done more or lesse by right. [u] And *Fleta* saith, *et habet rex in potestate sua ut leges & consuetudines & assisas in regno suo provisat & approbatas & juratas*, &c. where assises are taken for statutes, which are the effects of the sessions of parliament.

De ponderibus & mensuris, of weights and measures, is a most necessary learning to bee knowne, and daily in use, but it belongeth not to this treatise. In some other (if God so please) somewhat shall be said of them. (3)

Sect. 235.

ET le tenant attorna.

Here it appeareth, that an attornament (that is, an agreement to the grant) is no feisin of the rent.

Il ne ad ascun remedie, &c. which is as much to say, as he hath not any remedy either at the common law, or in any court of equity, which is worthy of observation.

See more of this in the chapter
of attornament sect. 565.
(4. Co. 10. Poll. 314. b. 315. a.)

Voile doner al grantee un denier, ou un maile, &c. en nosme de feisin de rent, &c. Here it is to be observed, that payment of any money in name of feisin of the rent, before any rent become due, is a good feisin of the rent to have an assise when it is due; and that, which is given in the name of feisin of the rent, worketh his

ITEM si soit seignior & tenant, & le seignior granta le rent de son tenant per son fait a un autre, s'avant a luy les services, & le tenant attorna, ceo est un rent secke, come est dit adevant. Mes si le rent a luy soit denie al prochain jour de payment, il ny ad ascun remedie; pur ceo qu'il n'avoit de ceo ascun possession. Mes si le tenant, quant il attorna al grantee, ou apres, voile doner al grantee un denier, ou un maile, &c. en

ALSO if there bee lord and tenant and the lord granteth the rent of his tenant by deed to another, saving to him the other services, and the tenant attorneth, that is a rent secke, as it is aforesaid. But if the rent be denied him at the next day of payment, hee hath no remedie; because that he had not thereof any possession. But if the tenant when he attorneth to the grantee, or afterwards, will give a penie or a halfe-penie to the grantee in *nosme*

(1) In Dy. 144. b. the reporter questions this same statute or ordinance, and on the same ground as is expressed in the prince's case cited by lord Coke; namely, that the king and the lords are named without the commons. But the editor of the last edition of Dyer gives a note tending to obviate the objection thus taken. The 8. H. 6. c. 29. is also supported as a statute by Mr. Serjeant Hawkins and Mr. Ruffhead in the prefaces to their respective editions of the statutes at large. The latter of these urges two strong arguments in favour of the 8. H. 6. c. 29. exclusive of the general argument for presuming the assent of the commons, of which in the next note. According to the first the roll containing the 8. H. 6. has a general preface, which mentions the assent of the commons in terms referable to all the chapters of that year. The second is, that the 22. H. 8. c. 10. expressly refers to the 8. H. 6. c. 29. as a statute, and therefore that the latter has been legislatively recognized.

(2) Acc. 4. H. 7. 18. a. Mo. 824. and the prince's case 8. Co. 20. a. In 4. Inst. 25. lord Coke also describes a statute as having the consent of king lords and commons, and an ordinance as made by only one or two of them.—But Mr. Prynne is very angry with lord Coke for thus distinguishing between an ordinance and a statute. He first attacked the difference in his *Irenarches Redivivus*; and there he is very copious in his arguments and instances against it. But Mr. Prynne did not rest here; for he continued the subject in various subsequent publications; namely, in his preface and index to what is called Cotton's Abridgement of the Records, and in his Animadversions on the 4th Institute. See the latter book p. 13. But in all these works, particularly his *Irenarches Redivivus*, he appears to me to labour the point in a manner, which indicates a very considerable misapprehension of lord Coke. It is manifest from his lordship's words here, that he did not mean to deny, that the term of ordinance might not be or was not frequently applied to statutes; for he here adduces instances of such an application. His chief intent was to guard against universally and indiscriminately so considering all ordinances in parliament. But Mr. Prynne not connecting what is here said by lord Coke with his words in the 4th Institute, but looking to the latter only, tediously and provokingly argues, as if lord Coke had denied, that an ordinance could be or was in any case a statute. Not content with fighting this imaginary proposition, Mr. Prynne runs into the contrary extreme of asserting, that acts of parliament and ordinances are universally and invariably the same. Thus the true questions arising on the subject were in great measure lost sight of, or at least were so obscured by being complicated with foreign, and needless discussion, as not easily to strike the reader. The real topics for debate with lord Coke, and those which should have been pointedly attended to, were, first, whether the term of ordinance was ever in fact applied to a provision made during the time of parliament by only one or two of the three branches of the legislature; and secondly, and principally, whether naming only one or two parts of the legislature doth exclude the

nosme de seisin de le rent, donques si apres a le procheine jour de payment le rent a luy soit denie, il avera assise de novel disseisin. Et issint est lou home grant a per son fait un annual rent issuant hors de sa terre a un auter, &c. si le grantor a donques ou apres paya al grantee un denier, ou un maile, en nosme de seisin de le rent, donques, si apres al procheine jour de payment le rent soit denie, le grantee poet aver assise, ou auterment nemy, &c.

name of seisin of rent, then if after at the next day of payment the rent be denied him, hee shall have an assise of novel disseisin. And so it is if a man grant by his deed a yearly rent issuing out of his land, to another, &c. if the graunter then after pay to the grauntee a penie, or an halfe-pennie, in name of seisin of the rent, then, if after the next day of payment the rent be denied, the grauntee may have an assise, or else not, &c.

effect to give seisin, and yet is no part of the rent, nor shall be abated out of the rent: but you shall read more hereof hereafter, sect. 565.

Un denier, ou un maile, &c. Here by this (&c.) is implied, that so it is of the gift of a sheepe, or an ox, or a ring, or a paire of gloves, or a pound of pepper, or of any valuable thing.

Issint si home grant per son fait un annual rent issuant hors de son terre a un auter, &c. By this (&c.) is implied, that the grant and deliverie of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintaine an assise or any other reall action, but there must be an actuall seisin.

Sect. 236.

ITEM de rent secke home poet aver assise de mort d'ancester, ou brise de aiel ou de cosinage, & tous auters manners d'actions reals, come la case gist, sicome il poet aver d'ascun autre rent.

ALSO of rent secke a man may have an assise of mort d'ancester, or a writ of aiel or cosinage, and all other manner of actions realls, as the case lyeth, as hee may have of any other rent.

BRIEFE de aiel.

Breve de avo. This writ lieth, where the grandfather or grandmother was seised of any land in fee the day that he died, and an estranger abate, the heire shall have this writ. [w] And if the great grandfather, be-faiel, proavus, or great grandmother, be-faieles, proavia, be seised, as is aforesaid, and die, &c. the heire shall have a writ de be-faiel, proavo, or be-faieles, proavia, &c.

Bract. li. 2. fo. 67. Brit. c. 89. & c. 76. Flet. li. 5. c. 7. 8. &c. F. N. B. 221.

[w] 6. E. 3. 34. 7. E. 3. 45. Regist. 226. F. N. B. 221. a. b. Britton. ca. 76.

Briefe de cosinage. Breve de consanguinitate. [a] This writ lieth, where the great grandfather's father, tritavus (id est) tertius avus, or abavus, (id est) avus avi was seised as is aforesaid, or where grandfather's or grandmother's mother, &c. ut supr. And so it is of the seisin of the brother of the grandfather's grandfather, &c. (1)

[a] Bract. lib. 2. fo. 67. Brit. c. 89. & c. 76. Flet. l. 5. ca. 7. 8. F. N. B. 221.

Rent secke. And so it is of a rent charge to all respects.

Et tous auters manners d'actions reals. Hereupon some have gathered, that a man shall have a writ of right of a rent secke, or of a rent charge, albeit they be against common right. But that, which hath been said by Littleton of an assise of mort d'ancester, a writ of aiel, cosinage, and other actions realls, is to be understood after seisin had by some of the ancestors of the demandant; for without an actuall seisin, or seisin in deed, none of these are maintainable.

15. E. 2. Hors de son fee 27. 3. E. 3. 35. 4. E. 3. droit 31. F. N. B. 6. 14. E. 4. 5. Diversity des Courts 117. 33. E. 3. Judgm. 252.

See.

(1) See the table for the degrees of consanguinity placed before fol. 18.

the presumption of the third's having assented. As to the former of these questions, it is rather verbal; and therefore I will here only observe upon it, that using the word *ordinance* in the manner stated by lord Coke seems well enough to answer the purpose of discrimination; that the word may have been frequently so applied in antient times notwithstanding the numerous examples of a contrary application so industriously collected by Mr. Prynne; that lord chief justice Crew partly adopts lord Coke's idea; that Mr. Prynne himself in his later writings, though he still denies lord Coke's distinction, brings forward and acknowledges precedents, which tend in some degree to affirm it; and that calling the acts of the parliament in the reign of Charles I. without the royal assent to them *ordinances* seems to have originated from lord Coke's difference between an ordinance and a complete statute. See W. Jo. 103. Prynne's Index to Cott. Abridgm. of Rec. title *ordinances*, and his Animadv. on 4. Inst. 13. As to the second question, besides what may be found in Mr. Prynne's pieces, it has been distinctly considered by Mr. Serjeant Hawkins and Mr. Ruffhead, both of whom, in the prefaces to their several editions of the statutes, anxiously oppose lord Coke's idea of not presuming the assent of lords or commons, where the record names one but omits the other. The general purport of the reasons urged by the former is, the various irregular and sometimes inexplicit penning of the more ancient statutes, the allowed force of several statutes in which only the king is named, and the long reception of others which do mention the king and lords without the commons. The latter editor pursues the like topics more at large, but, as it seems to me, in terms less guarded; some passages of his preface being such, as may encourage a hasty and unlearned reader to fall into the unwarrantable supposition, that the right of assent in the commons is disputable even as late as the reign of Richard the second, rather than induce him to presume the fact of their assent's having been given. See further on this subject, and for the various sense of the word *ordinance*, 2. Whitelocke on the Writ of Parliament, Elsyng on Parl. last ed. 26. and Barringt. on Ant. Stat. 4th ed. 46.

(3) Accordingly lord Coke discourses a little on these subjects in two other works. See 2. Inst. 41. and 4. Inst. 273.

Sect. 237.

(Cen. Jan. 485. 2. Ro. Abr. 277. 456. 457. Hob. 180. Dy. 231. Cro. Cha. 109. F. N. B. 101. c.)

18. F. 3. 3. 44. E. 3. 20. b. 20. H. 7. 1. a. 21. H. 7. 40. a. F. N. B. 102. b. 6. H. 6. Distress 9. 4. E. 2. Aff. 43. 8. E. 1. ibid. 416. W. 2. ca. 6. 12. H. 7. Ketway 20. (Post. 323. a.)

[p] 6. R. 2. Rescous 10. 40. E. 3. 33. 31. E. 3. Rescous 17. 22. H. 6. 2. b. 6. E. 4. 11. b. 7. E. 4. 20. 5. E. 4. 8. 34. H. 6. 47. F. N. B. 102. E. 2. H. 4. 21. 16. 4. E. 6. Distress Br. 24. 39. E. 3. 35. 39. H. 6. 7. 4. Co. 11. Bevil's case. 8. H. 4. 1. (Ant. 47. b. 9. Co. 23.)

7. E. 4. 24. (5. Co. 76.)

17. E. 3. 43. Vid. tit. Rescous 14.

Rescous. *Rescussus* is here described by *Littleton*. It is an ancient French word coming from *rescourer*, (*id est*) *recuperare*, that is, to take from, to rescue or recover. *Rescous* is a taking away and setting at liberty against law a distresse taken, or a person arrested by the proces or course of law. And all is one, as to the point of the disseisin, to rescue the distresse after it is taken, and before hand to resist and withstand the taking of it; but yet it is no rescous, untill it be distreyned. And therefore you may make fixe disseisins of a rent service; rescous of a distresse, resistance to distreyn, replevin, (3) inclosure, counterpleading of the title, and vouching of a record and failing. If the tenant rescue the distresse, and after is disseised of the tenancie, yet the assise lieth against him for the disseisin done of the rent by the rescous.

Pur son rent arere.

Here *Littleton* decideth an ancient question in our bookes, [p] viz. that the rent must be behind, or else the tenant may make rescous: for if no rent be behind when the distresse is taken, how can the rescous amount to a disseisin of the rent when none is due? And so it is, if the tenant resist the lord to distreine, when there is no rent behind, this can be no disseisin of the rent for the cause above sayd, and this (as it appeareth by *Littleton*) holdeth as well in case of a rent service between lord and tenant, as in case of a rent charge, &c. And so I heard sir *Christopher Wray* chief justice say, that he had adjudged it. And that which the tenant may do when there is no rent behind, may a stranger doe, if his beasts be distrained. If the tenant tender the rent to the lord when he is to take the distresse, if notwithstanding the lord will distreyn, the tenant may make rescous. (4) If the rent of the lord be behind, and the lord distreine the cattell of the tenant in the high way within his fee, the tenant may make rescous,

ITEM sont trois causes de disseisin de rent service, scil. rescous, replevin, & enclosure. Rescous est, quaut le seignior en la terre tenus de luy distreine pour son rent arere, si le distres de luy soit rescous, ou si le seignior vient sur la terre, & voile distreyn, & le tenant ou auter home ne luy voile suffer, &c. Replevin est, quant le seignior ad distreine, et replevin soit fait de le distresse per brieve ou per plaint. Enclosure est, si les terres ou les tenements sont issint encloses, (1), que le seignior ne poyt vener deins les terres ou tenements pur distreyn. Et la cause, pur que tiels choses issint faits sont disseisins al seignior, est, pur ceo que per tiels choses le seignior est disturbe de le mean per que il doit avoir & vener a son rent, scil. de le distresse. (2)

ALSO there be three causes of disseisin of rent service, that is to say, rescous, replevin, and enclosure. Rescous is, when the lord distraineth in the land holden of him for his rent behind, if the distresse be rescued from him, or the lord come upon the land, and will distreine, and the tenant or another man wil not suffer him, &c. Replevin is, when the lord hath distrained, and replevin is made of the distress by writ or by plaint. Enclosure is, if the lands and tenements bee so enclosed, that the lord may not come within the lands and tenements for to distrein. And the cause, why such things so done be disseisins made to the lord, is for this, that by such things the lord is disturbed of the meane by which hee ought to have come to his rent, scil. of the distresse.

(1) *Encloses* not in L. & M. but in Roh. P. & Red.

(2) *De le distresse* not in L. & M. Roh. or P.

(3) In a Coke upon *Littleton* I have with MSS. notes, it is objected to considering replevin here as a disseisin, that bringing a replevin is a course of law, and that neither an express denial of a rent-service, nor keeping the land without any thing distrainable by law upon it, amounts to a disseisin. Yet, the annotator allows, that there is an ancient pleading in assise to warrant the doctrine, the material words of which he gives at length.

(4) See several authorities accordingly cited in the case of the six carpenters 8. Co. 146. b. & 147. a. There too lord Coke states the diversities in point of effect, between tender on the land before distress, tender after distress and before inclosure, and tender after inclosure. See also Hob. 207.

rescous, for that it is defended by law to distreine in the (1) high way. And by the same reason if the lord will distreine *averia caruea*, where there is a sufficient distresse to be taken (2) besides, or if the lord distrayne any thing that is not distreynable, either by the common law, or by any statute, the tenant may make rescous.

Note, there is a rescous in deed and a rescous in law. Of a rescous in deed somewhat (Ant. 47. b. F. N. B. 102. C.) hath already been spoken. A rescous in law is, when a man hath taken a distresse, and the cattle distreyned as he is driving of them to the pound goe into the house of the owner, if he that tooke the distresse demand them of the owner, and he deliver them not, this is a rescous in law, and so of the like.

And every word of *Littleton* is materiall, for he saith;

En la terre tenus de luy. And therefore if the lord distreine out of his fee in lands not holden of him, the tenant may make rescous, unless it bee in some speciall cases.

As if the lord come to distreine cattle which he seeth then within his fee, and the tenant or any other to prevent the lord to distreine, drive the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distreine the cattle, and the tenant cannot make rescous, albeit the place wherein the distresse is taken is out of his fee, for now in judgement of law the distresse is taken within his fee, and so shall the writ of rescous suppose.

But if the lord coming to distreine had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves after the view goe out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distresse, then cannot the lord distreine them out of his fee, and if he doth the tenant may make rescous.

If a man come to distreine for *damage feasant*, and see the beasts in his soyle, and the owner chase them out of purpose before the distresse taken, the owner of the soyle cannot distreine them, and if he doth, the owner of the cattle may rescue them; for the beasts must be damage feasant at the time of the distresse; and so note a diversitie.

There is a diversitie [a] betweene a warrant of record and a warrant or an authoritie in law; for if a *capias* be awarded to the sherife to arrest a man for felony, albeit the party be innocent, yet cannot he make rescous. But if a sherife will, by authoritie which the law giveth him, arrest any man for felony which is not guiltie, he may rescue himselfe. (3)

Replevin [b] Is derived of *replegiare* to redeliver to the owner upon pledges or suretie.

[c] Also to counterplead the plaintife in an assise, by which he is delayed, maketh him that pleadeth it a disseisor. Otherwise it is, if he had pleaded *nul tort*, &c.

Encloser is here also described, and need no other explication; for the lord cannot [d] breake open the gates, or breake down the inclosures to take a distresse, and therefore the law accounts it a disseisin. But all these are intended by *Littleton* to be disseisins after an actuall feisin had, and when the rent is behind: otherwise none of these are disseisins at all.

But wherefore should a rescous of the distresse by the party himselfe, or a replevin which is a redelivery of the distresse by the sherife by the course of law to the partie, be any disseisin of the rent service? *Littleton* doth here yeeld the true reason; because that by the rescue, and by the suing of the replevin, the lord is disturbed of the meane by the which he ought to have and come to his rent, *viz.* of the distresse.

And so it is of an incloser; for he that disturbs a man of the meane disseiseth him of the thing it selfe, [e] as the turning of the whole streame that runnes to a mill is a disseisin of the mill it selfe.

So it is if a man be disturbed to enter and manure his land, [f] this is a disseisin of the land it selfe; for *qui adimit medium dirimit finem*, and *qui obstruit aditum destruit commodum*. [g] And therefore where it is said, that a man shall not be punished for suing of writs in the king's court, be it of right or wrong, it is regularly (4) true, but it sayeth in this speciall case of the writ of replevin for the cause aforesaid. [h] But *denier* is no disseisin of a rent service without rescous or resistance.

44. E. 3. 20. 6. R. 2. Rescous
11. 11. H. 7. 4. 21. H. 7. 40.
34. H. 6. 18. 16. E. 4. 10. lib. 9.
fol. 22. in case de avowrie.
(9. Co. 22. Plowd. 37. b. 38. a.
2. Inst. 131. Post. 268. b. 1.
Ro. Abr. 671.)

16. E. 4. 10. 2. E. 2. avowrie
182. lib. 9. ubi supra.

[a] 14. H. 7. 20. tit. Justice de
peace 9. (6. Co. 54. a. 3. Inst.
221.)

[b] Brit. fol. 108. Fleta lib. 4.
cap. 1. Mirror cap. 2. sect. 15.
(Ant. 145. b.)
[c] 24. Aff. 3. 29. Aff. 52. Fleta
lib. 4. cap. 1. Britton fol. 108.

[d] 10. E. 3. 9. 49. E. 3. 14.
7. E. 3. 3. 11. H. 7. 28. 8. Aff.
18. 10. E. 4. 2.

Bract. lib. 4. fol. 161. 204.
Britton fol. 108. Fleta lib. 4.
cap. 1.

[e] 9. Aff. 19. Mirror ca. 2.
sect. 15. Brit. fol. 108. 114. 118.
141.

[f] 26. Aff. 17. 3. E. 4. 2. per
Littl. 49. E. 3. 14. b.

[g] F. N. B. 42. g. 22. E. 3. 15.
43. Aff. 40. 43. E. 3. 20. faux
judg. 10. 8. E. 4. 15. per Moyle.
2. R. 3. 19. (Hob. 205. 266.
1. Mod. 4. Cro. Eliz. 836. 1.
Sid. 463.)

[h] 3. E. 3. 75. 8. H. 6. 11.

Sect.

(1) It is so provided by the statute of Marlebridge chap. 15. But the king is excepted. See the commentary on that statute in 2. Inst. 131. Some distresses also by the subject are not within this provision, of which there are instances given with the reasons in 2. Inst. 133. and lord Hales' notes on F. N. B. 90. A.

(2) Acc. ant. 47. a. and more at large in 2. Inst. 133.

(3) But, such arrest *virtute officii* being made on a just ground of suspicion of felony, the party rescues himself at his peril; for, according to lord Hale, if in the attempt to make the rescue he is upon necessity slain, it is no felony in the officer; and on the same principle if the officer is killed it will be murder. 2. Hal. H. P. C. 85. 86. 87. 92. 93. The obvious reason is, that the law makes it a duty in the sheriff and certain other officers to arrest for felony on just suspicion; and therefore rescue from such arrest is resistance of a lawful authority. If this be so, lord Coke is here too unqualified in expression. See further on this point Post. 270. 1. Burn's Justice tit. Arrest, and Dougl. Rep. 345.

(4) Acc. Dy. 285. a. 4. Co. 146. b. 1. Bullstr. 141. But on this rule it may be asked, whether the law of England is so defective as to furnish no remedy for the injury of being harassed by vexatious and groundless suits, or, to use the language of the Roman law, no penalty to restrain the *temere litigantes*? It may be answered, that the rule is not to be understood so largely; for certainly there are various provisions, the object of which is to discourage the commencement of suits from an unjust or improper spirit of litigation. I. By the ancient law no person could prosecute a civil action without having in the first stage of it two or more persons as pledges of prosecution; and if judgment was given against the plaintiff or he deserted his suit, both he and they were liable to amercement to the king either for not prosecuting or *pro falso clamore*; and hence the clause of *si fecerit te securum in writs* summoning the defendant to answer. Mirr. c. 1. f. 3. c. 2. f. 24. Ant. 126. b. 127. a. Originally these pledges were or ought to have been real and responsible persons; and the amercement of them and their principal was an actual branch of royal revenue; the ascertainment of the sum to be paid as an amercement being sometimes by the jury impanelled to try the issue, and sometimes by a jury summoned for that special purpose by the coroner on receiving an estreat of the amercement. F. N. B. on the writ of *miserata misericordia* 75. K. Griesley's case 8. Co. 39. a. Beecher's case 8. Co. 61. a. But this guard at length lost all its vigor, and even so early as in the reign of Edward the Fourth appears to have evaporated into mere form. 18. Ed. 4. 9. b. pl. 19. However as a form it still continues; and if omitted was a ground either for a demurrer or for a writ of error, till the legislature interposed by two different statutes, the last of which has been so liberally construed as scarce to make it possible to take advantage of the non-return or non-entry of pledges in any stage of a civil suit. See 3. Bullstr. 61. and the case of Hufsey v. Moore on a penal statute *ibid.* 275. where the subject of pledges is most learnedly investigated. See also Fortesc. Rep. 330. 1. Willf. 226. 2. Willf. 142. II. As the amercement leviable on a plaintiff and his pledges belonged wholly to the king in respect of and by way of penalty for troubling his courts improperly, it became necessary to have a distinct provision in favor of defendants who were unjustly sued; and for this purpose the legislature introduced costs in their favor. The first law giving costs to a defendant is said to be the statute of Marlebridge c. 6. which gave an action to the lord where he was defrauded of wardship by his tenant's collusively enfeoffing his heir within age, but at the same time directed, that the seoffee should have his damages and costs where he was maliciously impleaded. 52. Hen. 3. c. 8. and 2. Inst. 112. This provision for one particular case was, but not till after a long interval, followed by various statutes of a general kind, under which at this day a defendant is almost universally intitled to costs where the suit terminates against the plaintiff. See 22. H. 8. c. 15. 4. Jam. 1. c. 3. 8. Eliz. c. 2. 13. Cha. 2. ft. 2. c. 2. 8. & 9. W. & M. c. 11. 4. & 5. An. c. 16. to which add Law of Nisi Pri. ed. of 1725. chap. 8. p. 328. Mr. Serjeant Sayer's Law of Costs c. 8. 9. & 10. and Mr. Crompton's Pract. of K. B. & C. P. common places, 2. ed. v. 2 p. 461. But the statutory provisions are confined to suits in the king's courts of common law. However our courts of equity supply this seeming defect by the exercise of a discretion in awarding costs to a defendant, which is constantly done

Sect. 238.

Britton ubi supra. Fleta lib. 4. cap. 1.

SONT 4 causes de disseisin de rent

charge. And you may adde a fifth, viz. resistance to distreine, counterpleading and vouching a record and taylor thereof, as hath beene said before. (1)

14. E. 4. 4. 35. H. 6. 7. 3. Aff.
8. 10. E. 3. 9. 40. E. 3. 24.
3. H. 6. 35. 3. E. 3. 75. 29. Aff.
51. 39. Aff. 4. 40. Aff. 3. 13. E.
1. Aff. 40. 3. Aff. 8. 8. H. 6.
11. 18. E. 3. Aff. 78. (Cro. Cha.
607.)

Denier. Deniall is a disseisin of a rent charge, as well as of a rent secke; albeit he may distreine for the rent charge, as well as for a rent service. *Nota*, that when bookes say that a detainer of a rent charge or secke is a disseisin, it must be intended upon a demand made. (2)

If there be two joyntenants, and the grantee of a rent charge distreine for the rent, and one of them make rescous, they are both disseisors; (3) for a distresse for the rent is a demand in law, and then the non-payment is a deniall and a disseisin; but he that made the rescous is onely the disseisor with force.

ET sont 4 causes de disseisin de rent

charge; scilicet, rescous, replevin, enclosure, & denier, car denier est un disseisin de rent charge, come est avantdit de rent secke.

AND there bee foure causes of disseisin of a rent charge; scz. rescous, replevin, inclosure, & deniall, for denyall is a disseisin of a rent charge, as is said before of a rent secke.

Sect. 239.

49. E. 3. 15. 29. Aff. 5. 36. Aff.
7. 10. E. 3. 19. 33. H. 6. 35.
35. H. 6. 7. b.

THE reason, wherefore inclosure is a disseisin of a rent secke, is, because the grantee cannot come upon the land to demand it.

ET deux sont causes de disseisin de rent secke; cestascavoir denier & enclosure.

AND there be two causes of disseisin of a rent secke, that is to say, deniall and inclosure.

Sect. 240.

[*] Fleta lib. 1. cap. 42. 49. E.
3. 14. 49. Aff. 5. 29. Aff. 49.
(3. Inst. 195.)

FORSTALLA, [*] forestellamentum, signifieth *obstruſionem vice vel impedimentum transitus &c.*

Ove force & armes.

Vi & armis.

[†] Vid. sect. 431. (Post. 257. b.)

Force, viz. in [i] the common law is most commonly taken in ill part, and taken for unlawfull violence, for *maximè paci sunt contraria vis et injuria*. And therefore Britton said well, speaking in the person of the king, *nous volons, que tous gents plus usent judgement que force.* (4) *Arma.* Armes in the common law signifieth any thing, that a man striketh or hurteth

ET il semble, que il y ad un auter cause de disseisin de tous les trois services avantdits, cestascavoir, si le seignior soit en alant a la terre tenus de luy pur distreyner pur le rent arere, & le tenant ceo oyant luy encounter, & luy forstala la voy ovesque force & armes, ou luy menace en tiel forme que il ne oſast

AND it seemeth, that there is another cause of disseisin of all the three services aforesaid; that is, if the lord is going to the land holden of him for to distreine for the rent behind, and the tenant hearing this encountreth with him, forestal-leth him the way with force and armes, or menaceth him in such forme, that

(1) Ant. 160. b.

(2) This is agreeable to Littleton's description of such a disseisin in sect. 233. See W. Jo. 414.

(3) See acc. as to attornment by one of two jointenants, sect. 566.

(4) Britt. 116. a.

as often as they think, that, from the want of equity in the plaintiff or on any other account, he ought to have costs. III. Where two or more conspire to harraſs any person by a false and malicious suit whether *criminally* or *civilly*, it is a crime punishable by indictment, or the parties injured may sue for damages by writ of conspiracy; and both of these remedies lie at common law, that part of the statute or ordinance of *articuli super chartas*, which gives remedy against conspirators by writ out of chancery, being according to both Staundford and lord Coke only an affirmance of the common law. Staundf. P. C. 172. 2. Inst. 561. 562. IV. There is also a remedy for a false and malicious prosecution, though the aggravation of a conspiracy or confederacy is wanting and the injury comes from one only; for in such a case the party prosecuted may have an action upon the case for damages. I apprehend too that such action lies, as well where the vexation is practised by a *civil* suit, as where it is carried on through the medium of a criminal process. F. N. B. 114. D. Indeed the numerous cases to be met with in the books are chiefly for criminal prosecutions. See 1. Vin. Abr. 17. to 35. and the case of Farmer v. Dalling 4. Burr. 1971. But there seems to be no reason for distinguishing between the writ of conspiracy and an action upon the case in this respect; and exclusively of other authorities which may probably be found upon a search, lord Hobart, mr. serjeant Rolle, and lord Holt, all concur in the idea, that where a *civil* suit is commenced falsely and maliciously and for the mere purpose of vexation it is actionable. See Hobart's argument in Waterer v. Freeman Hob. 205. 266. Rolle's words in Sty. 379. and Holt's argument in giving judgment in Savill v. Roberts reported in 12. Mod. 208. 1. L. Raym. and other books, and the case of an action for falsely and maliciously suing out a commission of bankruptcy in 1. Blackst. Rep. 427. However from the language of a case in Dyer and of another in lord Coke's Reports, I doubt, whether actions on the case for false and malicious prosecutions were in general allowed in the reign of Elizabeth. Dy. 285. a. 4. Co. 14. b. V. In some special cases, a plaintiff failing in his action is exposed to the direct and immediate punishment of fine and imprisonment by the court in which he sues, without the benefit of a jury to assess the fine, or the circuitry of a separate prosecution to try the malice. This is the law in certain actions which are of a high nature, where the injury of which the defendant is accused concerns life or limb, or is otherwise of an atrocious kind, as in appeals of felony or mayhem, and in attain; for in all these the plaintiff may be fined and imprisoned by the court, if he be barred or nonsuited, or if the writ abates by his own default. Beecher's case 8. Co. 60. a. It is the same, where the action, though not of so high an order, is apparently vexatious; for on this principle a plaintiff, who sues the

[m] 23. Eliz. Dier 375. (Ant. 146. b.)

26. E. 3. 64. 11. H. 4. fol. ult. Ognel's case ubi supra. & 7. Co. 39. b. Lillington's case.

(2. Sid. 29.)

(4. Co. 51.)

[o] 5. Co. 118. Edridge's case.

* 40. E. 3. 3. b. 11. H. 4. 85. 14. E. 4. 4. 20. H. 7. 1. a. 28. H. 8. Dier 24.

[p] 34. E. 1. Avowry 233. F. N. B. 122. 10. H. 6. 11. 11. H. 6. 8. Mich. 32. H. 8. Rot. 429. Leake's case. Ognel's case ubi supra. 3. E. 3. Debt 157. (3. Co. 66. Cro. Eliz. 893.) [q] W. 1. ca. 36. F. N. B. 82. 122.

[r] 26. E. 3. 64. 10. H. 6. 11. (Cro. Jam. 28.)

* 22. H. 6. 25. F. N. B. 121. (Poil. 351. b.)

[s] Hill. 17. Eliz. Rot. 457. inter Sharpe & Pole. Vide Ognel's case ubi supra.

[t] 19. E. 3. Jurisdic. 22.

distreyned; which now they may doe by force of this statute; for in that point it addeth [m] another remedy, than the common law gave. (1)

3. If a man make a lease for life or lives, or a gift in taile, reserving a rent, this is a rent service within this statute.

4. The distresse is the more plaine and certain remedy than the action of debt; for the action of debt must be brought against them that tooke the profits when the rent became behinde, or against their executors or administrators; but the distresse may be taken upon the land, be it either in the tenants owne hands or in the hands of any other that claimes by or from him, (that is by interpretation under him) by purchase, gift or descent. And these words, *claiming onely by and from him*, are to be understood claiming onely from or under him by purchase, gift, or descent, and not paramount or above him; as the lord by escheate claimeth not under the tenant by purchase, gift, or descent, but by reason of his feigniory which is a title paramount. (2)

5. If there be lord and tenant, and the rent is behinde, and the lord grant away his feigniory, and dyeth, the executors shall have no remedy for these arrerages; because the grantor himself had no remedy for them when he dyed in respect of his grant, and the statute is (in like manner as the testator might or ought to have done) *Et sic de similibus*; for the act giveth no remedy, when the testator himselfe hath dispenced with the arrerages or had no remedy when he dyed. (3)

6. If the tenant make a lease for life the remainder for life, the remainder in fee, the tenant for life payes not the rent due to the lord, the lord dyeth, the tenant for life dyeth: the executors cannot distreine upon him in remainder, because he claimes not by or from the tenant for life. And so it is of a reversion for the cause aforesaid. But if a man grant a rent charge to A. for the life of B, and letteth the lands to C. for life, the remainder to D. in fee, the rent is behinde by divers yeares, B. dyeth, and after C. dyeth: A. may distrein D. in remainder for all the arrerages, by the latter branch of the statute of 32. H. 8. And this diversity riseth upon the severall pennings of the former branch and of this later, which you may reade in the statute it selfe, and so expounded and adjudged [o] in *Edridge's case*, and the latter clause giveth the lesser estate the greater remedy.

7. For the arrerages of a *nomine pance*, and for reliefe, or for aid *pur faire fits chevalier* or *pur file marier*, this statute * giveth no remedy. For, for the arrerages of the *nomine pance*, the grantee himselfe may have an action of debt, and consequently his executors or administrators; and yet the *nomine pance* as an incident to the rent shall descend to the heire. For reliefe the lord cannot have an action of debt but distreine; but his executors by [p] the common law shall have an action of debt (4), for it is no rent but a casuall improvement of services. For the said aides, if the lord doth levy them, the sonne and the daughter respectively shall have an action of debt against the executors or administrators of the lord, and if they have nothing, then against the heire; but this is by the statute [q] of W. 1. Note, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be in money or corne, cattell, fowle, pepper, comine, victuall, spurres, gloves, or any other profit to be delivered or yeilded, and whether they be annuall or every three or four yeares, &c. or the like, are within this statute; but work dayes, or any corporall service, or the like, are not within this statute.

8. A feme sole is seised of a rent in fee, &c. which is behinde and unpaid; she taketh husband; the rent is behinde again; the wife dyeth: the husband by the common law should not have the arrerages growne due before the mariage, but for the arrerages become due during the coverture the husband might [r] have an action of debt by the common law. But now this statute * by a particular clause giveth the husband the arrerages due before mariage, and the said double remedy for the same, and that he may distreine for the arrerages growne due during the coverture. So it giveth him that which he could not have before, and further remedy for that which the common law gave him. And so it hath bene [s] adjudged.

The bishop of [t] *Norwich* had the first-fruits of all the clergy within the diocese at every avoydance; the church became void, and another parson became incumbent, who paid the bishop parcell of his first-fruits according to the taxation of the church, and for the rest he had a day given unto him to pay it; the bishop dyed; the residue was not payd, whereupon his executors brought an action of debt: and it is adjudged that no action doth lie, because it is a meere spirituall thing and no lay contract, and therefore the court had no jurisdiction to hold plea of it.

I have bene the longer in the exposition of the said statute. (5) for that it is a generall case, and doth concerne most part of the subjects of England. (6)

Finis Libri Secundi.

THE

(1) This doctrine is impugned by the court's resolution in *Turner v. Lee* Cro. Cha. 471. for according to that case the statute of H. 8. only applies, where the common law gives no remedy. To this construction also the preamble of the statute affords countenance. However in a case in Cro. Eliz. 332. it seems to have been taken for granted, that the statute did not operate thus restrictively; and in *Hoole v. Bell* 1. L. Raym. 172. it was adjudged, that the statute being remedial extends to the executors of all tenants for life, as well to those executors who previously to the statute were intitled to action of debt, as to those executors who had no remedy whatever. Ever since too this last case, I apprehend the law to have been taken accordingly. See further as to this construction, ant. 162. a. note 4.

(2) For other cases not within the statute on a like ground, see Cro. Eliz. 332. 1. Leon. 302. 2. Vern. 612. See also on the extent of this branch of the statute *Edridge's case*, 5. Co. 118.

(3) Acc. by Vaughan chief justice, in his Reports 40.

(4) Adjudged accordingly in a case in Noy 43. and Cro. Eliz. 883. See also acc. ant. 83. a. & b.

(5) In 18. Vin. Abr. 542. most of the cases on this statute since lord Coke's time will be found distributed according to the severall clauses. See also Gilbert on Action of Debt, b. 1. chap. 2. & 3.

(6) The only clause in the statute of Cha. 2. for converting military into common socage tenures, which seems to affect rents, is a proviso to preserve rents certain, and to make the reliefs on them universally the same as on the death of tenant in common socage. See 12. Cha. 2. c. 24. f. 5. and as to the difference between relief for knight's service and relief for common socage, ant. sect. 112. and 126. with the commentary thereon. But various other statutory provisions relative to rents have been made since lord Coke's time; and as these are very material to the recovery of rents, it may not be amiss here to take a general review of the chief of them, though some have been incidentally noticed before in the chapters on *tenants for years* and *tenants at will*. I. There are several statutes, which extend the remedy for arrears of rent by action of debt. By the 8. Ann. c. 14. debt is given for rents on leases for a life or lives during their continuance, which the common law denied. Ant. 47. 2. note 4. The 11. G. 2. c. 19. gives action on the case to executors of a lessor or landlord, being only tenant for his own life, where he dies before or on a rent-day, and by his death the lease determines, in which case the lessee or under tenant by the common law might have avoided paying any rent. And by the 5. G. 3. c. 17. which enables ecclesiastical persons to lease tithes and other incorporeal inheritances, debt is given for recovery of rent on such leases, Ant. 47. a. note 4. II. Other statutory provisions extend the remedy for rents by distress to cases to which it was before inapplicable, particularly to *rents seek*. Thus the 4. G. 2. c. 28. on account of the tediousness and difficulty of the remedy for rent seek and also rents of assize and chief rents, (though why these two latter were added I do not understand) enables distraining for such rents, where they have been duly answered for three years within twenty years before the first day of the then session of parliament, or *where created afterwards*, as in case of rent on a lease. So too the 4. Ann. c. 14. gives distress for arrears of rent after determination of any lease, whether for life or lives, for years or at will, but with a proviso, that the distress be within six calendar months after such

T H E
T H I R D B O O K
O F T H E
F I R S T P A R T
O F T H E
I N S T I T U T E S
O F T H E
L A W S O F E N G L A N D. (1)

Chap. I.

Of Parceners.

Sect. 241.

PARceners sont en deux maners, cest-ascavoir ; parceners solonque le course del common ley, & parceners solonque custome. Parceners solonque le course del common ley sont, l'ou bome, ou feme, seisie de certaines terres ou tenements en fee simple ou en taile, n'ad issue forsque files, et devie, et les tenements discendent a les issues (2), et les files entrent en les terres ou tenements issint

PARceners are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custome. Parceners after the course of the common law are, where a man, or woman, seised of certaine lands or tenements in fee simple or in taile, hath no issue but daughters, & dieth, & the tenements descend to the issues, and the daughters enter into the lands or tenements

OUR author having treated in his two former bookes, first of estates of lands and tenements, and in his second booke of tenures whereby the same have beene holden, now in his third booke doth teach us divers things concerning both of them, as, 1. The qualities of their estates. 2. In what cases the entry of him that right hath may bee taken away. 3. The remedies, and in what cases the same may be prevented, or avoyded. 4. How a man may bee barred of his right for ever, and in what cases the same may be prevented or avoyded.

For the first, he, having spoken of sole estates, divideth the quality of estates into individued and conditionall. Individued, into coparcenary, joyntenancy, and tenancy in common. Coparcenary, into parceners by the common

(1) In the vellum MSS. of Littleton belonging to the public library at Cambridge, there is the following argument or introduction to this third book.

"En cest tierce liver aucun chose sera dit a toy, mon fitz, de parceners, de jointenantez, de tenantez in comen, de estatez de terre et tenementz sur condition, de discentez que tollount entrez, de continuell clayme, de releifz et confirmationz, de garrantiez liniall et collaterall et de garrantiez que comensont per disseisin, de attornament, de surrenders, de discontinuance, de remitterez, de tenant per elegit, de tenant per estatut merchant, de tenant per estatut de le staple &c."

On this addition to the printed copies of Littleton, sir William Jones, who kindly favoured me with the readings from the two Cambridge manuscripts, writes this observation.—"It is very remarkable, that in this argument a chapter is promised concerning surrenders, of which Littleton has not expressly and separately treated. The word surrenders, which is abbreviated by the transcriber, seems completely to have puzzled a former owner of the manuscript. He says in the margin, *ceste parole est en autre fragment que j'ay : quere ce que il signifie*. Since then surrenders are mentioned in two manuscripts as one of the heads of the third book, it is not improbable, that the author intended to have written a distinct chapter concerning them, as he did write concerning tenants by ELEGIT and by STATUTE MERCHANT and STAPLE."—See sect. 324. where Littleton refers to a chapter on elegits.

(2) In L. & M. and in Roh. it is *filles* instead of *issues*.

such determination and during continuance of the landlord's title and possession of the tenant indebted; whereas by the common law the power of distress ceased with the tenure. III. Other statutory provisions have variously improved the remedy of distress for rents, where it is applicable; namely, by enabling the sale of the property distrained and so giving to it the effect of an execution, by making new subjects of property distrainable, by newly regulating the mode of impounding distresses, by authorizing to distrain in *any place* things fraudulently carried off the premises to evade distress, and by preventing the avoidance of the *whole* distress for a mere informality or irregularity in *part* of the process. See 2. W. & M. c. 5. 8. Ann. c. 14. 4. G. 2. c. 28. and 11. G. 2. c. 19. to which add 3. Blackst. Com. 9th ed. 6. to 15. where the effect of these statutes is admirably incorporated into his view of the law of distresses with his usual excellence of order. IV. The 8. An. c. 14. f. 1. secures to landlords to the amount of a year's rent where so much or more is in arrear, in preference to persons seizing goods on the land in lease under an execution; but this favour is granted with a proviso to prevent prejudice to the crown in recovering and seizing debts fines and forfeitures.

Vide sect. 385.

common law, and parceners by the custome; and he beginneth his third book with parceners claiming by descent, which, coming by the act of law and right of blood, is the noblest & worthiest meanes whereby lands doe fall from one to another. Conditional, into conditions expresse or in deed, and conditions in law. Conditions in deed, into gages which he divideth into *vadia mortua*, and *vadia viva*. *Vadia mortua*, so called because either money or land may be lost: and *viva*, because neither money nor land can be lost, but both preserved. Then speaketh he of descents, whereby the entry of him that right hath may be taken away. And next to that of the remedy how to prevent the same, viz. by continuall claim. Then he teacheth, how a man, having a defeasible or an imperfect estate, may perfect and establish the same by three meanes, viz. by release, by confirmation, and attournment, where that is requisite.

Having spoken of a descent, being an act in law which taketh away an entry, he doth then speake of a discontinuance, the act of the party, whereby the entry of them that right have shall be taken away. And next unto that he teacheth in what case the same may be avoided by remitter. After he had treated of descents and discontinuances, which take away entries, but barre not actions, lastly, he setteth forth the learning of warranties, (a curious and cunning kind of learning I assure you) whereby both entry, action, and right may be barred, and the remedies how they may be prevented before they fall, and in what cases they may be avoyded after they be fallen. And thus have you an account of the thirteene severall chapters of his third booke. And now his method being understood, let us heare what our author will say unto us concerning parceners.

discendus a eux, donques els sont appels parceners, & quant a files els sont (1) forsque un heire a leur ancestor. Et els sont appels parceners; pur ceo que per le briefe, que est appel briefe de participatione faciendâ, la ley eux voet cohercer, que partition serra fait entre eux. Et si sont deux files al queux les terres descendent, donque els sont appels deux parceners; et si sont trois files, donque els sont appels trois parceners; et si quater files, quater parceners; & issint ouster. (2) so descended to them, then they are called parceners, and be but one heire to their ancestor. And they are called parceners; because by the writ, which is called *breve de participatione faciendâ*, the law will constrain them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they bee called two parceners; & if there bee three daughters, they bee called three parceners; and foure daughters, four parceners; and so forth.

[a] Bract. lib. 2. fo. 66. 71. &c. & 76. &c. & lib. 5. fo. 443. Brit. fo. 58. 112. 128. 183. 184. 185. 189. 193. Flet. lib. 5. ca. 9. li. 6. ca. 47. Glan. li. 7. ca. 3. & li. 13. c. 11.

[b] Bract. li. 2. fo. 66. 76. Flet. ubi sup. Brit. ubi sup. & Statut de Hibern.

[c] Vide sect. 8. vers. fin.

[d] Fleta lib. 5. ca. 9. Fleta lib. 6. ca. 47.

Et quant a files els sont forsque un heire a leur [a] ancestor. This is false printed; for the original is, *et quant que files els sont, els sont parceners, et sont forsque un heire a leur ancestor.* (3)

Parceners. [b] *Jus descendit quasi uni hæredi propter juris unitatem, sicut sunt plures filiae, &c. Et ubi omnes simul & in solidum hæredes sunt, plures coheredes sunt quasi unum corpus, propter unitatem juris quod habent.* Whereupon it followeth, that albeit where there bee two parceners [c] they have moities in the lands descended to them, yet are they both but one heyre; and one of them is not the moiety of an heire, but both of them are but *unus hæres*.

And it is to be observed, that there is a diversity betweene a descent, which is an act of the law, and a purchase, which is an act of the party. [d] For if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony, the father dieth both daughters being alive; the one moiety shall descend to the one daughter, and the other moiety shall escheat. But if a man make a lease for life, the remainder to the right heires of A. being dead, who hath issue two daughters, whereof the one is attainted of felony, in this case some have said, that the remainder is not good for a moiety, but voyd for the whole; for that both the daughters should have bene (as *Littleton* saith) but one heire. (4)

A man

(1) See below note 3.

(2) In L. & M. and in Roh. an &c. comes in here.

(3) The words are as here corrected by lord Coke both in L. and M. and in Roh.

(4) See ant. 25. b. 26. b. and post. 196. b. 374. b. Here lord Hale introduces the following note.—*Donee in tail on condition not to discontinue. Donee has issue two daughters. One discontinues. The donor may enter. R. 26. Eliz. C. B. Sir W. Moore's case. Hal. MSS.*

A man makes a gift in taile, reserving two shillings rent to himselfe during his life, and if he die his heire within age then reserving a rent of twentie shillings to his heires for ever; he dieth having issue two daughters, the one of full age, the other within age: in this case the donee shall hold by fealtie onely, inasmuch as the one daughter as well as the other is his heire, and both of them (as *Littleton* saith) make but one heire, *ergo* his heire is not within age, neither is his heire in that case of full age. But if the reservation had been, "and if he die, his heire neither being within age, nor of full age, &c." in this case the reservation had bene good. And if it doth not begin in his next heire, it shall never begin as this case is; for that the precedencie is not performed. [e] But yet if one of them be of age, and the other within age, she shall have her age and other privileges and advantages that an heire within age shall have; and when they are demandants, for the nonage of the one the paroll shall demurre against them both (1). [f] *Sunt autem plures participes quasi unum corpus, in eo quod unum jus habent; & oportet quod corpus sit integrum, & quod in nullâ parte sit defectus.* And when the right heire doth claime by purchase, he must be (say they) a compleat right heire in judgement of law. (2) And therefore if lands be given to a man and to the heires females of his bodie, and he hath issue a son and a daughter, and dieth, the daughter shall have the land by descent; but if a remainder be limited to the heires females of the bodie of *J. S.* and he hath issue a sonne and a daughter, his daughter shall never take it by purchase, for that she is not heire female of the body of *J. S.* because he hath a sonne.

If a man give lands to another, and to the heires males of his body, upon condition, that if he die without heire female of his bodie, that then the donor shall re-enter, this condition is utterly voyd, (3) for he cannot have an heire female, so long as he hath an heire male.

And as they be but one heire, and yet severall persons; so have they one entire freehold in the land, as long as it remains undivided, in respect of any stranger's *præcipe*. [g] But betweene themselves to many purposes they have in judgement of law severall freeholds; for the one of them may infeoffe another of them of her part, and make liverie. [h] And this coparcenarie is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue, and one *præcipe* shall lie against them, for they shall never joyne as heires to severall aunccestors in any action aunccestrell, but when one right descends from one aunccestour: and then *propter unitatem juris*, though they be in severall degrees from the common aunccestor, yet shall they joyne. But the issues of severall coparceners, because severall rights descend, shall never joyne as heires to their mothers; and yet when they have recovered, a writ of partition lieth betweene them.

For example, [i] If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issues shall joyne in a *præcipe*; because one right descends from the aunccestor; and it maketh no difference, whether the common aunccestor, being out of possession, died before the daughters or after, for that in both cases they must make themselves heires to the grandfather which was last seised, and when the issues [k] have recovered they are coparceners, and one *præcipe* shall lie against them. And likewise if the issues of two coparceners, which are in by severall descents, be disseised, they shall joyne in assise. But in the same case if the two daughters had been actually seised, and had bene disseised, after their deceases the issues shall not joyne; because severall rights descended to them from severall aunccestors; and yet when they have severally recovered, they are coparceners, (4) and one *præcipe* lieth against them, and a release made by one of them to the other is good. And so note a diversitie *inter descensum in capita, & in stirpes*.

And the statute of *Gloucester* cap. 6. made anno 6 *Edw. 1.* speaketh, *si homo morge, &c.* if a man dieth: so as that statute extendeth not, but where one dieth, and hath divers heires, whereof one is sonne or daughter, brother or sister, nephew or neece, and the others be in a further degree, all their heires from henceforth shall have their recoverie by writ of mortdaucestor. And this seemeth to me to be the common law; for *Bracton*, who writ before this statute, saith, [l] *in casu cum sit assisa mortis antecessoris conjungenda cum consanguinitate, non erit postea recurrendum ad præcipe de consanguinitate, sed ad assisam mortis; quia persona, quæ propinquior est, & facit assisam, & trahit ad se personam & gradum remotiorem ut ubi potius procedat assisa quam præcipe, quia id, quod est magis remotum, non trahit ad se quod est magis junctum, sed è contrario in omni casu.* And herewith agreeth the most of our [m] bookes: and two coparceners shall have a writ of *ayel*, and by their count suppose the common aunccestor to be grandfather to the one, and great grandfather to the other. (5)

I have benee the longer herein; for that this inheritance of coparceners is the rarest kind of inheritance that is in the law.

Furthermore it is to be observed, that herein also in case of coparceners, [n] sometimes the descent is *in stirpes*, (*viz.*) to stockes or roots; and sometime *in capita*, to heads. As if a man hath issue two daughters and dyeth, this descent is *in capita*, *viz.* that every one shall inherit alike, as *Littleton* here saith. But if a man hath issue two daughters, and

[e] Temps E. 1. Age 128. 8. E. 2. Judgement 240. 30. E. 3. 7. 44. E. 3. Age 47. 26. Aff. 65. 13. E. 3. Age 51. 28. Aff. 22. 29. Aff. 25. 57. 34. H. 6. 4. Aff. 17. [f] Fleta lib. 5. ca. 9. et lib. 6. cap. 47. (1. Co. 103. 2. Ro. Abr. 416.)

[g] 10. E. 4. 17. E. 3. 46. (Mo. 60.) [h] 37. H. 6. 8. 19. H. 6. 45. (Post. 196. 2.)

Vid. sect. 313.

[i] 7. E. 3. 30. 34. 48. E. 3. 14. 24. E. 3. 13. F. N. B. 221. 35. H. 6. 23. 27. E. 3. 89. 31. H. 6. 14. b. [k] 37. H. 6. 8. 9. E. 4. 13. b. 42. E. 3. 16. 17. (8. Co. 86. Post. 196. a. 364. b.)

[l] Bracton lib. 4. 254. b. Britton fol. 181. 182. & 178. 204. Fleta lib. 5. cap. 1. et 2. & 9. in fine.

[m] 19. E. 3. tit. Joyndre in Action 31. 7. E. 3. 30. et 34. 27. E. 3. 89. 48. E. 3. 14. 24. E. 3. 13. F. N. B. 221. Register. Vide 32. E. 1. Joyndre in Action 34. 13. E. 3. ibid. 29. Temps E. 2. ib. 35. 30. E. 1. ibid. 36. 25. H. 6. 23.

[n] Bracton lib. 2. 66. Britton cap. 71. Fleta lib. 5. cap. 9. et 6. cap. 47.

(1) But in the writ *de partitione faciendâ* the younger sister shall not have her age against the elder. Post. 171. 2.

(2) In a former note I have much at length, and as I fear tediously, endeavoured to support lord Coke in this doctrine. Ant. 24. b. note 3. But since the writing of that note a case has been published, in which the court of king's bench after three arguments decided against applying the rule to a will. See *Willes* and others v. *Palmer* and others 5. Burr. 2615. In another case also, which was three times argued, the court of exchequer, as I understand, refused to apply the rule to a marriage-settlement. *Evans* on demise of *Burtonshaw* v. *Weston* determined in a special verdict in *Scaccar*. Mich. 1774. or Hill. 1775. This latter case had been previously determined in B. R. in a case reserved in an ejectment in which *mr. Burtonshaw* was defendant, and there too the case was argued three times. In both courts the judgment was against *mr. Burtonshaw*. But the question on the construction of *heirs female of the body* considered as words of purchase was only a secondary point; and whether it was debated in B. R. or not, I am not at present informed. After such authorities, it can be scarce necessary to guard the reader against incautiously adopting my private ideas.

(3) As to effect from a condition's being void, see post. 206. a. & b.

(4) See the like as to jointenants, post. 188. a.

(5) See F. N. B. 197. B.

the eldest daughter hath issue three daughters, and the youngest one daughter, all these four shall inherit; but the daughter of the youngest shall have as much as the three daughters of the eldest, *ratione stirpium*, and not *ratione capitum*, for in judgement of law every daughter hath a several stocke or root.

Also if a man hath issue two daughters, and the eldest hath issue divers sonnes and divers daughters, and the youngest hath issue divers daughters, the eldest son of the eldest daughter shall onely inherit; for this descent is not in *capita*, but all the daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest, and shall have one moiety, (*viz.*) his mother's part; so that men descending of daughters may be coparceners, as well as women, and shall joyntly implead and be impleaded, as is aforesaid.

[o] 20. E. 2. Nuper ob. 14. F. N. B. 197. 7. E. 3. 13.

Braet. lib. 2. fo. 66. 71. &c. Brit. ca. 71. Fleta l. 5. ca. 9.

[o] If there be two coparceners, and the one bring a *rationabili parte* or a *nuper obiit* against the other, the defendant claime by purchase, and disclaime in the blood, the plaintife shall have a *mortdauncester* against her as a stranger for the whole. (1)

Parceners sont en deux manners. Here *Littleton* doth divide parceners; and herewith doe agree the ancient bookes of law.

Et ils sont appels parceners, &c. Parceners, *participes, et dicuntur participes, quasi partis capaces, five partem capientes; quia res inter eas est communis ratione plurium personarum.* This tenancie in the ancient books of law is called *adequatio*, and sometime *familia hirsifcunda*, (2) an inheritance to be divided; and many times parceners are called coparceners.

[p] Regist. Orig. 76. 316. Regist. Jud. 80. Brit. ubi sup. Flet. ubi sup. Braet. ubi supra, & 5. Co. 443. b.

Breve de participatione faciendâ. This is false printed, (3) and should be *De partitione faciendâ*, (4) a writ whereby the coparceners are compelled to make partition. [p] *Item est alia actio mixta, quæ dicitur actio familiæ hirsifcundæ; & locum habet inter eos qui communem habent hereditatem, &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de proparte sororum; vel inter alios, ubi res inter partes et cohæredes dividi debeat, sicut sunt plures sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures masculos, &c.*

(Ant. 32. a. 150. 151.)

Des terres & tenements. It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made betweene them. Wherin it is to be observed, that of inheritances some be entire, and some be severall: againe, of entire, some be divisible, and some be indivisible. And here it appeareth by *Littleton*, that parceners take their appellation, because they are compelled to make partition by writ of *partitione faciendâ*; where note, that *Littleton* alloweth well to finde out the true derivation of words, as often hath bene and shall be observed.

[q] 13. E. 2. tit. Quar. Imp. 170. 17. E. 3. 38. Flet. li. 5. c. 9. Mir. ca. 2. sect. 17. [r] 44. E. 3. tit. Partic. 6. & tit. Avowrie 75. 2. H. 6. fol. 11. (Ant. 148. a.)

If a villeine descend to two coparceners, this is an entire inheritance; and albeit the villeine himself cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one weeke, &c. and the other another day or weeke, &c. And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the chapter of dower. (5) Likewise an advowson is an entire inheritance; [q] and yet in effect the same may be divided betweene coparceners, for they may divide it to present by turnes. (6)

A rent charge is entire, and against common right; [r] yet may it be divided betweene coparceners, and by act in law the tenant of the land is subject to severall distresses, and partition may be made before seisin of the rent.

Entire inheritances not divisible, we finde divers in our bookes; and some inheritances that are divisible, and yet shall not be parted or divided betweene coparceners, as hereafter shall appeare.

[s] 2. E. 2. tit. Dower 123. [t] 17. E. 2. nuper obiit 12. 16. E. 2. ibid. 11. 5. Mariae Dier 153.

[s] If a man have reasonable estovers, as housebote, heybote, &c. appendant to his freehold, they are so entire as they shall not be divided betweene coparceners. [t] So if a corodie incertaine be granted to a man and his heires, and he hath issue divers daughters, this corodie shall not be divided betweene them; but of a corodie certaine, partition may be made.

[u] 17. E. 3. 72. [w] 13. E. 2. Quare Imped. 170. Fleta lib. 5. ca. 9. [x] Mich. 24. et 25. Eliz. inter Comitum de Huntingdon et Seignior Mountjoy. (Mo. 174.)

[u] Homage and fealtie cannot be divided betweene coparceners (7). [w] So a piscarie incertaine, or a common *sauns nombre*, (8) cannot be divided betweene coparceners; for that would be a charge to the tenant of the soile.—[x] The lord *Mountjoy*, seised of the mannor of Canford in fee, did by deed indented and inrolled bargain and sell the same to *Browne* in fee, in which indenture this clause was contained. *Provided alwayes, and the said Browne did covenant and grant to and with the said lord Mountjoye, his heires, and assignes, that the lord Mountjoye, his heires and assignes, might dig for ore in the lands (which were greete waists) parcell of the said mannor, and to dig turfe also for the making of allome.* And in this case three poynts were resolved by all the judges. First, that this did amount to a grant of an interest and inheritance to the lord *Mountjoye*, to digge, &c. Secondly, that notwithstanding

(1) See post. 175. 242. a.

(2) See the verb *herisco* or *erisco* used ant. 86. a.

(3) But in L. & M. and in Roh. it is the same.

(4) *Monfieur Houard* derives this writ from the capitulars of the first French kings. 1. Hou. Littl. 318.

(5) Ant. 32. a.

(6) See an instance of a partition of an advowson between jointenants in Carth. 505.

(7) See ant. 67. b. and Dav. Rep. 61. b.

(8) Acc. as to common *sauns nombre*, ant. 149. a. See the note on this sort of common, ant. 122. a.

ding this grant *Browne* his heires and assignes might dig also, and like to the case of common *sauns number*. Thirdly, that the lord *Mountjoy* might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the lord *Mountjoy*, &c. assigne his interest in any part of the waite to one or more, for that might worke a prejudice and a surcharge to the tenant of the land; and therefore if such an incertaine inheritance descendeth to two coparceners, it cannot be divided betweene them (1).

But then it may be demanded, what shall become of these inheritances? The answer is, that it appeareth in our bookes, that regularly [y] the eldest shall have the reasonable estovers, common, pishary, corody incertaine, &c. and the rest shall have a contribution, that is, an allowance of the value in some other of the inheritance, and so of the like. But what if the common ancestor left no other inheritance to give any thing in allowance, what contribution or recompence shall the younger coparceners have? It is answered, that if the estovers or pishary or common be incertaine, then shall one coparcener have the estovers, pishary, or common, &c. for a time, and the other for the like time; as the one for one yeare, and the other for another, or more, or lesser time, whereby no prejudice can grow to the owner of the soile. Or in case of the pishary, the one may have one fish, and the other the second, &c. or one may have the first draught, and the second the second draught, &c. And if it be of a park, one may have the first beast, and the second the second, &c. And if of a mill, one to have the mill for a time, and the other the like time; or the one one toll dish, and the other the second, (2) &c. And this appeareth to be the ancient law; for it is said, [z] *Sunt alie res hereditarie, que veniunt in partitionem, que, cum dividi non possunt, conceduntur uni; ita quod alie coheredes alibi de communi hereditate habeant ad valorem, sicut sunt vicaria, piscaria, pascua; vel saltem quod partem habeant pro defectu, sicut secundum piscem, tertium vel quartum, vel secundum tractum, tertium vel quartum. Item in parvis secundam, tertiam aut quartam bestiam.*

But now let us turne our eye to inheritances of honor and dignity. And of this there is an ancient booke case, [*] in 23. H. 3. tit. partition 18. in these words: Note, if the earldome of *Chester* descend to coparceners, it shall be divided betweene them as well as other lands, and the eldest shall not have this feignory and earldome entire to herselfe, *quod nota*, adjudged *per totam curiam*. (3) By this it appeareth, that the earldome (that is, the possessions) (4) of the earldome) shall bee divided; and that where there bee more daughters than one, the eldest shall not have the dignity and power of the earle, that is, to bee a countesse. What then shall become of that dignity? The answer is [a] that in that case the king, who is the sovereigne of honour and dignity, may for the incertainty conferre the dignity upon which of the daughters he please. And this hath beene the usage since the conquest, as it is said. (6)

But if an earle that hath his dignity to him and his heires dieth, having issue one daughter, the dignity shall descend to the daughter; for there is no incertainty, but onely one daughter, and the dignity shall descend unto her and her posterity, as well as any other inheritance. And this appeareth by many precedents, and by a late judgement given in *Sampson Leonard's* case, who married with *Margaret* the only sister and heire of *Gregory Fines* lord *Dacre* of the South, and in the case of *William* lord *Ros*. (7)

But there is a difference betweene a dignity or name of nobility, and an office of honor. For if a man hold a manor of the king to be high constable of *England*, and dye having issue two daughters, the eldest daughter taketh husband, he shall execute the office (8) solely, and before marriage it shall be exercised by some sufficient deputy: and all this was resolved by all the judges of *England*, in the case of [b] the duke of *Buckingham*. But the dignity of the crowne of *England* is without all question descendible to the eldest daughter alone, and to her posterity, (10) and so hath it beene declared by act of parliament. [*] For, *regnum non est divisibile*. And so was the descent of *Troy*.

*Præterea sceptrum, Illiæ quod gesserat olim
Maxima natarum Priami.*

Virgil 1. *Æneid*.

[b] If a castle, that is used for the necessary defence of the realme, descend to two or more coparceners, this castle might be divided by chambers and roomes as other houses bee. But yet, for that it is *pro bono publico* & *pro defensione regni*, it shall not be divided; for as one saith, *propter jus gladii dividi non potest*; and another saith, [*] *pur le droit del espée que ne seffre division en aventure que la force del realme ne defaille pax taunt*. But castles of habitation for private use, that are not for the necessary defence of the realme, ought to bee parted betweene coparceners as well as other houses; and wives may thereof be endowed, as hath beene said in the chapter of dower. (11)

If there be two coparceners of certaine lands with warranty, and they make partition of

(1) This same case of the earl of *Huntingdon* and lord *Mountjoy* is reported in *Godb.* 17. 1. *And.* 307. and *Mo.* 174. Lord *Anderson* gives the opinion of the judges as it was certified in writing to the privy council; but this certificate takes no notice of the point of *indivisibility*; nor is it one of the questions stated by lord *Anderson* to have been referred to the judges. In *Mo.* 707. the same case is cited *arguendo*; and there four judges are represented to have been equally divided in opinion as to the first point mentioned by lord *Coke*. But according to *Anderson* the difference of opinion was only, whether any remedy was furnished by law for the interest reserved to lord *Mountjoy* by the proviso. As to this latter point, see 8. Co. 46. *Noy* 145.

(2) How dower is to be assigned out of indivisible inheritances, see ant. 32. a.

(3) See *Dav. Rep.* 61. b.

(4) In 2. Ro. Abr. 254. the case of 23. H. 3. relative to the earldom of *Chester* is mentioned as if the daughters might have been coparceners of the dignity itself, and not merely of the possessions of the earldom. How the earldom of *Chester* became annexed to the crown in the reign of *Hen. 3.* on the death of *John Scot* the last earl leaving three sisters his coheirs, is explained in 1. *Dugd. Bar.* 45. See further on this point of *indivisibility* *Bract.* 76. b. *Brit.* 187. *Flet.* 313. and *Dav. Rep.* 61. b.

(5) *Fitz. Abr. partition* 56.

(6) This doctrine about the abeyance of titles of honor and their being revived by the royal nomination, though our books furnish little matter on the subject, is undoubtedly law; and there are many instances of an exertion of this prerogative. One of the most remarkable took place during the present reign in the person of the late mr. *Norborn Berkley*, who in 1764 was called to the house of peers in right of the old barony of *Botetourt* after an abeyance of several centuries, and was allowed to sit according to the antiquity of that barony. See *Cas. in Dom. Proc.* for 1764. Another instance in the present reign is the case of *Mr. Francis Dashwood* late lord *Despencer*; for in 1763 he was called to the ancient barony of that name in right of his deceased mother, who was eldest sister and one of the coheirs of an earl of *Westmorland*, on whose death that barony had become in abeyance; and being so summoned he took his seat as premier baron in place of lord *Abergavenny*, who before possessed that distinction.

(7) The first of these cases was in 1596. and the second in 1616. Both are now in print, having been published from manuscripts of the time by mr. *Collins* in his claims concerning baronies, &c. See p. 24. & 162. It must not be inferred from the purpose for which lord *Coke* cites them, that the descent of a barony to a female, where in the creation it was not confined to heirs male, was controvertible. The points debated in those cases were of another kind. In *Sampson Leonard's* the question was, whether the husband can be tenant by the curtesy of a title of honour. See my observation as to that point ant. 29. b. note 1. That of lord *Ros* depended on the effect of superadding an earldom in tail male to one having a barony before descendible to heirs general, it being contended, that the former should attract the latter in point of descent so as to be inseparable whilst the earldom continues.

[c] 29. E. 3. garrantie 70. (6. Co. 12. b.)
 [d] Itin. Pickering.
 8. E. 3. Rot. 34.
 (Ant. 115. a.)

of the land, the warranty shall remayne; because they are compellable to make partition. [c] But otherwise it was of joynteners at the common law, as shall be said hereafter in his proper place.—[d] *Thomas de Eberston*, seised of the manor of *Eberston* within the forrest of *Pickering*, had kept time out of mind a woodward for keeping of the woods parcell of that manor, and had the barke of all the trees felled in the said woods by any of the forresters of that forrest as belonging to his manor (which he could not have without a prescription). (1) *Thomas* of *Eberston* infeoffed two of the said manor; betweene whom partition was made, so as one of them had the one halfe in fevralty, and the other the other halfe. (2) *Robert Wyerne* afterwards had the one halfe, and *Thomas Thurnise* the other; and they in the eyre of *Pickering* claimed to keepe a woodward within the said woods, and the barke afore-said; and the truth hereof and the usage being specially found by the forrestors verderors and regardors, *Willoughby Hungerford* and *Hanburie* justices itinerants within that forrest gave judgment as followeth. *Idco consideratum est, quod prædicti Robertus & Thomas habeant woodwardum & corticem in bosco prædicto de quercubus prædictis sibi & hæredibus suis imperpetuum. Salvo semper jure, &c.*

Sect. 242.

AUXY si home seïsie de tene-ments en fee simple ou en fee taile devy sauns issue de son corps engender, & les tenements descendent a ses soers, els sont parceners, come est avantdit. Et en mesme le maner, lou il n'ad pas soers, mes les tenements descendent a ses aunts, els sont parceners, (3) &c. Mes si home n'ad forsque une file, el ne poit estre dit parcer-ner, mes el est appelle file & beire, &c.

ALSO if a man seised of tene-ments in fee simple or in fee-taile dieth without issue of his bodie begotten, and the tene-ments descend to his sisters, they are parceners as is afore-said. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are par-ceners, &c. But if a man hath but one daughter, she shal not be called parcener, but shee is cal-led daughter and heire, &c.

OU en fee taile. This must be intended of an estate taile made to the father and to the heires of his body; for otherwise if the estate taile were made to a man and to the heires of his body, his sisters cannot inherit. And not only daughters shall be coparceners, but sisters, aunts, great aunts, &c.

File & beire, &c. Here by (&c.) is implied sister and heire, aunt and heire, great aunt and heire, and so upward.

Sect. 243.

BY this section, and the (&c.) in the end of it, it is to be understood, that there are two kind of partitions betweene coparceners; the one in deed or expresse, and the other in law or implicate. Of partitions in deed or expresse, some bee voluntary whereof *Littleton* enumerates foure manners; and one compulsory, that is, by writ of partition. (4)

ET est ascavoir, que partition enter parceners poit estre fait en divers maners. Un est, quant els agreeont de faire par-tition, & sont par-tition de les tene-ments; sicome si soy-ent deux parceners,

AND it is to bee understood, that partition may be made in divers maners. One is, when they agree to make partition, & do make partition of the tenements; as if there bee two parceners to divide between them

(Ant. 46. a.)

(1) The claim of a like privilege as appurtenant to a manor is mentioned in *Crompt. Jurisd. Co.* 192. b. See further concerning the office of woodward in *Manwood's For. Laws* by Nelson, 389.

(2) It is observable in this partition, that no provision is made in respect to the office of woodward and privilege of having the bark of felled trees, which were appurtenant to the manor. In a former place lord Coke states the partition of a manor to which an advowson was appendant, and explains what the effect is on the advowson, where from want of any particular agreement between the parties it is left to the law to regulate how the advowson shall be disposed of. *Ant.* 122. a.

(3) *Els sont parceners* not in L. & M. or Roh.

(4) The reference in the margin to fol. 46. a. is to an instance of the difference in point of effect on the lessee for years of a coparcener, between partition by writ and partition without.

(8) In a late contest about the office of great chamberlain, which arose in consequence of the late duke of Ancester's leaving two sisters his co-heiresses, one of whom was married to mr. Burrell, the then attorney general made a report in conformity to the doctrine here stated by lord Coke as to the office of high constable; and this report, of which I have a copy, contains a very learned investigation of the subject. But afterwards when the case came before the lords, the judges gave it as their opinion, that the office belongs to both sisters; that the husband of the eldest is not of right intitled to execute it; and that both sisters may execute it by deputy to be appointed by them, such deputy not being of a degree inferior to a knight, and to be approved of by the king. See *Journ. Dom. Proc.* 25. May 1781. the printed cases of the several claimants, and the *Parl. Reg.* for 1780-1, v. 4. 258 to 297.

(9) *S. C. Keilw.* 170. b. 4. *Inst.* 117.

(10) See *ant.* 15. b.

(11) *Ant.* 31. b.

a devider enter eux les tenements en deux parts, chescun part per soy en severaltie & d'egal value; et si sont 3 parceners, a devider les tenements en trois parts per soy en severaltie, &c.

the tenements in two parts, each part by it selfe in severalty and of equall value; and if there bee three parceners, to divide the tenements in three parts by it selfe in severalty, &c.

The first partition in deed (F. N. B. 167.) between coparceners, is that which Littleton here speaketh of, viz. *Quant els agreont & font partition de les tenements, &c. chescun part per soy en severalty & de egall value, &c.* If coparceners make partitions, at full age and unmarried & of *sane memorie*, of lands in fee simple, it is good & firme for ever, albeit the values be unequal; but if it be of lands entailed, or if any of the par-

cners be of *non sane memorie*, it shall bind the parties themselves, but not their issues unlesse it be equall; or if any be *covert*, it shall bind the husband, but not the wife or her heires; or if any be within age, it shall not bind the infant; as shall be said more fully hereafter (1). The second partition followeth in the next section. And here the (&c.) implyeth further, that if there be foure parceners, then foure parts, if five, five parts and so forth. It further implyeth, that all this must be in severalty; whereof, and with what limitations this is to bee understood, it hath beene declared before. Vide sect. 241.

Sect. 244.

UN autre partition est, a eslier per agreement enter eux, certaine de lour amies, de faire partition des terres ou tenements en le forme avantdit. Et en tiels cases, apres tiel partition, le eigne file prymerment esliera un des partes issint divides, que el voit aver pur sa part, & donques la second file procheine apres luy autre part, & donques la tierce soer autre part, donques le quarte autre part, &c. si issint soit que soient plusors soers, &c. si ne soit auterment agreee enter eux. Car il poit estre agreee enter eux, que un avera tiels tenements, & un autre tiels tenements, &c. sans ascun tiel primer election, &c.

ANother partition there is, viz. to choose, by agreement betweene themselves, certaine of their friends, to make partition of the lands or tenements in forme aforelaid. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth another part, &c. if so bee that there bee more sisters, &c. unlesse it bee otherwise agreed betweene them. For it may be agreed betweene them, that one shall have such tenements, and another such tenements; &c. without any primer election.

Donques le quarte autre part, &c. 31. Aff. 16.

Here the (&c.) implyeth the 5 sister, and after her the 6 and so forth.

Car il poit estre agreee enter eux, que un avera tiels tenements & un autre tiels tenements, &c.

Here by this (&c.) is implied divers rules of law proving the conclusion of Littleton in this sect. viz. *Modus & conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introducto.* But with this limitation, that these rules extend (1. Sid. 339.) not to any thing, that is against the common-wealth or common right. For *conventio privatorum non potest publico juri derogare.* (1. Sid. 193. 269. Cro. Eliz. 664.)

Sect.

(1) See post. sect. 255. to 258. inclusive. See also 173. b.

Sect. 245.

* Bract. li. 2. 77. Fleta lib. 5. ca. 9. Britton ca. 72.

ENitia pars. It is called in old bookes *æisnetia*, which is derived of the French word *eisne* for eldest, as much to say as the part of the eldest; for Bracton saith, *quod eisnetia semper est præferenda propter privilegium ætatis; sed esse, quod filia primogenita relicto nepote vel nepte in vita patris vel matris, decesserit, præferenda erit soror antenata tali nepoti vel nepti quantum ad eisnetiam, quia mortem parentum expectant.* And herewith agreeth Fleta also, *quod nota:* whereby it appeareth that *enitia pars* is personall to the eldest, and that this prerogative or privilege descendeth

ET la part, que l'eigne soer ad, est appelle en Latin enitia pars. Mes si les parceners agree-ont, que l'eigne soer ferra partition de les tenements en le forme avantdit, & si ceo el fait, donque il est dit, que l'eigne soer esliera plus darreine pur sa part, & après chescun de ses soers, &c. (1)

AND the part, which the eldest sister hath, is called in Latine *enitia pars*. But if the parceners agree, that the eldest sister shall make partition of the tenements in manner aforesaid, and if she doe this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.

[f] 45. E. 3. fines 41. 19. E. 3. quar. imp. 59. 18. E. 2. ibid. 176. 5. H. 5. 10. 38. H. 6. 9. Doct. & Stud. 116. 117. Vid. Bract. 238. 249. * 5. H. 7. 8. 34. H. 6. 40. 11. H. 4. 54. 20. E. 3. quar. imp. 63. 34. E. 3. Ibid. 198. 15. E. 3. Dar. Presentment 11. 17. E. 3. 20. 21. E. 3. 21. F. N. B. 32. (Poll. 18. b.)

not to her issue, but the next eldest sister shall have it. [f] And here is a diversity to be observed betwene this case of a partition in deed by the act of the parties, for there the privilege of election of the eldest daughter shall not descend to her issue; and where the law doth give the eldest any privilege without her act, there that privilege shall descend. As if there be divers coparceners of an advowson *, and they cannot agree to present, the law doth give the first presentment to the eldest; and this privilege shall descend to her issue; may her assignee shall have it, (2) and so shall her husband, that is tenant by the curtesie, have it also (3).

Donques il est dit l'eigne soer eslier plus darreine, &c. By this and the &c. in the end of this Section is implied, the rule of law is, *cujus est divisio, alterius est electio*. And the reason of the law is for avoyding of partiality;

(*Ipsæ etenim leges cupiunt ut jure regantur*)

which might apparently follow if the eldest might both divide and choose (4). Now followeth the third partition in deed.

Sect. 246.

UN auter partition ou allotment est, sicome soient quater parceners, & après le partition de les terres fait, chescun part del terre soit per soy solement escript en un petit escrovet, & soit couvert tout en cere en lemaner d'un petit pile, issint que nul poit veier l'escrovet, & donque soient les 4 piles de cere mis en un bonnet a garder en les maines d'un indifferent home, &

ANOTHER partition or allotment is, as if there be four parceners, and after partition of the lands be made, every part of the land by itselfe is written in a little scrowle, and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the 4 balls of waxe are put in a hat to bee kept in the hands of an indifferent man, and then the eldest daughter shall first

donques

(1) The &c. not in L. & M. or Rob.

(2) Acc. P. 18. E. *Quare Impedit* 176. Post. 186. b. 3. Co. 22. b. 2. Inst. 365. 2. Ro. Abr. 346. Millory's *Quare Impedit* 145. Three judges also held accordingly East. 23. Eliz. in *Harris & Haies v. Nichois Cro. Eliz.* 18. But Anderson chief justice doubted, whether a grantee should have the privilege. In *Keilwey* there is a case of 18 Hen. 7. in which Pro-wike chief justice is made to give it to the grantee of the eldest sister, only where it has been once exercised by herself. But he afterwards doubted his own distinction, and seemed to incline to the grantee's right generally; in consequence of which the report concludes thus: *Stude bene et quere.* Keilw. 49. Upon the whole therefore it seems, that the point is not quite settled; and to determine it properly would require a very careful examination of the numerous cases cited by lord Coke here and in the second Institute. See 7. Ann. c. 18.—I was led into this note by a reference to the case from *Cro. Eliz.* in a Coke upon Littleton of the late Mr. Beverlham Filmer, and by an opinion of the same very learned gentleman, in which he represents the point to be doubtful, and therefore dissuaded accepting the title to the next presentation of an advowson belonging to three sons as heirs in gavel-kind, unless they would all join in the grant. The eminence of Mr. Filmer as a barrister, more especially in the conveyancing line, will, I presume, fully justify me for thus introducing his name. The doubts of a lawyer so profound and correct, as he was universally allowed to be, will ever claim high respect; and it is with peculiar pleasure, that I take this opportunity of expressing the veneration with which I hold him in my remembrance.

(3) Agreed by lord Anderson in the case from *Cro. Eliz.* cited in the preceding note.

(4) See Hob. 107. where the doctrine is cited with approbation.

donques leigne file primerment mettra sa maine en le bonnet, quel prendra un pile de cere ovesque le scrovet deins mesme le pile pur sa part, & donques le second soer mettra sa maine en le bonnet & prendra un auter, le tierce soer le 3 pile, & le 4 soer le 4 pile, &c. & en ceo cas covient chescun de eux luy tener a sa chance & allotment.

put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, & the 4 sister the 4 ball, &c. and in this case every one of them ought to stand to their chance and allotment.

Allotment. Of this partition by lots ancient authors * write, that in that case coparceners *fortunam faciunt judicem*. And Littleton here tearmeth it chance; for in the end of this section he saith, that in this case every of them ought to hold her selfe to her chance; and of this kinde of division you shall read in holy scripture, where it is sayd, *dedi vobis possessionem quam dividetis sorte*.

The &c. in the end of this section implyeth, that if there be more coparceners there must be more balls according to the number of the parceners.

* Fleta lib. 5. ca. 9. Brañton lib. 2. 75. Britton cap. 72.

Vide Numbers ca. 26. verse 54. 55. & ca. 33. ver. 54. of division by lots.

Sect. 247.

ITEM un auter partition il y ad. Sicome sont quater parceners, & ils ne voilent agreer a partition d'estre fait entre eux, donque l'un poit aver brief de partitione faciendâ envers les auters trois; ou deux d'eux poient aver brief de partitione faciendâ envers les auters deux, ou trois de eux poient aver brief de partitione faciendâ envers le quart, à leur election.

ALSO there is another partition. As if there bee foure parceners, and they will not agree to a partition to bee made betweene them, then the one may have a writ of *partitione faciendâ* against the other three, or two of them may have a writ of *partitione faciendâ* against the other two, or three of them may have a writ of *partitione faciendâ* against the fourth, at their election.

HERE followeth the fourth partition in deed. Littleton having spoken of voluntary partitions, or partitions by consent; now he speakes of a partition by the compulsory means of law where no partition can be had by consent. Now of what inheritance partition may be made by the writ of *partitione faciendâ* may partly appeare by that which hath beene sayd. Moreover it is to bee observed, that the words of the writ *de partitione faciendâ* be, * *quod cum eadem A & B insimul & pro indiviso teneant tres acras terræ cum pertinentiis*, &c. And note that this word (*tenet*) (1) in a writ doth alwayes imply a tenant of a freehold. And therefore [g] if one coparcener maketh a lease for yeares, yet a writ of partition doth lie (2). But if one or both make a lease for life, a writ

* 3 E. 3. 47. 48.

[g] 21. E. 3. 57. F. N. B. 62. g. 28. H. 6. 2. 11. H. 4. 3. 4. H. 7. 10. b. (Post. 176. b.)

of partition doth not lye betweene them; because *non insimul & pro indiviso tenent*, they doe not hold the freehold together, and the writ of partition must be against the tenant of the freehold. [b] If one coparcener disseise another, during this disseisin a writ of partition doth not lie betweene them; for that *non tenent insimul & pro indiviso*.

[h] 4. H. 7. 9. 11. Aff. 23 (Post. 167. b. 187. a.)

But there be other partitions in deed then here have beene mentioned. [i] For a partition made between two coparceners, that the one shall have and occupy the land from *Easter* untill the first of August only in severalty by himselfe, and that the other shall have and occupy the land from the first of August untill the feast of *Easter* yearly to them and their heires, this is a good partition (3). Also if two coparceners have two mannors by descent, and

[i] Temps E. 1. partition 21. F. N. B. 62. I. (7. Co. 5.)

(1) See the various applications of the verb *tenet* explained ant. fol. 1. a. & b.

(2) So too execution of dower is not prevented by a lease for years subsisting at the husband's death. Ant. 32. a. How lessee for years is affected by such a partition, is before explained by lord Coke in fol. 46. 2.

(3) See the case of a *moveable* fee simple, stated ant. fol. 4. a.

and they make partition, that the one shall have the one manor for one yeare, and the other the other manor for this yeare, and so *alternis vicibus* to them and their heires, this is a good partition. The same law is, if the partition be made in forme aforesaid, for two or more yeares, and each coparcener have an estate of inheritance, and no chattell, albeit either of them *alternis vicibus* have the occupation but for a certaine terme of yeares.

Of partitions in law, some be by act in law without judgement, and some be by judgement, and not in a writ *de partitione faciendâ*. And of these in order.

[k] 36. H. 6. 7. (Post. 192. a.)

[k] If there be lord, three coparceners mesnes, and tenant, and one coparcener purchase the tenancy, this is not onely a partition of the mesnalty, being extinct for a third part, but a division of the feignory paramount, for now he must make severall avowries (1).

[l] 37. H. 6. 8. 43. E. 3. 1.

[l] If one coparcener make a feoffment in fee of her part, this is a severance of the coparcenarie, and severall writs of *præcipe* shall lie against the other coparcener and the feoffee (2).

[m] 17. E. 3. 14. 15.

[m] If two coparceners be, and each of them taketh husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law.

[n] 12. E. 3. Judgm. 162. 7. Aff. 10. 7. E. 3. 49. 10. Aff. 17. 12. Aff. 5. 17. 10. E. 3. 40. 43. 28. Aff. 35. 23. Aff. 18. 20. E. 3. Aff. 62. 3. E. 3. 48. b. 19. H. 6. 45. 7. H. 6. 4. 3. E. 4. 10. * Braet. lib. 4. fo. 216. b.

[o] 3. E. 3. 48. 21. R. 2. tit. Nuper ob. 22. 4. H. 7. 10. 30. E. 1. Nup. ob. 18. F. N. B. 9. b.

* Britton fol. 112. a.

[p] 6. Co. 12. & 13. Morrice's case accorde. (Post. 187. a.)

[n] If two coparceners be, and one disseise the other, and the disseisee bringeth an assise, and recover, it hath beene said, that she shall have judgement to hold her moiety in severalty. And this seemeth (say they) verie ancient, and thereupon vouch *Braetôn*, * *si res fuerit communis locum habere poterit communi dividendo judicium*. And [o] so (say they) if the one coparcener recover against another in a *nuper obiit*, or a *rationabili parte*, the judgement shall be, that the demandant shall recover and hold in severalty. But *Britton* is to the contrary; for he saith, * *et si ascun des parcerers soit enget ou disturbe de la seisin per ses auters parcerers, un, ou plusors, al disseisee viendra assise per severall pleint sur les parcerers & recovra, mes nemy a tener en severaltie, mes en common solongue cco que avant le jyst, &c.* [p] And this seemeth reasonable; for he must have his judgement according to his plaint, and that was of a moiety, and not of any thing in severaltie, and the sherife cannot have any warrant to make any partition in severalty or by metes and bounds.

Sect. 248.

Braet. fo. 66. &c. Brit. 71. &c. Brit. ca. 72. Fleta lib. 5. ca. 9.

NOTE the first judgement in a writ of partition, whereof *Littleton* here speaketh, is, *quod partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis*, after which judgement. By this &c. *viz. tenements*, &c. is implied, that a writ shall be awarded to the sherife, *quod assumptis tecum 12 liberis & legalibus hominibus de vicineto tuo, per quos rei veritas melius sciri poterit, in propria personâ tuâ accedas ad tenementa prædicta cum pertinentiis, & ibidem per eorum sacramentum, in præsentia partium (3) prædictarum per te præmuniendarum si interesse voluerint, prædicta tenementa cum pertinentiis per sacramentum bonorum & legalium hominum prædictorum, habito respectu ad verum valorem earundem, in duas partes aequales partiri & dividi, & unam partem partium illarum, &c.*

This last &c. in this section is evident.

Judgement. Judi-

ET quant judgement sera done sur tiel brief, le judgement sera tiel; que partition sera fait enter les parties, & que le vicount en son proper person alera a les terres & tenements, &c. & que il per le serement de xii loyalx homes de son bayliwicke &c. fera partition enter les parties, & que l'un part de mesmes les terres & tenements soyent assignes al plaintiff ou a l'un des plaintiffs, et un auter part a un auter parcener, &c. nient fera-

AND when judgement shall be given upon this writ, the judgement shall be thus; that partition shall be made betweene the parties, and that the sherife in his proper person shall go to the lands and tenements, &c. & that he by the oath of 12 lawful men of his bailiwicke, &c. shall make partition between the parties, & that one part of the lands & tenements shall be assigned to the plaintiff or to one of the plaintiffs, & another part to another parcener, &c. not making mention in

sum

Ockam ca. quid sit liber judicarius. (4) 40. E. 3. 45. 9. Aff. 2. 8. Aff. 35. 49. E. 3. 2. Regist. F. N. B. 16.

(1) But according to Bro. Nouv. Caf. 108. the lord should have notice of the partition.

(2) Acc. ant. 67. b. post. 175. a. 195. a. But this sort of partition is not a partition in the sense in which *Littleton* writes of partitions, nor in the common sense of the word. He means a division of the land itself; whereas what lord Coke here calls a partition is a mere severance of the unity of title, which operates, as *Littleton* afterwards states, by making a tenancy in common. See sect. 309.

(3) These words enjoining the partition to be made *in the presence of the parties* shew, that the proceeding before the sheriff is quite open. So too as it seems should be the execution of a commission of partition issued by chancery as a court of equity, such commission being in nature of a writ at common law for the like purpose. But I understand, that there have been instances of treating the commission of partition as a close proceeding, and that on that idea it has been sometimes the practice to annex an oath of secrecy to the commission. This practice, I presume, has grown from not attending to the difference between commissions to divide lands and commissions to examine witnesses merely. In the latter sort of commission an oath to keep the depositions secret is expressly required by an order of chancery of the 9th of February 1721; and exclusively of the order the proceeding implies secrecy, the depositions being ever kept close under seal, till leave is obtained to divulge them by the passing of publication. But neither the language nor spirit of this order is applicable to commissions of partition, which like the writ of partition ought to be openly executed.

(4) See Dialog. de Scaccar. lib. 1. cap. 16. which has the same title.

sant mention en le judgement de l'eigne soer pluie de puisne. the judgement of the eldest sister more than of the youngest.

And thereupon antiquitie called that excellent booke in the exchequer, *Domesday, Dies iudicii*. Sicut enim distributi & terribilis examinis illa novissima sententia nulla tergiversationis arte valet eludi, &c. sic sententia ejusdem libri inficiari non potest, vel impune declinari; ob hoc nos eundem librum judicarium nominamus, &c. quod ab eo sicut a prædicto iudicio non licet ullâ ratione discedere. By Littleton it appeareth, that the formes of judgements, pleas, and other legall proceedings, doe conduce much to the right understanding of the law and of the reason thereof; as here Littleton rightly collecteth upon the forme of the judgement, that the sherife shall deliver to them such parts as he thinkes good, and that the eldest coparcener shall have no election when partition is made by the sherife. And it is to bee observed, that there bee two judgements in a writ of partition. Of the former Littleton speaketh in this place. And when partition is made by the oath of twelve men, and assignement and allotment thereof, and so returned by the sherife, then the latter judgment is, *ideo consideratum est, quod partitio prædicta firma & stabilis imperpetuum teneatur*, and this is the principall judgement. [7] And of the other, before this be given, no writ of error doth lie. (2)

Shireve is a word compounded of two Saxon words, viz. *shire*, and *reve*. *Shire*, *satrapia*, or *comitatus*, commeth of the Saxon verbe *shiran*, i. *partiri*, for that the whole realme is parted and divided into shires; and *reve* is *præfectus*, or *præpositus*; so as *shireve* is the *reve* of the shire, *præfectus satrapie*, *provincia*, or *comitatus*. And he is called *præfectus*, because he is the chiefe officer to the king within the shire; for the words of his patent be, *commisimus vobis custodiam comitatus nostri de &c.* And he hath a threefold custodie, *triplicem custodiam*, viz. First, *vite justitie*; for no suit begins, and no processe is served but by the sherife. Also he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vite legis*; hee is, after long suits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vite reipublice*; he is *principalis conservator pacis* within the countie, (3) which is the life of the common wealth, *vite reipublice pax*.

He is called before sect. 234. *viscount*, in Latyne, *vicecomes*, i. *vice comitis*, that is, in stead of the earle of that countie, who in antient time had the regiment of the countie under the king. For it is said in the *Mirror*, * that it appeareth by the ordinance of antient kings before the conquest, that the earles of the counties had the custodie or gard of the countie, and when the earles left their custodies or gards, then was the custodie of counties committed to viscounts, who therefore (as it hath beene sayd) are called *vicecomites*. And Ockam cap. quid centuria, &c. porro *vicecomes dicitur, quod vicem comitis suppleat*.

Marcuphis saith, this office is *judiciaria dignitas*; Lampridius, that it is *officium dignitatis*. Fortescue saith, *quod vicecomes est nobilis officarius*. And see there, and observe well his honourable and solemne election and creation at this day. But to confirme all that hath beene said touching this point, and to conclude the same, among the lawes of Edward the confessor (4) I finde it thus recorded. *Verum quod modo vocatur comitatus olim apud Britones temporibus Romanorum in regno isto Britannia vocabatur consulatus, & qui modo vocantur vicecomites tunc temporis vice-consules vocabantur; ille vero dicebatur viceconsul, qui consule absente ipsius vices supplebat in jure & in foro.* (5) Herein many things are worthy of observation. First, for the antiquity of counties. Secondly, that which wee called *comitatum*, the Romanes more latinely called *consulatum*. Thirdly, whom the Saxons afterwards called (as hath beene said) *shireve* or earle, the Romanes called *consul*. Fourthly, that the sherife was deputy of the consull or earle; and therefore the Romanes called him *viceconsul*, as we at this day call him *vicecomes*. Fifthly, that the sherife in the Romanes time, and before, was a minister to the king's courts of law & justice, and had then a court of his owne, which was the county court, then called *curia consulatus*, as appeareth by these words, *ipsius vices supplebat in jure et in foro*. Sixthly, that this realme was divided into shires and counties, and those shires into cities, burroughes, and townes, by the Brittaines: so that king *Ælfred's* division of shires and counties was but a renovation or more exact description of the same. (6) Lastly, the consequence that will follow upon these things being so ancient, (as in the time of, and before the Romanes) the studious reader will easily collect. And afterwards, fol. 135. amongst the lawes of the same king it appeareth, that those whom the Saxons sometimes called (and now we call) *aldermen*, or *eorles*, the Romanes called *senatores*, et similiter olim apud Britones temporibus Romanorum in regno isto Britannia vocabantur senatores, qui postea temporibus Saxonum vocabantur aldermani, non propter ætatem, sed propter sapientiam & dignitatem, cum quidam adolescentes essent, jurisperiti tamen & super hoc experti. (7)

[7] 11. Co. 40. Hill. 39. Eliz. Rot. 327. in Banke le Roy inter An. Countes de War & le Seignior Berkley. (Fortesc. 52. Ant. 50. a. 109. b.)

Vide the second part of the Institutes. W. 1. c. 10.

* Mirror cap. 1. sect. 3:

Ockam cap. Quid Centur. &c.

Fortescue cap. 24. 12. R. 2. cap.

Lambert fol. 129. 121

Cæsar. Polichro. Huntingdon. Polidor inter leges Malmucii. Hooker lib. 2.

De

(1) See same explanation of *iudicium*, ant. 39. a.

(2) The difference between an *interlocutory* judgment or award and a *final principal* or *plenary* judgment is here pointed at; as to which see Metcalfe's case 11. Co. 38. both questions in it depending on the distinction. See also Office of Exec. ed. 1676. chap. 17. p. 279. How the *civil* and *canon* laws distinguished between *interlocutory* and *definitive* sentences, especially in point of appeal, and between sentences merely *interlocutory* and *interlocutory* sentences having the effect of *definitive*, may be collected in some degree by consulting Voet. ad Dig. lib. 42. tit. 1. f. 4. Perez. in Cod. lib. 7. tit. 62. Wood's Civ. L. 8vo ed. 379. and Gilb. Chan. c. 10. As to the difference between *interlocutory* and *final* decrees or orders in our courts of equity, see Pract. Reg. in Chan. 122. and 153. and Nolle v. Foot in Dom. Proc. 12. March 1739. On the same subject in our ecclesiastical courts, see 1. Ought. Ord. and Consett's Pract. of Spirit. Co. 3d edit. 229. to 250. These references may assist inquiry; but a far more extended information will be necessary, before the distinctions can be well ascertained, and the use of them in point of *appeal* conclusion or otherwise be fully understood.

(3) See Lamb. Just. ed. of 1602. p. 12. 13. and 2. Inst. 174. in both of which books the coroner is so styled.

(4) Concerning the dispute about the authenticity of these laws, see notes 3. & 4. ant. 68. b. to which add Preface to 8. Co. Rep. 1. Tyr. Hist. b. 6. p. 103. Ibid. v. 2. p. 62. Brad. Intro. to Eng. Hist. 260. and a note by the late bishop of St. David, dr. Squire, in his book on the Anglo-Saxon Gov. in Engl. ed. of 1753, p. 219. Mr. Selden's opinion of these laws was, that "as the ordinary copies are, and as they speak in the published volume of Saxon laws, they are not without many mixtures of somewhat later transcribers." Seld. on Tithes, ed. 1618. p. 225. A like temperate caution concerning these laws is interposed by sir Henry Spelman and Mr. Somner. Spelm. Gloss. 3d ed. 67. Reliq. Spelm. 61. Somn. on Gavelk. 101. But dr. Brady is not content with this; for, moved by that excess of party-spirit, which is so destructive of truth and so much tarnishes his learned writings on the English history, he indiscriminately and passionately rejects the whole body of these laws. His words in one place are as follow. "The factious bishops and churchmen and the seditious and dissolute barons made a noise for king Edward's laws. But what they were it is now a hard matter to know. Those, put forth under his name with Mr. Lambard's Saxon laws, were none of his. They are incoherent farce and mixture, and a heap of nonsense, put together by some unskilful bishop"

De son Bayliwicke. It appeareth before, that the enquest must be *de vicinato* of the place where the lands doe lie, and not generally *de balivâ tuâ*. By this it appeareth, that the sherife is *balivus*, and his county called *balivâ*; and therefore it is good to be seene what *balivus* originally signified, and whereof it is derived.

Flet. lib. 2. cap. 67. (Cro. Jam. 178. Plowd. 28. b. 1. Ro. Abr. 339.)
Bract. lib. 3. tract. 2. cap. 33. nu. 3. Idem lib. 3. fo. 121. b.

Bract. li. 3. 156. b. Brit. fo. 56. Flet. li. 2. ca. 63. (10. Co. 103. Poit. 295. a.)

Baylife (1) is a French word and signifies an officer concerning the administration of justice of a certaine province; and because a sherife hath an office concerning the administration of justice within his county or bailiwick, therefore he calleth his county *balivâ sua*. For example, when he cannot find the defendant, &c. he returneth, *non est inventus in balivâ meâ*.

I have heard great question made, what the true exposition of this word *balivus* is. In the statute of *Magna Charta* cap. 28. the letter of that statute is, *nullus balivus de cetero ponat aliquem ad legem manifestam nec ad juramentum simplici loquelâ suâ sine testibus fidelibus ad hoc inductis*. And some have said, that *balivus* in this statute signifieth any judge; for the law must be waged and made before the judge. And this statute (say they) extends to the courts of common pleas, king's bench, &c. for they must bring with them *fideles testes*, &c. and so hath bene the usage to this day.

Glave. li. 1. ca. 9.

But I have perused a very ancient and learned reading upon this statute; and the reader taketh it, that, at the common law before this statute, he, that would make his law in any court of record, must bring with him *fideles testes*. And this opinion herein is warranted by *Glanvil*, who wrote in the reign of *Henry the second*. But the reader holdeth, that in the courts which were not of record, (2) as the county court, the hundred court, the court baron, &c. there the defendant without any faithfull witnesses might before this stat. have made his law, for remedy whereof this act was made; and therefore (saith he) the statute extendeth to the judges of such courts as are not of record. In 10. H. 4. it is holden, that if a lord, that hath a franchise in a leet, doth not enquire of things enquirable, and punish them, the sherife shall enquire in his turne, *et si le vicount ne faire en son torne, le baylie le roy enquirer quant il vient, ou autrement serra inquis per justice en eire*, where *baylie le roy* is understood *justice le roy*. And in the *Mirror** it is holden, that the statute doth extend to everie justice, minister of the king, steward, &c. and all comprehended under this word *baylife*.

10. H. 4. 4. (Cro. Jam. 551. 584.)

* Mir. ca. 5. sect. 2. Vi. Bract. fo. 409. Flet. li. 2. ca. 63. 56.

The chiefe magistrates in divers ancient corporations are called baylifs, as in Ipswich, Yarmouth, Colchester, &c. And *baylife* in French is *diocetes*, *nomarcha*, in English, a bailife or governor. But of this thus much shall suffice.

Sect. 249.

Brit. fo. 187. b. acc. Bract. l. 2. fo. 71. &c. Flet. l. 5. ca. 9.

SOUTH son seale, &c.

Note, the partition, made and delivered by the sherife and jurors, ought to bee returned into the court under the seale of the sherife, and the scales of the twelve jurors; for the words of the judicial writ of partition, which doth command the sherife to make partition, are, *assumptis tecum 12, &c.* (so as there must be twelve) & *partitionem inde, &c. scilicet facias justiciariis, &c. sub sigillo tuo, & sigillis eorum per quorum sacramentum partitionem illam feceris, &c.*

And this is the reason, wherefore in this case the partition, which they make upon oath, ought to be returned under their scales: & the reason of that is for the more strengthening of the partition

ET de la partition que le vicount ad issint fait il ferra notice as justices (3) south son seale & les seales de cheescun de les 12, &c. Et issint en ceo case poies veier, que l'eignejoer n'averâ my la primer election, (4) mes le vicount luy assignera sa part que el averâ, &c. Et poit estre que le vicount doit assigner primerement un part a le plus puisne, &c. & darreinement a l'eigne, &c.

AND of the partition which the sherife hath so made, he shall give notice to the justices under his seale, and the scales of everie of the 12, &c. And so in this case you may see, that the eldest sister shal not have the first election, but the sherife shall assigne to her her part which shee shal have, &c. And it may be that the sherife will assigne first one part to the youngest, &c. and last to the eldest, &c.

(1) See ant. 61. b. at the bottom. The additional references in the margin on the side of the word *bailiff* relate to *bailiffs of manors*.

(2) Concerning the distinction of courts of record, see ant. 117. b.

(3) In L. & M. and in Roh. there is an &c. here.

(4) An &c. here in L. & M. and in Roh.

"bishop monk or clerk many years after his death to serve the ends and deligis of the present times." General Pref. to Brad. Eng. Hist. xxx. See further Wright. Ten. 65. note (i).

(5) The passage here cited from the laws of Edward the Confessor seems rather a remark by the copier or translator of the law, than a part of the law itself; and perhaps it is on this account, that Lambard distinguishes this passage in the printing by an *Italick* letter. But whether the passage is to be deemed part of the law or not, the comparison it draws, of the Roman denominations of their territorial government and officers in Britain with those of the Saxons, seems to me quite imaginary. At least I am not able to find any trace of authority to prove such an use or application of the words "*consulatus consul* and *vice-consul*" amongst the Romans whilst Britain was a part of their empire, as this extract supposes.

(6) This agrees with the idea of sir John Spelman in his life of Alfred, and of mr. St. Amand in his Essay on the Legislative Power of England. Dr. Stuart in his Historical Dissertation on the English Constitution makes some additional remarks in support of the same opinion. See 2d ed. of this latter book, 250.

(7) The remark above in note 5. on the former extract from Lambard's Anglo-Saxon Laws equally applies to this second one. As to the origin and office of sheriffs, see further Preface to 3. Co. Rep. Dav. Rep. 60. Dalt. on Sher. Spelm. Gloss. vocibus *comites comitatus & vicecomes*, Seld. tit. Hon. ed. 1681. p. 627. 2. Henry's Hist. Gr. Brit. 242. a note by lord Fortescue in his ancestor's book on absolute and limited monarchy, 112. and Stuart's Hist. Dissert. on Engl. Const. 2d ed. 241.

tion by the 12, and that the sherife should not returne what partition he would. Now after all this, this (S^c.) viz. 12, &c. doth imply, that the principall judgement upon the partition so returned is, *ideo consideratum est per curiam quod partitio firma & stabilis imperpetuum teneatur.* (1) The latter two (S^c.) are evident. (2)

Sect. 250.

ET nota, que partition per agreement perenter par-ceners poit estre fait per la ley enter eux, auxibien per parol sans fait, come per fait.

AND note, that partition by agreement betweene par-ceners may bee made by law betweene them, as well by paroll without deed, as by deed. (3)

HERE it appeareth, that [r] not onely lands and other things that may passe by livery without deed, but things also that do lie in grant, as rents commons advowsons and the like that cannot passe by grant without deed, whether they bee in one county or in severall counties, may be parted and divided by paroll

[r] 3. E. 4. 9. 10. 9. E. 4. 38. 11. H. 4. 3. 9. H. 4. partition 13. 21. E. 3. 38.

without deed. [s] But a partition betweene joyntenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the statutes of 31. H. 8. cap. 10. and 32. H. 8. cap. 32. because they must pursue that act by writ *de partitione faciendi*; and a partition betweene joyntenants without writ remains at the common law which could not bee done by paroll. And so it is and for the same reason of tenants in common. But if two tenants in common be, and they make partition by paroll, and execute the same in severalty by livery, this is good, and sufficient in law. And therefore where bookes say, that joyntenants made partition without deed, it must be intended of tenants in common and executed by livery.

(Dy. 350. b. Post 187. a. 198. b.) [s] Vide sect. 290. 3. H. 4. 1. 19. H. 6. 25. 28. H. 6. 2. 3. E. 4. 9. 10. 47. E. 3. 22. 47. Aff. 8. 19. H. 6. 1. 17. E. 3. 46. 30. Aff. 8. lib. 4. fo. 73. h. 6. fo. 12. 13. 2. H. 7. 5. Dier 18. Eliz. 358. 31. H. 8. Dier 46. 2. Eliz. Dier 179. 28. H. 8. Dier 29. 1. Mar. Dier 98. (1. Leon. 103. 6. Co. 12. 8. Co. 42. Post 186. a. 193. b. 200. b. 335. a. 2. Inst. 403.)

Nota, betweene joyntenants there is a twofold privity, viz. in estate and in possession: betweene tenants in common, there is privity onely in possession, and not in estate: but par-ceners have a threefold privity, viz. in estate, in person, and in possession.

Sect. 251, & 252.

ITEM si deux meafes descendent a deux par-ceners, & l'un meafé vault per an 20 s. l'auter forsque 10 s. per an, en cest cas partition poit estre fait enter eux en tiel forme; cestascavoir, que un par-cener avera l'un meafé, & que l'auter par-cener avera l'auter meafé; & celui que avera le meafé que est de value de 20 s. & ses heires payeront un annual rent

ALSO if two mefes descend to two par-ceners, and the one meafe is worth twenty shillings *per annum*, and the other but ten shillings *per annum*, in this case partition may bee made betweene them in this manner; to wit, the one par-cener to have the one meafe, and the other par-cener the other meafe; and she which hath the meafe worth 20 shillings *per annum* and her heires shal pay

PER parol. Nota,

Here [t] a rent may be granted for owelty of partition without (4) deed, even as a rent in case of a lease for yeares, for life, or a gift in taile, may bee reserved, without deed; and so may a rent be assigned to a woman out of the land, whereof shee is dowable, &c. without deed. But albeit an exchange for lands in the same county may be without deed; yet a rent granted for equality (5) of the same exchange cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and compellable to make partition.

[t] 8. E. 3. 16. 21. Aff. p. 1. 21. E. 3. 38. 11. H. 4. 61. 45. E. 3. 21. 2. H. 6. 14. 21. H. 6. 11. 1. Mar. Dier 91.

(Ant. 34. b.)

(Mo. 29.)

Le rent, &c.

The same law is of common of estovers, or a coradie, or a common of

(1) See acc. ant. 168. a.

(2) Here I shall subjoin to Littleton's explanation of the different modes of *express* partition the following notices for the aid of students. I. Since Littleton's time a statute has been made for newly regulating the proceedings on a writ of partition, with a view to render them less dilatory and more effectual; and this statute equally extends to par-ceners joint-tenants and tenants in common. See 8. & 9. W. & M. c. 31. What the form of proceeding under the writ of partition was before, is explained in Flet. lib. 5. c. 9. Bract. lib. 2. c. 33. Brit. c. 71. 72. 73. and Booth on Real Actions 244. II. Partition by release between co-parceners, which I do not observe to be noticed by Littleton or Coke, is mentioned in 2. Fulbeck's Paral. fol. 57. b. III. There is a partition by judgment exclusive of that on the *partitione faciendi*. An instance of it is stated in 6. Co. 12. b. IV. Littleton hereafter adds to the forms of partition explained by him in this chapter, one other form; namely, partition by throwing into hotchpot, which is the subject of sect. 266. V. Besides the writ of partition mentioned by Littleton there was another also issuing out of chancery, which was called a writ of livery and partition. It applied, where land holden of the king in *capite* descended to two or more as co-parceners, in which case they could not have livery of their land from the crown without a partition, the reason of which is explained in Staundf. Prerog. 24. b. 81. b. The various forms of this writ of partition may be seen by consulting F. N. B. 256. F. 259. C. 261. B. C. and Reg. Orig. 316. 317. It differed from the common writ *de partitione faciendi* in almost every respect. That was directed to the sheriff, this to the escheator: that was returnable in the common pleas, this in chancery: that was executed with a jury, this without: that was given for the benefit of the party suing it, this grew out of a policy to increase the number of the king's tenants in *capite* for his advantage: the partition in that was confirmed by a judgment of the court on return of the writ, the partition in this had no such solemnity added to it; and lastly the partition on that was conclusive on the parties though infants and all claiming under them, but the partition on this was open to subsequent inquiry and if unequal avoidable by *scire facias* in chancery or a *partitione faciendi* at common law. See Staundf. Prerog. and Fitzb. N. B. in the places before cited and post. 171. a. & b. See further on the force of such partition in chancery 29. Aff. pl. 3. Bro. Abr. jurisdiction 114. partition pl. 10. But this species of partition under the writ of livery is no longer in force: for it was a mere incident to livery; and livery being taken away by the 12. Cha. 2. c. 24. as one of the great grievances from tenure in *capite*, all writs of livery of course are, as a very learned writer has forcibly expressed it, *uno flatu* dispersed. See Mr. serjeant Wynne's Observat. on F. N. B. in his Miscellany of Law Tracts p. 51. VI. Another kind of partition in chancery unnoticed by Littleton was, where two persons succeeded as co-parcenary heirs to land holden of the king in *capite* and one of them being within age was in ward to the crown; for then the king's committee of the infant heir might

of pasture, &c. or a way granted upon the partition by the one coparcener to the other. All which and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

Issuant hors de mesme le mease, &c.

[x] For if it be granted out of other lands then descended to the coparceners, then there must be a deed. [z] But if the rent be granted generally (out of no land in certaine) for owelty of partition, *pro residuo terræ*, it shall bee intended out of the purpartie of her that granteth it.

[a] If there be three coparceners, and they make partition, and one of them grant twenty shillings *per annum* out of her part to her two sisters and their heires for equality of partition, the grantees are not joynteners of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moiety of the rent shall descend to her issue in course of coparcenary, and not survive to the other, for that the rent doth come in recompence of the land, and therefore shall ensue the nature thereof; and if the grant had beene made to them two of a rent of twenty shillings, *viz.* to the one ten shillings, and to the other ten shillings, yet shall they have the rent in course of coparcenary, and joyne in action for the same.

[b] If one coparcener be married, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the fem covert, this partition being equall shall charge the part of the fem covert for ever.

[c] If two coparceners by deed indented alien both their parts to another in fee, rendering to them two and their heires a rent out of the land, they are not joynteners of this rent, but they shall have the rent in course of coparcenary; because their right in the land, out of which the rent is reserved, was in coparcenary.

Purront distreiner de common droit, &c. That is, [d] in this case the law doth give a distresse, lest the grantee should bee without remedy, for the which upon the partition she hath given a valuable recompence in land, which descended, &c. And so in the case of dower abovementioned. (1)

de v. s. issuant hors de mesme le mease a l'auter parcener & a ses heires a tous jours, pur ceo que chescun de eux auroit owelty en value.

a yeerely rent of five shillings issuing out of the same mease to the other parcener and to her heires for ever, because each of them should have equality in value.

Sect. 252.

ET tiel partition on fait per parol est assés bone; & mesme le parcener, que avera le rent, & ses heires, purront distreiner de common droit pur le rent en le dit mease de le value de 20 s. si le rent de 5 s. soit aderere en asun temps, en quecunque mains que mesme le mease deviendra, coment que ne fuit unques ascun escripture de ceo fait enter eux de tiel rent.

AND such partition made by paroll is good enough; and that parcener, who shall have the rent, & his heires, may distrein of common right for the rent in the sayd mease worth twenty shillings, if the rent of 5 shillings be behinde at any time, in whose hands soever the same mease shall come, although there never were any writing of this made betweene them for such a rent.

Sect. 253.

TERRES & tenements, &c. Here (*&c.*) implyeth a caution, *viz.* that they be such lands

EN mesme le maner est de tous maners de terres & tenements

IN the same manner it is of all manner of lands and tenements

(1) See ant. 34. b. 153. a. and Sheph. Comm. Assur. 425.

might assent to make partition with the other co-parcener, in which case the writ for livery to the co-parcener of full age recited that with such assent the king had assigned certain estates for the purparty of such co-parcener, and directed the escheator to give livery accordingly. F. N. B. 260. B. This mode of partition in chancery is also at an end from the same cause as the writ of partition and livery. VII. A new compulsory mode of partition has sprung up, and is now fully established: namely by decree of chancery exercising its equitable jurisdiction on a bill filed praying for a partition: in which case 'tis usual for the court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition and wresting from a court of common law its antient exclusive jurisdiction over this subject, might be traced by examining the records of chancery, I know not. But the earliest instance of a bill for partition I observe to be noticed in the printed books is a case of the 40. Eliz. in Tothill's Transact. of Chanc. title *partition*. According to the short report of this case the court interposed from necessity in respect of the minority of one of the parties, the book expressing that on that account he could not be made party to a writ of partition; which reason seems very inaccurate, for, if lord Coke is right, that writ doth lye against an infant, and he shall not have his age in it, and after judgment he is bound by the partition. See post. 171. b. But probably in lord Coke's time this was a rare and rather unsettled mode of compelling partition; for I observe in a case in chancery of the 6. Cha. 1. which was referred to the judges on a point of law between two co-parceners, that the judges certified for issuing a writ of partition between them, and that the court ordered one accordingly; which, I presume, would scarce have been done, if the decree for partition and a commission to make it had then been a current and familiar proceeding with chancery. 1. Cha. Rep. 49. However it appears by the language of the court in a very important cause, in which the grand question was whether the lord chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James the Second bills of partition were become common. 1. Vern. 421. 2. Cha. Caf. 189. For other reported cases on bills of partition, see Toth. Transact. tit. *partition*, 1. Cha. Rep. 235. 3. Cha. Rep. 29. 2. Cha. Caf. 214. 237. 2. Vern. 232. 1. P. Wms. 446. 2. P. Wms. 518. As to the forms of a commission of partition, see 1. Prax. Alm. Cur. 3d ed. 93. 94. Clerk's Tutor in Chanc. 3d ed. 360. and 2. Harrison's Chanc. last ed. 396. For cases in which chancery interposes by awarding commissions to ascertain boundaries, which subject in some degree connects with commissions of partition, see Tothill 24. 126. 130. Nelf. Ch. Rep. 14. 121. 1. Cha. Rep. 41. 63. 259. Rep. temp. Finch. 131. 186. 210. Car. Rep. 107. 17. 96. 239. 462. 1. Cha. Caf. 145. 1. Vern. 359. 456. 2. Vern. 38. and 1. Vef. 453. To these add Fitzh. N. B. 133. on the writ *de perambulatione faciendi*, which being considered may perhaps throw some light on the origin of this branch of equitable

ments, &c. *lou tiel rent est reserve a un ou a divers parceners sur tiel partition &c. Mes tiel rent n'est pas rent service, mes est rent charge de common droit* (1) *ewe & reserve pur egalite de partition* (2).

ments, &c. where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent service, but a rent charge of common right had and reserved for equality of partition.

and tenements out of which a rent for egalite of partition may be granted, whereof sufficient hath been said before.

Reserve al un. Here reservation is taken for a grant; and if it be used upon the partition, doth amount in this case to a grant, which is worthy the observation.

Sect. 254.

ET nota, que nulles sont appellees parceners per le common ley, mes females ou les heires de females, que veignent a terres & tenements per discent: car si soers purchase terres ou tenements, de ceo ils sont appellees joyntenants, & nemy parceners.

AND note, that none are called parceners by the common-law, but females or the heires of females, which come to lands or tenements by discent: for if sisters purchase lands or tenements, of this they are called joyntenants, and not parceners.

This needs no explanation.

Sect. 255.

ITEM si deux parceners de terres en fee simple font partition enter eux, & la part de un vault plus que le part de l'auter, si els fueront al temps de la partition de pleine age, s. de 21 ans, donques la partition tous dits demurrera, & ne sera unques defeat. Mes si les tenements (dont els font partition) soyent a eux en fee taile, & le part que l'un ad est

ALSO if two parceners of land in fee simple make partition between themselves, and the part of the one valueth more then the part of the other, if they were at the time of the partition of full age, s. of 21 yeares, then the partition shall alway remaine and be never defeated. But if the tenements (whereof they make partition) be to them in fee taile, and the part of the one

DONQUES le partition tous dits

demurrera, &c. Hereby it appeareth, that the inequality of the value shall not impeach a partition made of lands in fee simple between coparceners of full age, (3) no more then it shall doe in case of an exchange. (4)

9. H. 6. 5. and other the bookes above said.

Ils sont concludes durant leur vies. This inequall partition doth so conclude the parceners themselves, as sice that hath the inequall part shall not avoid it during her life.

Concludes. This word (Post. 352. a.) is derived of *con* and *claudo*, (5) and in this sense significth to close or shut up her mouth that she cannot speake to the contrary.

Huf-

(1) See ant. 153. a. note 1.

(2) In L. and M. &c. here.

(3) Ant. acc. 166. a.

(4) Ant. 51. a.

(5) Acc. ant. 37. a.

equitable jurisdiction; and concerning the modes of partition by our law see the cases under that title in Fitzh. Abr. Bro. Abr. and Viner.—Concerning partition by the Roman law, see Fulbeck in his parallel of the civil canon and English Laws b. 2. p. 57. This neglected but ingenious writer extracts from the Roman law three actions having the like object with our writ of partition. These are the action *de familia heredeunda*, the action *pro socio*, and the action *de communi dividundo*. He applies the first to partition amongst co-heirs, the second to that amongst joint-tenants, and the third to that amongst tenants in common; an assimilation, in which he is partly followed by lord Stair in respect to the law of Scotland. Stair's Instit. 48. The second and third of these Roman actions are treated of in lib. 10. tit. 2. & 3. of the Digest, tit. 1. of the same book being upon the action *finium regundorum*, which partly answers to our bill in equity for ascertaining boundaries. It is remarkable also, that Fleta represents the three Roman actions last mentioned as a part of our law. Flet. lib. 5. c. 9. p. 309. See further as to the Roman law about partition 1. Dom. Civ. L. by Strah. 325. For partition according to the French law, see tit. *partage* in their books; and for the like subject in the Scotch law, see concerning the obligation of division, heirs portioners, commonities, and writs of division, in Stair's Instit. 48. 477. 169. 576. and in Erskine's Instit. 468.

(3) In 1. Atk. 542. there is a case in equity, in which lord Hardwicke allows of a *parol* agreement for a partition. See infra note 4. and 1. Vern. 472.

(4) Here the eleventh edition of this book has a note questioning whether such *parol* grant would be good now in respect of the 29. Cha. 2. c. 3. and Mr. serjeant Hawkins in his Abridgment makes a like question. See supra note 3.

(5) Of equality in exchanges, see ant. 50. b. 51. a. & b.

11. Aff. p. 23.

See after the chapter of Garr. (2)
(Doctor & Stud. 65.)

[g] 21. E. 3. 34. 35. 2. E. 2.
Ballard 19. 11. Aff. 23. 30. Aff.
7. 17. E. 3. 59. (8. Co. 101. b.
Poll. 244. b.)

Husband and wife tenants in speciall taile of certaine lands in fee have issue a daughter, the wife dyeth, the husband by a second wife hath issue another daughter, both the daughters enter (where the eldest is only inheritable) and make partition: the eldest daughter is concluded during her life to impeach the partition, or to say that the youngest is not heire, and yet she is a stranger to the taile, but in respect of privity in their persons the partition shall conclude, for a partition between meere strangers in that case is voyd, but the issue of the eldest shall avoid this partition as issue in taile.

[g] I. S. seised of lands in fee hath issue two daughters, Rose and Anne, bastards cigne and mulier puisne, and dieth. Rose and Anne doe enter and make partition. (3) Anne and her heires are concluded for ever. (4)

melieux en annuall value que est la part le l'auter, coment que els sont concludes durant leur vies a defeater la partition; uncore si le parcener, que ad le meinder part en value, ad issue & devy, l'issue poit disagree a la partition, & enter & occuper en common l'auter part que fuit allotte a sa aunt, & if sint l'auter poit enter & occuper en common l'auter part allotte a sa soer, &c. si come nul partition n'est fait. (1)

is better in yearly value then the part of the other, albeit they be concluded during their lives to defeat the partition; yet if the parcener, which hath the lesser part in value, hath issue and dye, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister, &c. as if no partition had beene made.

Sect. 256.

ELS & leur barons.

Here it appeareth, that the wife must be party to the partition, and so are the bookes * to bee intended that speake of this matter.

* 42. Aff. 22. 8. E. 4. 4. 9. E. 3. 38. 15. E. 4. 20. F. N. B. 62. 29. Aff. 23. 9. H. 6. 5. 43. Aff. 14.

Et defeatera la partition. Note, the partition shall not bee defeated for the surplusage onely to make the partition equall, but here it appeareth that it shall bee avoyded for the whole. But of this more shall be said hereafter in this chapter, section 264. [b] And though the partition be unequal, yet is not the partition voyd, but voydable; for if after the decease of the husband, the wife entereth into the unequal part, and agreeeth thereunto, this shall binde, and therefore Littleton

[b] Vid. 2. E. 2. Cui in vita 17.

ITEM si deux parceners de tenements en fee preignent barons, & els & leur barons sont partition enter eux, si la part l'un est meinder en anual value que la part l'auter, durant les vies leur barons la partition esloyera en sa force. Mes comment que il esloyera durant les vies les barons, uncore apres la mort le baron, celui feme, que ad le meinder part, poit enter en la part sa

ALSO if two parceners of lands in fee take husbands, and they and their husbands make partition betweene them, if the part of the one bee lesse in value then the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit it shal stand during the lives of their husbands, yet after the death of the husband, that woman which hath the lesser part may enter into

(1) This case of Littleton turns upon the inequality of the partition; for if the parts are equal, it binds notwithstanding infancy. Ant. 166. a. Poll. 173. b.

(2) See the case of discontinuance stated by lord Coke post. 373. b.

(3) In a Coke upon Littleton I have with MSS. notes and references, the annotator is for excluding from such an estoppel as is here stated a partition in pais. His note is thus expressed: "If two make partition in court of record, when one of them had no right, he thereby shall gain a moiety by estoppel or conclusion. Bro. Nouv. Cal. pl. 306. But otherwise I conceive of a partition in pais; though the book speaketh generally; and upon this difference you shall read a like case in this booke fol. 46. a."

(4) Acc. Dr. & Stud. dial. 1. c. 19. where mulier puisne sues livery with bastard cigne. See Bro. Abv. entrie c. 31. and descent 9. But it is said, that this sort of estoppel will not bind in chancery. Cary's Rep. 26. See further 2. Co. 4. b. Cr. Cha. 110. Pollexf. 67. and 3. Com. Dig. 278.

soer come est avant-dit, & defeatera la partition.

her sisters part as is aforesaid, and shall defeat the partition.

useth the word (*defeatera*), which proveth it to bee voydable.

Sect. 257.

MES si le partition fait perenter les barons (1) fuit tiel, que chescun part al temps d'allotment fait fuit de egall annuall value, donque il ne poit apres estre defeat en tielx cas.

BUT if the partition made betweene the husbands were thus, that each part at the time of the allotment made was of equall yearly value, then it cannot afterwards be defeated in such cases.

PERenter les barons. This is mistaken, for the originall is *perenter eux*, that is, betweene the barons and fems, and not as it is here betweene the barons, therefore this error would be hereafter reformed.

Al temps del allotment. Hereby it appeareth, that if the parts at the time of the partition bee of equall yearly value, neither

the wives nor their heyres shall ever avoyd the same; and the reason hereof is, for that the husbands and wives were compellable by law to make partition, and that which they are compellable to doe in this case by law, they may doe by agreement without processe of (2) law. If the annuall value of the land be equall at the time of the partition, and after become unequal by any matter subsequent, as by surrounding, ill husbandry, or such like, yet the partition remains good.

9. H. 6. 5. And other the bookes above said. (Post. 179.)

*Judicis officium est, ut res ita tempora rerum
Quarere; quæsito tempore tutus eris.*

But if the partition be made by force of the king's writ, and judgement thereof given, it shall binde the fem-coverts for ever, albeit the parts be not of equall annuall value; because it is made by the sherife by the oath of twelve men by authority of law; and the judgement is, that partition shall remaine firme and stable for ever, as hath beene said. [a] But a partition in the chancery where one coparcener is of full age and such livery, and one other is within age and hath an unequal part allotted to her, this shall not binde her at full age; for in a writ directed to the escheator to make partition, there is a *salvo jure*, and there is no judgement upon such a partition. But if such a partition be equall, it shall binde, so that a part of the land holden *in capite* bee allotted to every of the coparceners, for to that end there is an expresse *proviso* in the writ. [b] And this partition may be avoyded either by *seire fac'* in the chancery, or by a writ *de partitione faciendâ* at the common law at her full age (3).

[a] F. N. B. 256. 259. 260. 261. 262. 263. 9. H. 6. 6. 21. E. 2. 31.

[b] Vide 21. E. 3. 31.

Sect. 258.

*ITEM si deux parcer-
ners sont, et le pu-
isne esleant deins l'age
de 21 ans, & partition
est fait enter eux, issint
que la purpartie que est
allot al puisne est de mein-
dre value que la purpar-
tie l'auter, en cest case le*

ALSO if two coparceners be, and the youngest being within the age of twenty-one years, partition is made betweene them, so as the part which is allotted to the youngest is of lesse value than the part of the

AS before in the case of the fem-covert, [c] so it is in the case of the infant; for if the partition be equall at the time of the allotment, it shall binde him for ever; because he is compellable by law to make partition, and he shall not have his age in a *partitione faciendâ*;

[c] 43. Aff. 14. 9. H. 6. 5. 6. 7. E. 3. 13. 8. E. 3. 24. 10. H. 4. 5. 31. Aff. 16. 21. H. 6. 25.

(1. Ro. Abr. 138. Hob. 179.)

(1) Instead of *les barons* it is *eux* in L. & M. & Roh.

(2) In 1. Atk. 541. there is a case, in which lord chancellor Hardwicke is represented to say, that a partition by agreement between two husbands will not bind the inheritance of their wives. But, notwithstanding this high authority, I take the doctrine of Littleton and Coke, that such a partition will bind the wives *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See acc. F. N. B. 62. F.

(3) Acc. F. N. B. 62. H.

dā; (2) and though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry, for if he take the whole profits of the unequal part, after his full age, the partition is made good for ever. And therefore *Littleton* here giveth him a caveat, that in that case he take not the whole profits of his unequal part, neither shall an unequal partition in the chancery binde an infant as appeareth before. (3) But a partition, made by the king's writ *de partitione faciendā* by the sherife by the oath of twelve men, and judgement thereupon given, shall binde the infant, though his part be unequal, *causā quā supra*.

lepuisne, durant le temps de son nonage, & auxy quaut el vient a pleine age, s. de 21 ans, poit enter en la purpartie a sa soer allot & defeatera la partition. Mes bien soy gard tiel parcener quant el vient a sa plein age, que el ne preigne a son use demesne tous les profits des terres ou tenements que a luy furent allots. Car donques el soy agreea a le partition a tiel age, en quel case la partition estoiera & demurra en sa force. Mes peradventure les profits de la moitie el poit prendre, relinquant les profits de l'auter moitie a sa soer. (1)

other, in this case the youngest, during the time of her nonage, and also when shee commeth to full age, s. of 21 yeares, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to her full age, that shee taketh not to her owne use all the profits of the lands or tenements which were allotted unto her; for then shee agrees to the partition at such age, in which case the partition shall stand and remaine in its force. But peradventure she may take the profits of the moitie, leaving the profits of the other moitie to her sister.

Sect. 259.

THE law hath provided for the safety of a man's or woman's estate, that * before their age of twentie one yeares they cannot binde themselves by any deed, (4) or alien any land (5), goods, or chattels (6).

Age de 21 ans.

Before this age a man or woman is called an infant.

Fait. *Factum*, *Anglicè*, a deed, and signifieth in the common law, an instrument consisting of three things, *viz.* writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the civilians *litterarum obligatio*.

Feoffment. Of this word sufficient hath bin

ET est ascaroir, que quant il est dit, que males ou females sont de pleine age, ceo serra entendue d'age de 21 ans; car si devant tiel age, ascun fait ou feoffement, grant, release, confirmation, obligation, ou auter scripture, soit fait per ascun de eux, &c. ou si ascun deins tiel age soit baylife ou recevoir a ascun home, &c. tout serve pur nient, & poit estre awayde.

AND it is to be understood, that when it is said, that males or females bee of full age, this shall be intended of the age of 21 yeares; for if before such age any deed or feoffment, grant, release, confirmation, obligation, or other writing, bee made by any of them, &c. or if any within such age bee baylife or receiver to any man, &c. all serve for nothing, and may be avoided. Al-

Auxy

* Vid. sect. 402. 403. (2. Infl. 673. F. N. B. 192. 5. Post. 246. a. 337. b. 350. a. & b. 380. a. Ant. 171. a. 8. Co. 44. b.)

Brit. fo. 65. 66. & 101. Flet. li. 3. ca. 14.

(Perk. sect. 135.)

(1) In L. & M. & Rob. an &c. here.

(2) Acc. 6. Co. 4. b. But there the reason given for an infant's not having his age in partition is different, namely that both coparceners are in possession. In the year book of 9. H. 6. 6. b. the reason is expressed to be the prejudice which otherwise there might be to the infant.

(3) See the case of partition of an advowson between coparceners, where one is within age, in F. N. B. 36. D.

(4) See ant. 51. b. note 2. and 52. a. note 2. To the references there add 3. P. Wms. 298.

(5) Not even though a special power is given to him, though it is otherwise with a feme covert. So held by lord chancellor Hardwicke in a case in 1. Ves. 298. and 3. Atk. 695. See Mo. 512. But by the 7. An. c. 17. an infant having a real estate only as a trustee or under a mortgage is enabled to convey under the direction of the court of chancery or the court of exchequer. However this act is deemed not to extend to trusts merely constructive. 2. P. Wms. 549. 3. P. Wms. 337. Another exception to an infant's not being able to alien land arises from the custom of particular places, as the custom of Kent in respect to gavelkind lands, which may be aliened by an infant on attaining 15. See the late Mr. Robinson's excellent Treatise on Gavelk. 193. and Mo. 512.

(6) But an infant may before 21 dispose of personal estate by last will, though it is controverted at what age this testamentary power begins to attach in infants. On this point I have heretofore expressed my notions at length. See note 6. of fo. 89. b.

Auxy home devant le dit age ne serra my jure en un enquest, &c. (1)

so a man before the sayd age shall not be sworne in an enquest, &c.

sayd before in the first chapter of the first booke.

Grant. *Concessio* is in the common law a conveyance of a thing that lies in grant and not in livery, Lib. 3. fol. 63. in Lincoln Colledge case.

which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like. Of this also sufficient likewise hath been said in the first chapter of the first booke.

Release, confirmation, &c. Of these shall be spoken hereafter in their proper places and chapters.

Obligation is a word of his owne nature of a large extent; but it is commonly taken in the common law, for a bond containing a penalty, with condition for payment of money or to do or suffer some act or thing, &c. and a bill is most commonly taken for a single bond without condition.

Ou auter scripture soit fait per ascun de eux, &c. Here by this (&c.) is implied some exceptions out of this generality, [d] as an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards: but if he bind himselfe in an obligation or other writing with a penalty (2) for the payment of any of these, that obligation shall not bind him. [e] Also other things of necessity shall bind them, as a presentation to a benefice, (3) for otherwise the laps shall incurr against him. Also if an infant be an executor upon payment of any debt due to the testator, hee may make an acquittance; but in that case a release without payment is voyd (4): and generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. (5) But of this common learning this little tast shall suffice.

Baylife ou receiver al ascun home, &c. By this &c. many things are implied, as that by baylife is understood a servant that hath administration and charge of lands goods and chattels to make the best benefit for the owner, against whom an action of account doth lie for the profits which he hath raised or made or might by his industry or care have reasonably raised or made, his reasonable charges and expences deducted. [f] But one under the age of twenty one yeares shall not be charged in any such account; (6) because, by intendment of law, before his full age hee hath not skill and ability to raise or make any such improvement and profit.

An account against a receiver is, when one receiveth money to the use of another to render an account; but upon his account he shall not be allowed his expences and charges. [g] And therefore a man cannot charge a baylife as a receiver; because then the baylife should lose his expences and charges.

In an account against a receiver, the plaintife must declare by whose hands the defendant received the money, which he shall not doe in the case of a baylife. [h] But in some case in an action of account against one as *receptor denariorum*, he shall have allowance of his expences and charges, and also shall account for the profit he received (7) or might reasonably receive; and this was provided by law in favour of merchants, and for advancement of trade and trafficke.

As if two joynt merchants occupy their stocke goods and merchandizes in common to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenien' sicut per legem mercatoriam rationabiliter monstrare poterit.*

[i] If there be two joyntenants or tenants in common of lands, and the one make the other his baylife of his moiety, he shall have an action of account against him as baylife: and so are the bookes to be intended, that speake of an action of account in that case. (8)

So as there be but three kinds of writs of account, *viz.* against one as gardian, wherof *Littleton* hath spoken before in the chapter of focage; the second against one as baylife; and the third as receiver; as here it appeareth. [k] For a man shall not be charged in an account as surveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there must be, either a privity (9) in deed by the consent of the partie, for [l] against a disseisor or other wrongdoer no account doth lie; or a privity in law *ex provisione legis* made by the law, as against a gardian, &c. wherof sufficient hath been spoken in the chapter of focage. (10)

[d] 18. E. 4. 2. 21. H. 6. 3. lib. 9. fol. 87. Pinchons case. (2. Ro. Abr. 146. Cro. Eliz. 920. 2. Infl. 483. Cro. Cha. 179. Cro. Jam. 494. 560. 1. Ro. Abr. 729. Plowd. 364.)

[e] 8. E. 4. 4. 9. H. 6. 5. 17. E. 3. 9. 29. Aff. 25. 2. Mar. Dyer 104. 105. (5 Co. 29. b. 27. 2. 6. Co. 3. Cro. Cha. 324. 590. 502. Mo. 105. Cro. Jam. 320. 1. Sid. 41. 259. 446.)

[f] Fleta li. 2. ca. 64. & c. 67. Britton fol. 62. 70. Fleta lib. 2. cap. 64. 41. E. 3. 39. 46. E. 3. account 40. 2. R. 2. 104. 45. 6. R. 2. ibid. 3. E. 3. 10. (Cro. Jam. 177. 1. Leon. 219.)

[g] 13. E. 3. infant 9. 17. E. 2. account 121. 21. E. 3. 8. 10. H. 4. 14. 2. H. 4. 13. regill. 135. (Finch L. 302. 303. Noy 12.)

[h] 43. E. 3. 31. 46. E. 3. 3. b. 4. H. 6. 27. (1. Ro. Abr. 119. 2. Infl. 379. 4. Leon. 39. 1. Ro. Rep. 87.)

[i] 30. E. 3. 1. account 127. 47. E. 3. 22. 10. H. 7. 16. Bract. h. 5. f. 334. Brit. f. 62. Fleta l. 2. c. 64. & 51. 5. E. 3. 1. lib. in. trat. 17. 18. 19. (F. N. B. 117. d. Post. 182. a. Cro. Jam. 410.)

[j] 45. E. 3. 10. 3. E. 3. 27. 39. E. 3. 27. 47. E. 3. 22. F. N. B. 118. (Post. 186. 200. b.)

[k] 13. E. 3. account 76. 41. E. 3. ibidem 34. 8. E. 3. 46. 8. E. 4. 6. b. F. N. B. 119. d. (2. Infl. 379. F. N. B. 119. c. 1. Ro. Abr. 119.)

[l] 2. Mar. B. account 89. F. N. B. 117. Pl. Com. 542. 2. H. 4. 12. 33. H. 6. 2. 4. H. 7. 6. & c. (F. N. B. 219. c.)

Ne

(1) No &c. in L. & M. or Rob.

(2) Acc. 1. Ro. Abr. 729. pl. 8. Mo. 679. Cro. Eliz. 920. Godb. 219. But lord Coke's words imply, that a single bond, that is, one without a penalty, being given for necessities, may be good against an infant; and so it hath been frequently adjudged. See March 145. 1. Ro. Abr. 729. pl. 8. and 1. Lev. 86.

(3) See acc. ant. 89. a. and note 1 there.

(4) Acc. post. 264. b.

(5) See F. N. B. 168. d. and the notes b. & c. in the 4to edition as to infant's binding himself to serve.

(6) See acc. ant. 88. b.

(7) See Dy. 21. b.

(8) But now one jointenant or tenant in common may have account against the other as bailiff for receiving more than his share of profits, though there is no appointment of him as bailiff. See 4. An. c. 16. f. 27. See too 1. Leon. 219.

(9) See as to this and the king's prerogative in charging persons as accountants the earl of Devonshire's case 11. Co. 89. a.

(10) Ant. 90. b.

Ne ferra jure en un enquest, &c.

[m] Bract. lib. 5. fo. 340. b.

[n] 13. E. 3. Ley 50.

[o] 26. E. 3. 63. 2. Marie Dyer

104. 105.

[p] Vid. devant cap. de Homage

et cap. de Fealty sect. 85. 91.

Bract. li. 2. fo. 124. Britton fo.

73. 74. et fol. 19. Fleta lib. 1.

cap. 27.

[q] 11. H. 6. 40. 1. H. 7. 25.

15. E. 4. 24. (Post. 295.)

[r] 46. E. 3. 10. 9. E. 4. 24.

15. E. 4. 2. 21. H. 3. 23.

(Post. 295. a. Cro. Eliz. 161.)

[m] *quid minor jurare non potest.* For example, [n] an infant cannot make his law of *non summons*; [o] and therefore the default shall not grieve him; for seeing the meane to excuse the default is taken away by law, the default it selfe shall not prejudice him. But yet this rule hath an exception, that [p] an infant, when he is of the age of 12 yeares, shall take the oath of allegiance to the king (1): and this was, as *Bracton* saith, *secundum leges sancti Edwardi*; but indeede such was the law in the time of king *Artbur*. (2) [q] An infant cannot upon his oath make his law in an action of debt. [r] And the husband and wife of full age, for the debt of the wife before the coverture, shall make their law.

Sect. 260.

LA terre en fee simple est allot a la file puisne. It is first to be observed upon this whole case, that the fee simple land is allotted to the yongest daughter, and the land entailed to the eldest. This partition *primâ facie* is good; (4) and herein the partition differeth from the exchange, where in the exchange the estates must be equal.

But yet this partition by matter subsequent may become voidable (as *Littleton* here puts the case). The eldest coparcener hath by the partition and the matter subsequent barred herself of her right in the fee simple lands, inso-much as when the yongest sister alieneth the fee simple lands and dieth, and her issue entreth into halfe the lands entailed, yet shall not the eldest enter into halfe of the lands in fee simple upon the alience; for by the alienation, the privie of the state is destroyed.

Le puisne file alien la terre en fee simple, &c.

The same law it is, if the yongest daugh-

ITEM si terres ou tenements soyent dones a un home en le taile, quel ad tant des terres en fee simple, et ad issue deux files, et devie, & ses deux files font partition enter eux, issint que la terre en fee simple est allot a la file puisne en allowance des terres & (3) tenements tailes allottes a la file eigne, si, apres tiel partition fait, la puisne file alienast sa terre en fee simple a un auter en fee, & ad issue fits ou file & devie, l'issue poit bien entrer en les tenements tailes & eux tener & occuper en purpartie ovesque son aunt. Et ceo est pur deux causes. Un est, pur ceo que l'issue ne poit aver ascun remede de la terre alien per sa mere, pur ceo que la terre fuit a luy en fee simple, & pur tant que il est un de les heires en taile, & n'ad my ascun recompence de ceo que a luy assiert de les tenements tailes, il est

ALSO if lands or tenements be given to a man in taile, who hath as much land in fee simple, and hath issue two daughters and die, and his two daughters make partition betweene them, so as the land in fee-simple is allotted to the younger daughter in allowance for the lands and tenements in taile allotted to the elder daughter, if, after such partition made, the yonger daughter alieneth her land in fee simple to another in fee, & hath issue a son or daughter & dies, the issue may enter into the lands in taile and hold and occupy them in purparty with her aunt. And this is for two causes. One is, for that the issue can have no remedie for the land sold by the mother; because the land was to her in fee simple; and in as much as she is one of the heires in taile, & hath no recompence of that which belongeth to her of the lands in taile, it is reason

reason

(1) Acc. ant. 68. b. & 78. b. See also 128. a.—Another exception is, that he may be sworn as a witness at 14, and before if he appears to understand an oath or rather as it is expressed by lord Hale hath competent discretion. 11. Mod. 228. 2. Hal. H. P. C. 278.—Also according to lord Hale in some cases of exigence, as in rape, an infant of tender years may be examined without oath.—In 1. Stra. 700. there is a case in which an infant of 7 years was refused. There too the point about examining infants as witnesses is ably argued. The same point was touched upon incidentally in the great case of *Onychund and Barker* before lord chancellor Hardwicke about receiving a Gentoo's evidence; which I more particularly refer to here; because in it lord Hale's doctrine of admitting infants to give evidence in criminal cases without oath is said to have been over-ruled at the Old Bailey after mature deliberation and also by lord Raymond. 1. Atk. 29. See 1. Hal. Hist. P. C. 302. 634. and 2. Hal. H. P. C. 279. and Lamb. Just. 24. 1602. p. 85.

(2) See notes 3. and 4. of fol. 68. b.

(3) In L. & M. instead of *terres* & it is *autres*.

(4) Acc. F. N. B. 62. M.—Here lord Hale's MS. makes a question, whether such partition be void or voidable, being made by husband, and cites M. 30. 31. Eliz. B. R. Morris and Maule.

reason, que el eit sa purparty de les tenements tailes, & nosnement quant tiel partition ne fait ascun discontinuance (1).

Mes le contrary est tenu M. 10. H. 6. s. que le heire ne poit enter sur le parcener que ad la terre taile, mes est mis a formedon.

deed or in law descended. If on the other side the eldest coparcener alien the land entailed and dyeth, her issue shall have a *formedon* alone (4) for the whole land entailed; for so long as the partition continueth in force (5), she is only inheritable to the whole land entailed.

Et n'ad my ascun recompence. This is intended, as it appeareth, of a full recompence.

Tiel partition ne fait ascun discontinuance. And the reason thereof is, for that it passeth not by Every of seisin, but the partition is in truth lesse then a grant, for that it maketh no degree, but each coparcener is in by descent from the common ancestor. See more of this in the chapter of discontinuance. Section 262.

Mes le contrary est tenu, &c. This is no part of *Littleton*, and is contrary to law as appeareth by *Littleton* himselfe; and besides, the case intended is not truly vouched, for it is not in 10. H. 6. but in 20. H. 6. and yet there it is but the opinion of *Newton obiter* by the way. *Vide F. tit. part. 1.* 20. H. 6. 14.

Sect. 261.

UN autre cause est, pur ces que il serra rette la folly del eigne soer, que el voit suffer ou agree a tiel partition, ou el puiroit aver si el voile la moitie de la terre en fee simple & son moitie des tenements en le taile pur soy purparty, & issint estre sure sans damage.

in fee simple, and this she might doe *ex provifione legis*. But when she will not submit her to the policie and provision of the law, but betake herselfe to her owne policy and provision, there the law will not ayde her, as here by *Littleton* it manifestly appeareth. And so it is in the other case. (*) As if a man be seised of three mannors of equal value in fee, and taketh wife, and chargeth one of the mannors with a rent charge, and dyeth, she may by the provision of the law take a third part of all the mannors and hold them discharged; but if she will accept the entire mannor charged, it is holden that she shall hold it charged.

ANother reason is, for that it shall be accounted the folly of the eldest sister, that she would suffer or agree to such a partition, where she might if shee would have had the moity of the land in fee simple and a moity of lands entailed for her part, and so to be sure without losse.

UN autre cause, &c.

This is another reason to prove, that by the partition the eldest daughter hath concluded her selfe, as is aforesaid.

Son moitie des terres en le taile.

For if a writ of partition had beene brought, the eldest should not have beene compelled to take the whole estate in taile, for the prejudice that might after ensue, but might have challenged the one moity of the lands in taile, and another moity of the lands in

(*) 26. E. 3. dower 123. 17. E. 2. tit. dower 164. 18. H. 6. 27. (Ant. 32. b. 33. a.)

A

(1) In L. & M. Rob. and the two Cambridge MSS. these words are added, *de le taile, si come sera dit en apres en le chapitre de discontinuance*. What follows in this section is not in L. & M. Rob. or the MSS.

(2) For the effect of this doctrine about reversions on estates tail, and with what qualification it should be understood, see the authorities collected in 1. Vin. Abr. 141. pl. 2. to which add 2. Atk. 206. and post. 174. b.

(3) Lord Coke may be here presumed to mean a *lineal* warranty; because hereafter he allows and in his time it was the common learning, that *collateral* warranty would bar the issue in tail without recompence. Post. 374. b.

(4) In a Coke upon *Littleton* I have with MS. notes there is the following remark.—“*Quare* of this; for I think the *formedon* must be brought in the name of the issue and the surviving parcener, and then the parcener to be summoned and severed, and then the issue to make a special count and shew the partition.”

(5) See post. 176. b. and sect. 274.

Dyer 1. Mar. 98.

A partition of lands intailed betweene parceners, if it be equall at the time of the partition, shall bind the issues in taile for ever (1), albeit the one doe alien her part.

But here it may be demanded, that seeing *Littleton* saith, that it shall betaken to be the folly of the eldest parcener, &c. what if so be the eldest did not know of the estate tayle either in respect of the antiquity thereof, or for want of having of the evidence, or for any other cause, what folly can be imputed to her?

The answer is, that it is presumed in law, that every one is consant of her right and title to her owne land; and on the other side it should be arrected (2) great folly in her to bee ignorant of her owne title. And therefore the reason of *Littleton* doth firmly hold.

Sect. 262.

BEfore (3) it appeareth, that when the privity of the estate is destroyed by the feoffment of one coparcener, that upon eviction of a moiety by force of an entayle against the other she shall not enter upon the alienee. But in this case that *Littleton* here putteth, when the privity of the state remaineth, and the part of the one is evicted, (*) she shall enter and hold in coparcenary with her other coparcener; and so it is in the case of an exchange. By reason of the &c. in the end of this section there may two questions be justly demanded.

What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition avoyded, for that *Littleton* here putteth the case that the whole purpartie of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in taile, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty bee evicted, that shall avoyd the partition in the whole, bee it of a mannor, that is entire, or of acres of ground, or the like that bee severall; [u] for the partition in that case implyeth for this purpose both a warrantie and a condition in law (4), and either of them is entire, and giveth an entry in this case into the whole. And so hath

AUXR si home soit seifie en fee d'un carve de terre per just title, & disseist un enfant deins age d'un auter carve, & ad issue deux files, & morust seifi d'ambideux carves, l'enfant adonque esteant deins age, & les files entront & font partition, issint que l'un carve est allotte al purparty l'un, come per case al puisne en allowance d'auter carve que est allotte a le purparty de l'auter, si puis l'enfant enter en le carve dont il fuit disseist sur la possession le parcener que ad mesme le carve, donques mesme le parcener poit entrer en l'auter carve que sa soer ad, & tener en parcenary ovesque luy. Mes si le puisne aliena mesme la carve a un auter en fee simple devant l'entrie l'enfant, & puis l'enfant enter sur le possession l'alienee, don-

ALSO if a man bee seised in fee of a carve of land by just title, and hee disseise an infant within age of another carve, and hath issue two daughters, and dyeth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as per case to the youngest in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof hee was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the yongest alien the same carve to another in fee before the entry of

(*) 15. E. 4. 3. a. per *Littleton*. lib. 4. fo. 121. 122. *Ballard's* case.

[u] 13. E. 4. 3. 42. Aff. 22.

(1) Acc. ant. 166. a. 2. Vern. 233.

(2) This word, which is so uncommon that I cannot find it noticed in any dictionary I have seen, is apparently used for *reckoned*. Lord Coke seems to borrow it from *Littleton's* use of the word *rette* at the beginning of the section here commented upon.

(3) Ant. 172. b.

(4) That is a condition to give re-entry and a warranty to vouch and have recompence. See post. 384. a.

que el ne poit enter en l'auter carve; pur ceo que per son alienation el ad luy tout ousterment dismisse d'aver ascun part de les tenements come parcener. Mes si le puisne devant l'entrie l'enfant fait de ceo un lease pur terme d'ans, ou pur terme de vie, ou en fee tayle savant la reversion a luy, & puis l'enfant enter, là paraventure auterment est; pur ceo que el ne soy dismisse de tout ceo que juit en luy, mes ad reserve a luy le reversion & le fee, &c.

the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed her self to have any parte of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for terme of yeares, or for terme of life, or in fee tayle saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed her selfe of all which was in her, but hath reserved to her the reversion, & the fee, &c.

it beene lately resolved [a] both in the case of exchange and of the partition.

To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoyded in the whole. (1) As if A. bee seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and hee disseise the lessee for life who makes continuall clayme; A. dyeth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter: the partition is avoyded for the whole, and so likewise hath [p] it beene lately resolved.

[q] Yet there is a diversity betweene the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law (2) she defeateth the partition in the whole. But when shee voucheth by force of the warranty in law for part, the partition shall not bee defeated in the whole, but shee shall recover recompence for that part. And therein also there is another diversity betweene a recovery in value by

[a] Bostard's case lib. 4. fol. 121.

[p] Bostard's case, ubi supra.

[q] Vide 5. E. 3. tit. voucher 249.

(6. Co. 12. b. 1. Ro. Abr. 815, 4. Co. 122.)

force of the warranty upon the exchange and upon the partition. For upon the exchange he shall recover a full recompence for all that he loseth. But upon the partition she shall recover but the moiety, or halfe of that which is lost, to the end that the losse may be equall. (3).

Many other diversities there be between exchanges and partitions; for there are more and greater privities in case of partition in persons blood and estates, than there is in exchanges; all which were too tedious to rehearse in this place, seeing so much as hath beene said herein is sufficient for the explanation of the cases of partition which *Littleton* hath put.

18. E. 2. tit. aid 171. 19. H. 6. 26. (Ant. 50. b.)

Donques el ne poit enter en l'auter carve, &c. By this is also approved that which hath beene often said before, that when the whole privy betweene coparceners is destroyed, there ceaseth any recompence to be expected either upon the condition in law or warranty in law by force of the partition.

Per son alienation il ad luy tout ousterment dismisse d'aver ascun part de les tenements come parcener. Hereupon it followeth, that if one parcener maketh a feoffment in fee, and after her feoffee is impleaded and voucheth the feoffor, [r] she may have aid of her coparcener to deraigne a warranty paramount, (4) but never to recover *pro rata* against her by force of the warranty in law upon the partition; for *Littleton* here saith, that by her alienation she hath dismissed her selfe to have any part of the land as parcener, and without question as parcener she must recover *pro rata*, upon the warranty in law against the other parcener.

And yet in some case the feoffee of one coparcener shall have aid of the other parceners to deraigne the warranty paramount. And therefore [a] if there be two coparceners and they make partition, and the one of them enfeoffes her sonne and heire apparent and dieth, the sonne is impleaded, albeit he be in by the feoffment of his mother, yet shall he pray in ayd of the

[r] 41. E. 3. 24. 11. H. 4. 22. 23. 14. E. 3. 24. 24. (Hob. 21. 26.)

[a] 43. E. 3. 23. Pl. Com. 4. E. 3. 15. 5. E. 3. 7. 38. E. 3. 17. &c.

(1) So it is of an exchange. Hob. 152. Calthrope's reading on lord and copyholder 92. 1. Ro. Abr. 815.

(2) That is, by entry.

(3) See acc. the case of dower post. 384. b. See also the provision in favour of the lord for the third part not devisable by the Statute of wills 34. & 35. H. 8. c. 5. f. 11.

(4) See 31. H. 8. c. 1. f. 1. 4 H. 7. 3. a. & Plowd. Mansel's case 7. a. & b.

[5] 32. E. 1. tit. aid 178.
3 E. 2. ibid. 163. (Post. 384. b.)

the other coparcener to have the warranty paramount; and the reason [5] of the granting of this aid is, for that the warranty between the mother and the sonne is by law admulled, (1) and therefore the law giveth the sonne albeit he be in by feoffment, to pray in ayd of the other parcener, to deraigne the warranty paramount; wherein is to bee observed the great equity of the common law in this case;

Ipsæ etenim leges cupiunt ut jure regantur.

[*] 2. H. 6. 16. (Flowd. 9. b.
Manuel's case.)

[*] But if a man be seised of lands in fee, and hath issue two daughters, and make a gift in taile to one of them, and dye seised of the reversion in fee which descends to both sisters, and the donee or her issue is impleaded, she shall not pray in ayd of the other coparcener, either to recover *pro rata*, or to deraigne the warranty paramount; for that the other sister is a stranger to the state taile, whereof the eldest was sole tenant, and never partition was or could be thereof made. (2)

(Ant. 173. a.)

Mes si le puisne devant l'entrie l'enfant fait de ceo un lease, &c. ou en fee taile savant le reversion a luy, &c. This (upon that which hath beene said) (3) needeth no explanation. Only this is to be observed, that, albeit it is in the power of tenant in taile to cut off the reversion, yet if the infant enter before it be cut off, the law hath such consideration of this reversion, that she that loseth it shall enter into her sisters part, and hold with her in coparcenary, for that the privity between them was not wholly destroyed. (4)

Sect. 263.

(F. N. B. 162. c.)

ITEM si soient trois ou quater parceners, &c. que sont partition enter eux, si le part d'un parcener soit defeat per tiel loyal entrie, el poit enter & occuper les auters terres ov'esque tous les auters parceners, & eux compeller de faire nouvel partition de les auters terres enter eux, &c.

ALSO if there be three or four coparceners, &c. which make partition between them, if the part of the one parcener be defeated by such lawfull entrie, she may enter and occupie the other lands with all the other parceners, and compell them to make new partition between them of the other lands, &c.

INTER eux, &c. This &c. implieth, that so it is betweene the surviving parceners and the heires of the other, or betweene the heires of parceners, all being dead.

Sect. 264.

LE baron soy tient einscome tenant per le curtesie. This is no severance of the state in coparcenary, [5] for the other coparcener and the tenant by the curtesie shall be joyntly impleaded; for he doth continue the state of coparcenary, as the other parcener did. (5)
Vers le tenant

ITEM si sont deux parceners, & l'un prent baron, & le baron & sa feme ont issue enter eux, & la feme devy, & le baron soy tient eyns en le moity come tenant per le curtesie, en ceo cas le parcener que survesquist & le tenant per le curtesie bien poient faire par-

ALSO if there be two parceners, and the one taketh husband, and the husband and wife have issue betweene them, and his wife dieth, and the husband keepes himselfe in as tenant by the curtesie, in this case the parcener which sur-
titution

[5] 24. E. 3. 29. 31. E. 3. Bricle 339. 9. E. 4. 13. 19. H. 6. 26. 3. H. 6. 26. 3. H. 6. Aff. 1. 27. H. 6. 8. 21. E. 3. 14. (Ant. 167. b.)

(1) Acc. post. 390. a.

(2) See post. 177. b. *contra* as to land given in frankmarriage. See also 2. H. 6. 16.

(3) Ant. 173. a. and note 2. there.

(4) See ant. 103. a. & b.

(5) Acc. post. 175. b. See also fo. 192. a. and Bro. joinder in action 40.

titim enter eux, &c. Et si le tenant per le curtesie ne voit agreer al partition d'estre fait, donques le parcener que survesquist poit aver envers le tenant per le curtesie, brieve de partitione faciendâ, &c. & luy compeller de faire partition. Mes si le tenant per le curtesie voile aver partition enter eux d'estre fait, & le parcener que survesquist ne voit ceo aver, donque le tenant per le curtesie n'avera aucun remedy pur aver partition, &c. Car il ne poit aver brieve de partitione faciendâ, pur ceo que il n'est parcener, car tiel brieve gift pur parceners tantselement. Et issint poyes veyer, que brieve de partitione faciendâ gift envers tenant per le curtesie, & uncore il mesme ne poit aver tiel brieve.

tenant by the curtesie, and yet he himselfe cannot have the like writ.

before. But a *nuper obiit* and a *rationabili parte* (3) doe lye onely betweene two coparceners on both sides.

If three coparceners be, and the eldest doth purchase the part of the youngest, the eldest, having one part by descent and the other by purchase, shall have a writ of partition at the common law against the other middle sister, *et sic de similibus*. And so it is in a far stronger case, if there be three coparceners, and the eldest taketh husband, and the husband purchase the part of the youngest, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in the right of his wife who is a parcener. (4)

Pur aver partition, &c. Here by this &c. is included all others that be strangers in blood, whether they come to their estates by purchase or by act in law. Since *Littleton* wrote, by the statutes [d] one joyntenant or tenant in common may have a writ of partition against the other; and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common: and the like had bene attempted in former parliaments [*] but prevailed not untill these latter statutes.

[e] The tenant by the curtesie shall have a writ of partition upon the statute of

veth, and the tenant by the curtesie may well make partition between them, &c. And if the tenant by the curtesie will not agree to make partition, then the parcener which surviveth may have against the tenant by the curtesie a writ of *partitione faciendâ, &c.* & compel him to make partition. But if the tenant by the curtesie would have partition to be made between them, and the parcener which surviveth will not have this, then the tenant by the curtesie cannot have any remedy to have partition, &c.

For hee cannot have a writ of *partitione faciendâ*, because he is no parcener. For such a writ lyeth for parceners onely. And so you may see, that a writ of *partitione faciendâ* lyeth against

per le curtesie brieve de partitione faciendâ, &c. Here by the &c. is implied, that albeit that the tenant by the curtesie be an estranger in blood, yet the [c] writ *de partitione faciendâ* clearly lies against the tenant by the curtesie, because he continueth the estate of coparcenary.

If two coparceners be, and one doth alien in fee, they are tenants in common, and severall writs of *præcipe* must be brought against them; (1) and yet the parcener shall have a writ of partition against the alienee at the common law, which is a far stronger case then the case put of tenant by the curtesie.

Tiel brieve gift pur parceners tantselement.

Hereby it appeareth, that neither the tenant by the curtesie, nor (much lesse) the alienee of a coparcener shall have a writ of *partitione faciendâ* at the common law; (2) for *Littleton* saith here, that such a writ lyeth onely for parceners, [*] but it may be brought by a parcener against strangers, as it appeareth

[c] 3. E. 3. 47. 9. E. 5. 13. 16. E. 3. Aid 129. 19. E. 3. ibid. 144.

28. E. 3. 51.

[*] 3. E. 3. 47. 48. (F. N. B. 197; Plowd. 306. b.)

Dier 1. Marix 98.

F. N. B. 52. Registr.

[d] 31. H. 8. cap. 1. 32. H. 8. cap. 32. Vid. sect. 290.

[*] Rot. Parl. 1. R. 2. nu. 82.

[e] Brooke tit. partition 41. 32.

(1) Acc. ant. 167. b. But it is no severance, if the alienation be only for life. Post. 192. a.

(2) See acc. Dy. 98. b.

(3) See ant. 164. b.

(4) See in F. N. B. 62. S. the form of the writ in such a case.

32. H. 8. ca. 32. for albeit he is neither jointenant nor tenant in common, for that a *præcipe* lyeth against the parcener and tenant by the curtesie, as hath been said, yet he is in equall mischief as another tenant for life.

[f] Mich. 7. & 8. Eliz. Bendloes inter Wotton & Cooke. (1) Dier 3. Mariz 128. A. & 7. Eliz. 243.

[f] If there be three coparceners and a stranger purchase the part of one of them, he and one other of the coparceners shall not joyne in a writ of partition, neither by the common law, nor by force of the statute; for the words of the preamble of the statute be (*and none of them by the law doth or may know their severall parts, &c. and cannot by the lawes of this realme make partition thereof, without other of their mutuall assents, &c.*) Now in this case the one of the plaintifes, viz. the parcener, may have a writ of partition at the common law, and the other parcener being a purchaser may have it by the statute; and therefore they shall not joyne in one writ.

Cap. 2. Parceners by Custome. Sect. 265.

(1. Sid. 136. Ant. 140. a.) See before all the ancient authors of the law concerning gavelkind ubi supra. Lambert verbo terra exscript.

[g] 5. E. 4. 8. b. 21. E. 4. 56. b. Plo. Com. 129. b. in Buckleis case. Vide sect. 8. versus finem. (1. Sid. 138. Doct. Plac. 105.)

[h] Berockesire. Hereford.

[i] Lamb. verb. Welfamen. Silvester Giraldus.

MES il covient en le declaration de faire mention de le custome. Well said Littleton,

[g] that he in his declaration must make mention of the custome, as to say, that the land is of the custome of gavelkinde; but hee shall not prescribe in it. And so is it of *Burgh English*. And these two vary in that point from other customes; for the law, when they are generally alledged, taketh knowledge of these two. (4)

In [h] *Domesday* it is thus said, *duo fratres tenerunt in paragio* (5) *quisque habuit aulam suam, & potuerint ire quod voluerint.*

Auxy tiel custome est en auters lieux Angleterre. Of this sufficient hath beene said before. (6)

North Gales. Wales, *Wallia*. It commeth [i] of the Saxon word *wealh*, which signifieth *peregrinus*, or *exterus*; for the Saxons so called them, because in troth they were strangers to them being the remaine of the old and ancient Britons, a wise and warlike nation inhabiting in the west part of England. These men have kept their

proper language for above these thousand yeares past; and they to this day call us Englishmen *Saxons*, (that is) Saxons. And the like custome, as our author here saith was in North Wales, was also in Ireland; for there the lands also (which is one marke of the ancient Brittons) were of the nature of gavelkinde: but where by their *Brehon* law the bar-

PARCENERS per le custome sont lou

home seisie en fee simple, ou en fee taile, de terres ou tenements que sont de tenure appel gavelkind deins le county de Kent, & ad issue divers fits & devie, tielx terres ou tenements descenderont a tous les fits per le custome, & ovelment enheriteront & ferront partition enter eux per le custome, sicome females ferront, et briefe de partitione faciendâ gist en ceo cas, sicome enter females.

Mes il covient en la declaration de faire mention de le custome.

Auxy tiel custome est en auters lieux d'Angleterre. Et auxi tiel custome est en North Gales, &c. (2)

PARCENERS by the custome are,

where a man seised in fee simple, or in fee taile, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath issue divers sonnes and die, such lands or tenements shall descend to all the sons by the custome, and they shall equally inherit and make partition by the custom, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custome. Also such custome is in other places of England, and also such custome is in North-Wales, (3) &c.

(1. S. C. is also in Dy. 260. b.

(2) In L. & M. and the two MSS. it is *en Northumberland et North Wales, &c.*

(3) But by the 34. & 35. H. 8. gavelkind descent of lands in Wales is expressly taken away, and all lands there are made descendible to the eldest son according to the common law of England. See that statute c. 26. f. 91. and 128. Also in Kent various estates have been made descendible according to the common law by special statutes for this purpose. See Robins. on Gavelk. 75.

(4) But according to a very accurate writer on gavelkind this doctrine must be restrained to the special descent of gavelkind and *Borough English* lands, which is considered as the essence of both; and therefore the other customs incident to gavelkind and *Borough English* land must be specially pleaded. See Robins. on Gavelk. 41. For this difference several authorities are cited; namely, as to gavelkind a case in Cro. Cha. 562. another in 1. Lev. 79. 1. Sid. 137. and Raym. 76. and a third in 2. Sid. 153. and as to *Borough English* a case in 1. Salk. 243. I rather introduce these references because mr. Robinson's treatise is become very scarce.

(5) This word means equality, being derived from the adjective *par*, and made a substantive by the addition of *agium*. Read more concerning the termination of *agium* ant. 86. a. See also as to *disparagatio* ant. 80. a.

(6) Ant. 14. a. and 140. a. See also book 1. chap. 7. of Robinson on Gavelkind, where the reader will see a most learned dissertation on the origin antiquity and universality of partible descents.

stards inherited with their legitimate sons, as to the bastards that custome was abolished. (1) Vide sect. 212. And agreeing with Littleton in this point, see an old statute. * *Aliter usitatum est in Wallia*, * Stat. Walliz, an. 12. E. 1. quàm in Angliâ, quoad successionem hereditatis, eò quòd hereditas partibilis est inter heredes masculos, et à tempore cuius non extitit memoria partibilis extitit, dominus rex non vult, quòd consuetudo illa abrogetur, sed quòd hereditates remaneant partibiles inter consimiles heredes sicut fieri consuevit, Et fiat partitio illius sicut fieri consuevit. (2)

Parceners per le custome, &c. Well sayd Littleton, "by the custome," for sons are parceners in respect of the custome of the fee or inheritance, and not in respect of their persons, as daughters and sisters, &c. be. [b] *Et sunt participes quasi partem capientes, &c. ratione ipsius rei quæ partibilis est, et non ratione personarum, quæ non sunt quasi unus heres & unum corpus, sed diversi heredes, ubi tenementum partibile est inter plures coheredes petentes, qui descendunt de eodem stipite & semper solent dividi ab antiquo.* [4] Brañ. li. 5. fo. 428. Brit. cap. 71. Flet. lib. 5. cap. 9.

Sect. 266.

ITEM il y ad autre partition quel est d'auter nature et d'auter forme que aucuns des partitions a-vaunt dits sont. Sicome home seise de certain terres en fee simple ad issue deux files, et l'eigne est mary, et le pere dona parcel de ses terres a le baron ove sa file en frank-mariage, et morust seise de le remnant, le quel remnant est de plus greinder value per an que sont les terres dones en frank-mariage.

Also there is another partition which is of another nature and of another forme then any of the partitions aforesaid be. As if a man seised of certaine lands in fee simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frankemariage, and dyeth seised of the remnant, the which remnant is of a greater yearly value then the lands given in frank-mariage.

DONA parcel de ses terres a le baron ove sa file en frankmariage.

Here it appeareth, that a gift in frankemariage may be made after marriage, as hath beene sayd in the chapter of fee tayle. (3)

Le quel remnant est de plus greinder value per an, &c.

Admit, that the lands given in frankmariage are of greater value than the lands descended in fee simple, shall the other sister have any remedy against the donees? It is plaine she shall not; because it is lawfull for a man to dispose of his own lands at his will and pleasure.

Sect. 267.

EN cel case, le baron, ne le feme, avera riens pur tour purpartie de le dit remnant, sinon que ils voient mitter leur terres dones en frank-mariage en hotch-pot ovesque le rem-

IN this case, neither the husband, nor wife, shall have any thing for their purpartie of the said remnant, unless they will put their lands given in frank-mariage in hotch-pot, with the remnant of the

EN cel case, le baron, ne le feme, avera riens pur tour purpartie, &c. [1] This gift in frankmariage shall *prima facie* be intended a sufficient advancement; and therefore the remnant shall descend to the other coparcener, onely with this provision in law

tacite annexed, that if the donees

[1] 8. H. 3. breve 380. 34. E. 1. nuper obiit 15. adjudge 4. E. 3. 49. 10. Aff. p. 14. Vi. 10. E. 3. 38. & 30. Aff. 7. Brañton lib. 2. fol. 77. lib. 5. fo. 428. Brit. ca. 72. Fleta lib. 6. cap. 47.

(1) The gavelkind descent of lands in Ireland was an incident to the custom of *tanistry*, and as such fell to the ground with its principal in consequence of a solemn judgment against the latter in a case of the fifth of James the first. For this case, which is excellently reported by sir John Davis, who was attorney-general in Ireland at the time, see Dav. Rep. 23. But in the reign of queen Anne, the policy of weakening the Roman Catholic interest in Ireland was the cause of an Irish statute to make the lands of papists descendible according to the gavelkind custom unless the heir conformed within a limited time. See Robins. on Gavelk. 17. However now by an Irish statute of the present reign the descent of the lands of papists is again reduced to the course of the common law. Irish Stat. of 17. & 18. G. 3. c. 49. f. 1.—Lord Coke, from his supposing that the Brehon law of partibility except as to bastards remained in Ireland, seems not to have been aware of the case of *tanistry*. Indeed what he writes in this respect was before that case more applicable to Wales than Ireland; for the statute of Wales cited in the next passage confirms the partible descent of lands there amongst males with an exception excluding bastards, whereas I doubt whether there is any evidence of confirmation of the Brehon law with such an exception. See ant. 141. a. where lord Coke himself takes notice of a total abolition of the Brehon law.

(2) See ant. 175. b. note 4.

(3) See ant. 21. b. See also acc. as to dower *ex assensu patris* after marriage F. N. B. 151. L.

nees will put the land into *botchpot*, then she shall out of the remnant make up her part equall. But the donees must doe the first act, and in the meane time the whole fee simple land descends to the other. And this is warranted here by *Littleton*, viz. that the donees shall have nothing for the purpartie of the remnant, unlesse they will put their lands given in frankmariage in *botchpot* so as the donees must doe the first act; and more expressely after in this chapter, (1) where he directly saith, that the other sister shall enter into the remnant, and them to occupy to her owne use, unlesse the husband and wife will put the lands given in frankmariage into *botchpot*. And herewith agreeth *Fleta*, (2) who saith, *cum dicat tenens excipiendo, quod non tenetur petenti respondere, quia A. participem habet, &c. replicari poterit à petente, quod prædictus A. tenet quandam partem in maritagium de communi hereditate, nec vult illud in partem ponere*. And here are three things (that I may speake once for all) to be observed. First, that in this speciall case where there be two daughters, one of them onely shall inherit the lands in fee simple. Secondly, that in this case there lieth no writ of partition; because *non tenent in simul & pro indiviso*. Thirdly, if the parcener, to whom the land in fee simple descended, will not put the lands in *botchpot*, then may the donees enter into the fee simple lands, and hold them in coparcenarie with her.

And it seemeth by our old bookes, [k] that by the ancient law there was a kind of resemblance hercof concerning goods. *Si autem post debita deducta, & post deductionem expensarum quæ necessarie erunt, id totum, quod tunc superfuerit, dividatur in tres partes; quarum una pars relinquatur pueris (3) si pueros habuerit defunctus, secunda uxori si superstes fuerit, & de tertiâ parte habeat testator liberam disponendi facultatem. Si autem liberos non habeat, tunc medietas defuncto, & alia medietas uxori: si autem sine uxore decesserit liberis existentibus, tunc medietas defuncto, & alia medietas liberis tributur: si autem sine uxore & liberis, tunc id totum defuncto remanebit*. And by the law before the conquest it was thus provided, *si quis incuria siue morte repentina fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur heredi nomine) sibi assumito, verum eas judicio suo uxori liberis & cognatione proximis jussu pro suo cuique jure distribuito*.

But it appeareth by the *Regist*, [l] and many of our bookes, that there must be a custome alleged in some county, &c. (5) to inable the wife or children to the writ *de rationabili parte bonorum*; (6) and so hath it bene resolved in parliament. [m] But such children, as be reasonably advanced by the father in his life time with any part of his goods, shall have no further part of his goods; for the words of the writ be, *nec in vitâ patris promossi fuerunt*. (7)

Note, the custome of *London* is, that if the father advance any of his children with any part of his goods, that shall bar them to demand any further part, unlesse the father under his hand or in his last will do expresse and declare, that it was but in part of advancement, (8) and then that child so partly advanced shall put his part in *botchpot* with the executors and widow, (9) and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in effect, which the civilians call *collatio bonorum*. (10)

E:

(1) See sect. 268.

(2) See also acc. F. N. B. 197. O.

(3) Though *pueri* more commonly means *boys*, yet it is plain, that here it comprehends children of both sexes; because afterwards *liberi* is used for the same purpose. The word is used in the same large sense in the writ *de rationabili parte bonorum*; and therefore Fitzherbert observes, that the son and daughter may join in that writ. F. N. B. 122. C. Also this large sense of *pueri* is warranted both by the application of the word in the Roman law, and by its derivation from the Greek word *παις*, which is masculine or feminine according to the article before it. To this effect Justinian's Digest in the title *de verborum significatione* gives the following extract from the commentary of the Roman lawyer Julius Paulus on his famous predecessor Sabinus, *Pueri appellatione etiam puella significatur: nam et feminas puerperas appellant recentes ex partu; et Græci παῖς communiter appellatur*. See Dig. lib. 50. tit. 16. leg. 163. and Menag. Jur. Civil. Amcenitates cap. 39. voce *puerpera*, where that learned French writer expatiates on the etymology of *puer*. I have been induced to give this explanation of the word *puer* by a case in our own law-books, which actually turned upon the question, whether a daughter could take lands under that description. The case arose on a remainder in a settlement made by a man on his first marriage *seniori puero* of the husband and the heirs of his body; and this was decided by two judges against one to intitle a daughter and only child of the first marriage in preference to the son of a second. Dy. 337. b. However there is a much earlier case on the construction of *pueri*, in which it was interpreted to exclude females. Hob. 33. and the case there cited from 30. Aff. 47. & 30. E. 3. 27. But now indeed, when legal instruments are so universally expressed in the English tongue, it is not probable, that any dispute should arise in our courts of justice about the interpretation of this Latin word.

(4) The chapter of *Fleta* is here referred to erroneously. It should be cap. 57.

(5) The places, usually named, as those in which the customary division of personality on a death prevailed and so in favor of wife and children restrained the testamentary power to a third or a moiety, are these: the province of York, the city of London, and various districts of Wales. But since lord Coke's time several statutes have been made to remove this restraint in each of these different places; and under those statutes the whole of the personal estate is now disposeable by last will in them through England and Wales, with this exception however, that there is still no statute affecting either the city of Chester which is part of the province of York, or such other places not within that province or London or Wales as may have such a custom; though whether there be any such places, I am uncertain. See for the province of York 4. W. & M. c. 2. & 2. & 3. An. c. 5. for London 11. G. 1. c. 18. and for Wales 7. & 8. W. 3. c. 38. Indeed sir William Blackstone treats the testamentary power over personal estate as now prevailing through all England, 2. Blackst. Comm. 9th ed. 493. But if there be no other statutes than those he cites, being the same as are before mentioned, I take this to be a mistake so far at least as regards the city of Chester. The fact is, that both the cities of York and Chester were excepted in the 4. of W. & M. and that the 2. & 3. An. take away the exception as to the city of York only. As too the statutes, which subject the custom of dividing the personal estate of deceased persons to the testamentary power, do not name any place in England except London and the province of York, it follows, that the local

[k] Glanvil. lib. 7. cap. 5. Bracton lib. 2. fol. 60. Fleta lib. 2. cap. 5. (1) Magna Carta cap. 18. 3. F. N. B. 222. 30. E. 3. 25. 31. E. 3. Resp. 60. 31. Aff. 14. 17. E. 2. Detincw 17. E. 3. 17. 1. E. 2. Detincw 56. 31. H. 8. tit. rationab. parte bonorum 6.

* Lamb. f. 119. 68. (Poll. 185; b. Ant. 149. b.)

[l] Regill. 142. 34. E. 1. Detincw 60. 1. E. 4. 6. 7. E. 4. 21. 43. E. 3. 38. (F. N. B. 122. L.) [m] 3. E. 3. dette 156. 40. E. 3. 18.

Et il semble que cest parol (botchpot) est en English a pudding, &c. Littleton both here and in other places searcheth for the signification of words, in all arts a thing most necessary; for *ignoratis terminis ignoratur & ars.* Vide for Etymologies, sect. 95. 119. 135. 154. 164. 204. 234. &c.

Hutspot or *botspot* is an old Saxon word, and signifieth so much as *Littleton* here speaks. And the French use *botchpot* for a commixion of divers things together. It signifieth here metaphorically in *partem posito*. In English we use to say *bodgepodge*, in Latine *sarrago* or *miscellaneum*.

The residue of this section needeth no explication.

Vide Brit. cap. 72. 4. E. 3. 47. 6. E. 3. 30. 10. E. 3. 38. 24. 4. 3. 27. F. N. B. 262. Regitt. 320. Fleta lib. 6. ca. 47. (1) Mich. 10. E. 1. coram rege Hereford in thesaur.

Sect. 268.

ET cest terme (botchpot) n'est forsque un terme similitudinarié, & est a tant adire, cestascavoir, de mitter les terres en frankmarriage & les auters terres en fee simple ensemble; & ceo est a tiel extent de conuſter le value de tous les terres, s. de les terres dones en frankmarriage, & de le remnant que ne fueront dones, & donques partition ferra fait en le forme que ensuist. Sicome, mittomus que home soit seisie de 30 acres de terre en fee simple, chescun acre de value de 12 d. per an. & que il ad issue deux files, & l'une est covert de baron, & le pier dona 10 acres de les 30 acres a le baron ove sa file en frankmarriage, & morust seisie de le remnant, donques l'auter soer entra en le remnant, s. en les 20 acres, & eux occupiera a son use demesne, si non que le baron et sa feme voile mitter les 10 acres dones en frankmarriage, ove les 20 acres en botchpot, cestascavoir, ensemble; & donque quant le value de chescun acre est conus, cestascavoir que chescun acre vault per an, & est assesse ou enter eux agreee, que chescun acre vault per an 12 d. donques le partition

AND this tearme (*botchpot*) is but a tearme similitudinary, & is as much to say, as to put the lands in frankmarriage and the other lands in fee simple together; and this is for this intent, to know the value of all the lands *scz.* of the lands given in frankmarriage, and of the remnant which were not given, and then partition shall be made in form following. As, put the case that a man be seised of 30 acres of land in fee simple, every acre of the value of 12 pence by the yeare, and that he hath issue two daughters, and the one is covert baron, and the father gives ten acres of the 30 acres to the husband with the daughter in frankmarriage, and dyeth seised of the remnant, then the other sister shall enter into the remnant, *viz.* into the 20 acres, and shall occupie them to her owne use, unless the husband and his wife will put the 10 acres given in frankmarriage, with the 20 acres in *botchpot*, that is to say, together; and then when the value of everie acre is knowne, to wit, what every acre valueth by the year, and is assessed or agreed between them, that every acre is worth by the yeare 12 pence, then the partition shall be *ferra*

(1) This reference to Fleta is wrong. It should be lib. 5. cap. 9. p. 314.

local custom of any other part of England on this subject is not disturbed by any statutory provision. It now only remains to add here, that though the testamentary power is thus extended over the whole personalty notwithstanding the customs within London or the province of York or within any part of Wales, yet in the case of an intestacy the customs of those places still operate, there being a special provision to save them and all other peculiar customs in the statute of Cha. 2. for distributing the personal estates of intestates. See 22. & 23. Cha. 2. c. 10. See further as to the statutes about these customs in the latter part of note 9. infra.

(5) In Swinburne on testaments there is a curious dissertation explaining the custom of the province of York in respect to filial portions; and in the course of it, the question, what sort of advancement shall exclude a child, is considered at large. This valuable part of Swinburne is not in the first edition; but was afterwards added by him. It is otherwise as to many additions in the latter editions of his book; these being full of enlargements coming from others, but printed without discriminating them from Swinburne's own work. This manner of treating authors in new editions is ever dissatisfactory and unjustifiable; but in respect to law-books, it is peculiarly inconvenient, the weight and authority of these so much depending on the character of the author. To Swinburne on this subject add the title *gills* in Dr. Burn's Eccles. Law, in the course of which it is learnedly attempted to give the result of every thing to be met with on the subject in Swinburne's book or elsewhere.

(6) Acc. 2. Inst. 33. But in this point some of great respect differ from Lord Coke. Fitzherbert in his commentary on the writ *de rationabili parte honorum* contends, that the distribution, which excludes the testamentary power from one third or one moiety of the personal estate, was in his time the general law of the land, and therefore needed not a special custom to support it. He is followed by Swinburne in the same idea, and even by our great modern commentator on the law of England, who cites Finch's law to prove, that the general law was taken to be as represented by Fitzherbert as late as the reign of Charles the first. However Mr. Justice Blackstone states, that about this period the general law insensibly changed; which

*serra fait en tiel forme, cestasca-
voir le baron & sa feme averont
oultre les 10 acres dones a eux
en frankmarriage 5 acres en
severalte de les 20 acres, & l'au-
ter soer avera le remnant, s. 15
acres de les 20 acres pur sa pur-
partie, issint que accomptant les
10 acres que le baron & sa feme
ount per le done en frankmar-
riage, et les auters 5 acres de
les 20 acres, le baron et sa feme
ont autant en annual value que
l'auter soer ad.*

made in this manner, viz. the husband and wife shall have be- sides the 10 acres given to them in frankmarriage 5 acres in several- tie of the 20 acres, and the other sister shall have the remnant, s. 15 acres of the 20 acres for her purpartie, so as accounting the 10 acres which the baron and fem have by the gift in frankmarriage, and the other 5 acres of the 20 acres, the husband and wife have as much in yearly value as the other sister.

Bract. lib. 2. fol. 77. lib. 5. fol. 428. Brit. cap. 72. and Fleta lib. 6. ca. 47. 4. E. 3. 49. 10. E. 3. 37. [n] 10. E. 3. 37. 10. All. 14. 4. E. 3. 49. [o] 29. All. 23. (Ant. 169. b.)

AND herewith in expresse tearmes agreeth *Bracton*, *Britton*, and *Fleta*, and all the bookes abovesaid and many others. And it is worthy the observation [n] that after this putting into hotchpot, and partition made, the lands given in frankmarriage are become as the other lands which descended from the common ancestor, and of these lands if she be impleaded [o] she shall have aide of the other parcener as if the same lands had descended. (1) So the coparcener that hath a rent granted to her for owelty of partition, as is aforesaid, hath the rent, as if it had descended to her from the common ancestor.

Sect. 269.

*ET issint tous foits sur tiel
partition les terres dones
en frankmarriage demurgent a
les donees & a lour heires selon-
que le forme de le done: car si
l'auter parcener averoit riens
de ceo que est done en frank-
marriage, de ceo ensucroit en-
convenience & chose encounter
reason, que la ley ne voit suf-
fer. Et la cause, pur que les ter-
res dones en frankmarriage
serront mis en hotchpot, est ceo.
Quant home done terres ou tene-
ments en frankmarriage ove
sa file ou ove auter cosin, il est
entendus per la ley, que tiel do-
ne fait per tiel parol (frank-
marriage) est un avancement, &
pur avancement de sa file ou de
son auter cosin, & nosmement*

AND so alwaies upon such parti- tion the lands given in frank- marriage remaine to the donees and to their heires according to the forme of the gift: for if the other parcener should have any of that which is given in frankmar- riage, of this would ensue an in- convenience and a thing against reason, which the law will not suffer. And the reason, why the lands given in frankmarriage shal bee put in hotchpot, is this. When a man giveth lands or tenements in frankmarriage with his daugh- ter, or with his other cousin, it is intended by the law, that such gift made by this word (frankma- riage) is an advancement, and for advancement of his daughter, or of his cousin, and namely when

quant

(Hob. 10.)

(1) See ant. 174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.

amounts to an admission that lord Coke's doctrine of the necessity of a special custom for the *rationabili parte bonorum* became perfectly established within a few years after his advancing it, and that this was so without the aid of any statute. It is observ- able also, that mr. justice Blackstone considers Bracton and Fleta as clear authorities against lord Coke. But mr. Somner, whose very learned and extended discussion of this subject seems to have escaped the author of the Commentaries, though not inclined to an intire agreement with lord Coke, cites various passages of the same ancient authors, from which it appears, that their writings in this respect are contradictory. See in Somn. Gavelk. 91. a dissertation on the question, *whether the writ de RATIONABILI PARTE BONORUM was by the common law or by custom*. Nor is it a slight testimony of its being settled law in lord Coke's time not to allow of the writ *de rationabili parte bonorum* without a special custom, that mr. Somner, whose book before cited was finished as early as 1647 though not published till the restoration, observes on the order of partition under this writ, that it was then, and *that not lately*, antiquated and vanished out of use in Kent and other counties, surviving only in the province of York and some few cities.

(7) What under the custom of the province of York ought to be deemed a reasonable advancement sufficient to bar the right to a filial portion, is largely discoursed upon in Swinburne on Testaments part 3. sect. 18. For the cases since Swinburne's time, see Eq. Caf. Abr. 160. 161. 11. Vin. Abr. 198. Burn's Ecclef. L. tit. *will*.

(8) Mr. Somner writes doubtfully on the preceding doctrine, and makes it questionable, whether the child advanced may not waive his former portion and elect to take benefit of the customary partition in the way of hotchpot. Somn. Gavelk. 91. By others the doctrine is absolutely denied in another form, by insisting, that the advancement must be equal to the customary share; and that, if the child advanced can prove the advancement to be less, then such child on the terms of throwing the ad- vancement into hotchpot is intitled to the benefit of the customary partition, notwithstanding any declaration of the father to the contrary. Green's Priv. Lond. 52. 53. But in a case before lord chancellor Somers, the mayor and aldermen of London certifi- ed the custom in terms not wholly agreeing either with lord Coke or with the differences from him before stated. According to this certificate, though the advancement shall not be equal to the customary share at the father's decease, yet the child so ad- vanced

quant le doner et ses heires n'a-
veront ascun rent ne service de
eux, sinon que soit fealty, tanque
le quart degree soit passe, &c. Et
pur tiel cause la ley est, que el a-
vera riens de les auters terres
ou tenements descendus a l'auter
parcener, &c. sinon que el voile
mitter les terres dones en frank-
mariage en hotchpot, come est
dit. Et si el ne voile mitter les
terres dones en frankmariage
en hotchpot, donque el n'avera
riens del remnant, pur ceo que
serra entendu per la ley, que el est
sufficement avance, a que a-
vancement el soy agree & luy ti-
ent content.

the donor and his heires shall
have no rent nor service of them
but fealtie untill the fourth degree
be past (1). And for this cause the
law is, that she shall have nothing
of the other lands or tenements
descended to the other parcener,
&c. unlesse shee will put the lands
given in frankmariage in hotch-
pot, as is said. And if she will not
put the lands given in frankma-
riage in hotchpot, then she shall
have nothing of the remnant, be-
cause it shall be intended by the
law, that shee is sufficiently ad-
vanced, to which advancement
shee agreeth and holds her selfe
content.

DE ceo ensueroit enconvenience & chose encounter reason que la ley ne
voet suffer.

Quod est inconveniens aut contra rationem non permittitur in lege. Hereby it appeareth,
as it hath beene often noted, [o] that an argument *ab inconvenienti* aut *ab eo quod est contra*
rationem is forcible in law. [p] *Nihil enim, quod est inconveniens, est licitum.*

Regula.
[o] Vid. sect. 138. 139. 231. 440.
478. 488. 722.
[p] 40. Aff. 27.
(Ant. 23. b.)
Sect. 20.

Tanque le quart degree soit passe, &c. Here by &c. is implied how the
degrees shall be accounted, whereof sufficient hath beene said before.

Sect. 270.

MESME la ley est THE same law is
perenter les between the heirs
beires de les donees of the donees in frank-
en frankmariage, et mariage, & the other
les auters parceners, parceners, &c. if the
&c. si les donees en donees in frankmari-
frankmariage deviont age die before their
devant leur auncester, ancestor, or before
ou devant tiel parti- such partition, &c. as
tion, &c. quant a mit- to put in hotchpot,
ter en hotchpot, &c. &c.

BY these three &c. in
this section is implied,
that if either the donees dye
before the ancestor, or sur-
vive the ancestor and die
before such a partition, or
if the donees and all the
parceners die before such
partition upon the putting
into hotchpot, their issues
shall have the same bene-
fit to put the lands into hotch-
pot; for that benefit is herit-
able, and descendible to the
issues.

Sect. 271.

ET nota, que AND note, that gifts
dones en frank- in frankmarriage
mariage fueront per were by the common

Continue, &c. By
this &c. is to be un-
derstood, that before the sta-
tute it was a fee simple, and
since

(1) See ant. 21. b.

vanced shall be excluded from any further part of the customary estate, unless the father shall by his last will or some other writing signed with his name or mark declare the value of such advancement, in which case the child advanced, bringing the advancement into hotchpot, shall, notwithstanding the father's declaration of having fully advanced the child, have as much more as will make the advancement a full customary share. This certificate was considered by lord Somers as conclusive of the question; and has been since referred to by lord chancellor Hardwicke, as settling the point. See the case of Chase v. Box in 1. L. Raym. 484. & 1. Eq. Caf. Abr. 154. in which latter book the certificate from the city is given at length. See also lord Hardwicke's words in 1. Vef. 16. and those of Fortescue master of the rolls in 3. Atk. 45. Being therefore taken as the rule of future decision, the certificate demands particular attention. The result with respect to its operation upon the several ideas, which, as is before stated, have prevailed concerning this point of the custom, may be thus stated.—Mr. Somner's notion, of a general right of election in the child advanced to waive his advancement and claim the customary share, seems to fall to the ground; there being no election, except where the father under his hand ascertains the advancement by confessing what its value was, and being so ascertained it can be proved to be less than what the custom gives.—The opinion, that the advanced child is universally at liberty to prove his customary share greater than the advancement and so intitle himself to the benefit of the customary partition, seems to fail; because the terms of the certificate appear to admit no other evidence to ascertain what the value of the advancement was, than the father's hand-writing, though it must be confessed, that excluding other evidence is scarce to be satisfactorily accounted for, unless the common reason of the difficulty of taking an account of such advancements shall be deemed a sufficient one.—As to lord Coke's representation of the custom, this also receives some qualification from the beforementioned certificate: for, though it leaves him perfectly right, where the father is silent about the advancement; yet it crosses lord Coke's opinion of the effect of the father's declaring the advancement to be in full, and makes such declaration inoperative where the advancement admitted by the father's hand-writing is not actually full and adequate.

(9) Here

[7] 12. H. 4. 11. 31. E. 3.
Gard. 116.

(Ant. 21. a.)

since the statute a fee taile. So as it is true, that [g] the gifts doe continue (as our author here saith) but not the estates; for the estate is changed, as at large appeareth in the chapter of estates in taile. And albeit our author here saith, that such gifts have beene alwaies since used and continued, yet now they be almost growne out of use, and serve now principally for mooted cases and questions in law that thereupon were wont to rise.

*la common ley de- law before the sta-
vant le statute de tute of Westm. second,
Westminster second, and have beene al-
et tout temps puis ad waies since used and
este use et continue, continued, &c.
&c.*

Sect. 272.

THE lands given in frankmariage and the lands in fee simple must move from one and the same ancestor, for the lands given in frankmariage are in respect of the advancement accounted in law, as hath beene said (1), as if the same had descended from the same ancestor who died seised of the fee simple lands, and there is no reason to barre the donee of her full part of the fee simple lands that descended from another ancestor from whom shee had no such advancement.

Nemy per le donor, &c. Here &c. implieth no more but that donor that made the gift of frankmariage. The other two &c. in this section need no explanation.

ITEM, tiel mitter en hotchpot, &c. est lou les auters terres ou tenements que ne fueront dones en frankmariage descendent de les donors en frankmariage tant-solement; car si les terres descenderont a les files per le pier le donor, ou per le mere le donor, ou per le frere le donor ou auter ancestor, et nemy per le donor, &c. la auterment est, car en tiel cas el, a quel tiel done en frankmariage est fait, avera sa part, sicome nul tiel done en frankmarriage ust este fait, pur ceo que el ne fuit avance per eux, &c. cins per un auter, &c.

ALSO, such putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmariage descend from the donors in frankmariage only; for if the lands shall descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancestor, & not by the donor, &c. there it is otherwise; for in such case, shee, to whom such gift in frankmariage is made, shal have her part, as if no gift in frankmariage had beene made, because that she was not advanced by them, &c. but by another, &c.

Sect. 273.

BY this section and the &c. herein some have gathered, that the value of the lands shall be accounted as they were at the time of the gift in

ITEM, si home seisie de 30 acres de terre chescun acre de ovel annual value, eiant issue deux files come est avant-dit, et dona 15 acres de

ALSO if a man be seised of 30 acres of land everie acre of equall annual value, and have issue two daughters as afore-said, and giveth 15 acres

cco

(1) Ant. 177. b.

(9) Here lord Coke extends the putting into hotchpot so as to make it for the benefit both of the executors in respect of the testamentary third and of the wife for her third part. But Salkeld reports it as the opinion of sir Edward Northey, that the custom requires the advanced share to be brought into hotchpot for the benefit of other children only; and therefore that in case of there being no other child besides the advanced one, such child shall have his full orphan's part without any regard to what has been already received. Salk. 426. See further concerning this custom of London a discourse in justification of it in 2. Stow's Surv. of Lond. Strype's ed. of 1720. first Append. 61. and the statute of 11. G. 1. c. 18. For the cases on the custom and the statute of 11. G. 1. concerning it, see Eq. Caf. Abr. 150. to 160. the title *custom of London* in New Abr. Viner's Abr. and 2. Eq. Caf. Abr. Com. Dig. tit. *guardian* G. 2. and the contin. in same part, and Burn's Eccl. L. tit. *wills*. Add to these March. 107. Forrest. 130. Barnard. Ch. Rep. 430. 2. Ark. 43. 523. 644. and 3. Ark. 213. 616. See also Flet. 1. 2. p. 125.—Note, that though the 11. G. 1. c. 18. enables making a will of the whole personalty notwithstanding the custom, yet this is with the exception of freemen agreeing by writing upon or in consideration of marriage or otherwise to be subject to the custom. In this respect therefore there is a difference in the form of the statute alteration of the custom as to London and the alteration as to Wales and the province of York, the statutes as to these two latter not providing for an agreement to abide by the custom. Perhaps however it may be doubted, whether an *express* provision was necessary to create such an exception; but on this point I do not mean to offer any opinion.

(10) See on the *collation of goods* Dig. lib. 37. tit. 6. 1. Dom. Civ. L. by Strah. 687.—The Roman law in respect to the collation of goods deserves the particular attention of the English lawyer; as our statute for distribution of the personal estate of intestates contains a like provision to prevent children advanced in the life-time of the intestate from having double portions, which was apparently borrowed in some degree from the *collatio bonorum*, and may therefore be considerably influenced in the construction by the rules of the Roman law and the doctrine of the civilians on that title. See 21. & 23. Ch. 2. c. 10. f. 5. Forrest. 276. See also for the cases in general on this part of the statute of distribution, 11. Vin. Abr. 109. 2. Com. Dig. 145. Continuation of same book 176. and Eq. Caf. Abr. 246.

ceo a le baron ove sa file en frankmarriage, & morust seise de les auters 15 acres, en cest cas el auter soer avera les 15 acres issint descendus a luy sole, et le baron et sa feme ne mitteront en tiel cas les 15 acres a eux dones en frankmarriage en hotchpot; pur ceo que les tenements dones en frankmarriage sont de anxy grand et de bone annual value come les auters terres descendus, &c. Car si les terres dones en frankmarriage sont de tant egal annual value, que le remnant sont, ou de plus value, en vaine et a nul entent tielx tenements dones en frankmarriage serra mis en hotchpot, &c. pur ceo que el ne poit riens aver de les auters terres descendus, &c. car si el averoit ascun parcel de les tenements descendus, donques el avera plus de annual value que sa soer &c. que la ley ne voit, &c. Et si come est parle en les cases avantdits de deux files ou de deux parceners; en mesme le maner est en semblable cas, l'ou sont plusors soers ou plusors parceners, solonque ceoque le case & le matter est &c.

hereof to the husband with his daughter in frankmarriage, and dies seised of the other 15 acres, in this case the other sister shall have the 15 acres so descended to her alone, and the husband and wife shall not in this case put the 15 acres given to them in frankmarriage into hotchpot, because the tenements given in frankmarriage are of as great and good yearly value as the other lands descended, &c. For if the lands given in frankmarriage be of equall or of more yearly value then the remnant, in vaine and to no purpose shall such tenements given in frankmarriage be put in hotchpot, &c. for that she cannot have any of the other lands descended, &c. for if shee should have any parcell of the lands descended, then she shall have more in yearly value then her sister, &c. which the law will not, &c. And as it is spoken in the cases afore said of two daughters or of two parceners; in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is, &c.

frankmarriage. But it is clear, that the value shall be accounted as it was at the time of the partition; for if the donor purchase more land after the gift, or if the land given in frankmarriage be by the act of God decayed in value, or if the remnant of the lands in fee simple be improved after the gift, or *de converso*, (Ant. 32. a. 171. a.) the law shall adjudge of the value as it was at the time of the partition, (unlesse it be by the proper act or default of the parties) as hath beene said before in the former chapter. And some have collected upon this section, that the reversion in fee of the lands given in frankmarriage shall only descend to the donee; for otherwise the other sister shall have more benefit then the donee, which should be against the reason of our author.

In vaine & a nul entent, &c. For it is a maxime in law, *lex non præcipit inutilia, quia inutilis labor stultus.*

Regula. Vid. sect. 194. 578. lib. 5. fo. 89.

Lib. 3. Cap. 2. Of Parceners by Custome. Sect. 274, 275, 276.

Sect. 274.

(Ant. 172 b.)

ET est ascavoir, que terres ou tenements dones en frankmariage ne serra mise en hotchpot, forsque ou terres descende en fee simple; car de terre descendus en fee taile partition serra fait, sicome nul tiel done en frankmariage ust este fait.

31. Aff. pl. 14.

AND it is to be understood, that lands or tenements given in frankmariage shall not bee put in hotchpot, but where lands descend in fee simple; for of lands descended in fee taile partition shall be made, as if no such gift in frankmariage had beene made.

FOR of lands intailed the donee in frankmariage shall have as much part as the other coparcener, because, over and besides the land given in frankmariage, the issue in taile claimeth *per formam doni*, and both of the parceners must equally inherit by force of the gift, & *voluntas donatoris &c. observetur.*

Sect. 275.

ITEM nuls terres serra mise en hotchpot ove auters, sinon terres que fueront done en frankmariage tant solement: car si ascun feme ad ascuns auters terres ou tenements per ascun auter done en le tayle, el ne unques mittera tiel terre issint done en hotchpot, mes el avera sa purpartie de le remnant descendus, &c. scilicet a tant que l'auter parcener avera de le mesme remnant.

17. E. 1. tit. taile 26. 6. E. 3.
30. b. 4. E. 3. 49. 50.

ALSO no lands shall bee put in hotchpot with other lands, but lands given in frankmariage only: for if a woman have any other lands or tenements by any other gift in taile, she shal never put such lands so given in hotchpot, but she shal have her purparty of the remnant descended, &c. (*videlicet*) as much as the other parcener shall have of the same remnant.

Bract. li. 2. fo. 77.

FOR if the ancestor infeoffeth one of his daughters of part of his land, or purchase lands to him and her, and their heires, or giveth to her part of his lands in taile speciall or generall, she notwithstanding this shall have a full part in the remnant of the lands in fee simple; for the benefit of putting &c. into hotchpot is onely appropriated to a gift in frankmariage, (*quia maritagium cadit in partem*) which shall be (as is aforesaid) accounted as parcel of her advancement.

Sect. 276.

ITEM un auter partition poet estre fait enter parceners, que variaist de les partitions avantdits. Sicome y sont trois parceners, & le puisne voet aver partition, & les auters deux ne voillont, mes voilent tener en parcenarie ceo que a eux affi-

ALSO another partition may be made betweene parceners, which varieth from the partitions aforesaid. As if there bee three parceners, and the youngest will have partition, and the other two will not, but will hold in parcenarie that which to them belon-

ert

ert sans particion, en ceste case, si un part soit alot en severalty al puisne joer selonque ceo que el doit aver, donques les auters poient tener le remnant en parcenarie, & occuper en common sans partition si els voient, & tiel partition est asfets bone. Et si apres l'eigne ou le mulnes parcenier voile fayre partition inter eux de ceo que ils teignent, ils poient ceo bien faire quant a eux pleist. Mes l'ou partition serra fait per force de brieve de partitione faciendâ, la auterment est; car la covient, que chescun parcenier avera sa part en severaltie, &c.

Plus serra dit des parceniers en le chapter de Joyntenants, & auxy en le chapter de Tenants in Common.

geth, without partition, in this case if one part be allotted in severalty to the youngest sister, according to that which shee ought to have, then the others may hold the remnant in parcenarie, and occupy in common without partition, if they will, and such partition is good enough. And if afterwards the eldest or middle parcenier will make partition betweene them of that which they hold, they may well do this when they please. But where partition shall be made by force of a writ of *partitione faciendâ*, there it is otherwise; for there it behoveth, that every parcenier have her part in severaltie, &c.

More shall be said of parceniers in the chapter of Joyntenants, and also in the chapter of Tenants in Common.

HERE it is to be observed, that this partition is good by consent, for *consensus tollit errorem*; but if it be by the king's writ, then everie parcenier must have his part. And here you may see that *modus & conventio vincunt legem*. 24. H. 3. tit. Partic. 19. Regula.

En severaltie, &c. Here by this &c. is implied another kind of severaltie than our author hath mentioned; and that is, that the one parcenier shall have the land in severaltie from the feast of Easter until the gule of August, (that is, the first of August) and the other in severaltie from thence untill the feast of Easter, or the like, *& sic alternis vicibus* to them and their heires *in perpetuum*, whereof sufficient hath beene spoken before. (1)

Cap. 3. Of Joyntenants. Sect. 277.

Joyntenants sont, sicome home seise de certaines terres ou tenements, &c. & enfeoffe deux, trois, quater, ou plusors, a aver & tener a eux pur term de leur vies, ou pur terme d'auter vie, per force de quel feoffment ou lease ils sont sei-

Joyntenants are, as if a man bee seised of certaine lands or tenements, &c. and infeoffeth two, three, foure, or more, to have and to hold to them for term of their lives, or for terme of another's life, by force of which feoffment or THIS agreeth not with the original, (2) for it should bee, *joyntenants sont, sicome home seise de certaine terres ou tenements, &c. & ent enfeoffe deux, ou trois, ou quater, ou plusors, a aver & tener a eux & a leur heires, ou lessâ a eux pur terme de leur vies ou pur terme d'auter vie, per force de quel feoffment ou lease, &c.* The error may easily bee perceived by that which is in print, *viz.* "by force of which feoffment or lease," &c. *ergo* there must be

(1) Ant. 4. a. and 167. a.
(2) Notwithstanding lord Coke's censure of the text here, it agrees with the print of the two earliest editions, neither the edition by L. & M. nor the Rohan one having any of the words added by lord Coke, except *ent* before *enfeoffe*. But I think that his addition seems requisite to the sense intended to be conveyed by Littleton, as well for the reason assigned by lord Coke, as because otherwise Littleton's description of jointenancy might be construed to exclude an estate in fee, which certainly could not be his intention. Probably therefore the omission of an estate in fee was an error in the manuscript from which Littleton was first printed. The addition of an estate in fee to Littleton's description of jointenancy was first introduced by Rastell in his edition of 1534. which I was first led to observe by a note I was favoured with from mr. justice Blackstone.
(3) I take this reference to Bracton to be erroneous. But in fol. 28. a. of Bracton there is a chapter, which connects with Littleton's on jointenancy; the first branch of it being *de donationibus factis pluribus simul sive successivis*. See also Bract. fo. 12. b. & 13. a.
(4) It should be cap. 46. to which as a corresponding part of an almost co-temporary writer add Bract. fol. 48. a.

be feoffment and lease spoken of before.

There be also joyntenants

by other conveyances than *Littleton* here mentioneth, as by fine, recoverie, bargain and sale, release, confirmation, &c. So there be divers other limitations than *Littleton* here speaketh of: as if a rent charge of ten pounds be granted to *A.* and *B.* to have and to hold to them two, viz. to *A.* untill he be married, and to *B.* untill he be advanced to a benefice, they be joyntenants in the meane time, notwithstanding the severall limitations, (1) and if *A.* die before marriage, the rent shall survive; but if *A.* had married, the rent should have ceased for a moitie, & sic *de converso* on the other side.

7. E. 4. 29. 11. H. 4. 26. (5. Co. 51.)

Littleton having spoken of one kinde of tenants *pro indiviso*, viz. of parceners, commeth now to another, viz. joyntenants, and first of joyntenants of freehold. If an alien and a subject purchase lands in fee, they are joyntenants, and the survivorship shall hold place, (2) *et nullum tempus occurrit regi*, upon an office found.

Flet. lib. 6. ca. 47. Braët. lib. 5. fol. 435. a. (Noy 13. Ant. 164. Cro. Jam. 83. 166. Post. sect. 311.)

Joyntenants. So called, because the lands or tenements &c. are conveyed to them jointly, *conjunctim feoffati*, &c. or *qui conjunctim tenent*, and are distinguished from sole or severall tenants, from parceners, and from tenants in common, &c. and anciently they were called *participes*, & non *heredes*. And these joyntenants must jointly implead and jointly be impleaded by others, (3) which propertie is common betweene them and coparceners; but joyntenants have a sole qualitie of survivorship, which coparceners have not. *Littleton*, having now spoken of parceners and of joyntenants of right, doth next speake of joyntenants by wrong.

Sect. 278.

IT is to be observed, that some disseisors be tenants of the land, and some be no tenants of the lands; & of both these kinds *Littleton* here speaketh.

50. E. 3. 2. 17. Aff. 14. 14. Aff. 12. 8. Aff. p. 39. 10. E. 3. 47. 10. Aff. 22. 23. H. 8. tit. disseis. p. 77. 28. Aff. 21. 27. Aff. 30. 12. E. 4. 9. 7. E. 4. 7. b. 38. Aff. 7. 21. H. 7. 35. 29. Aff. 50. 21. H. 8. 25. 35. H. 6. 61. 21. E. 4. 46. 15. E. 4. 15. F. N. B. 179. g. (Mo. 53. Post. 374. a. Ant. 10. a. 1. Ro. Abr. 660. Post. 188. a.)

&c. In the first &c. nothing is implied but foure or five, or more. But in the latter &c. many things be to be understood. As of disseisors that be no tenants, some are coadjutors whereof *Littleton* here speaketh, some counsellors, commanders, &c. when the disseisin is not to be done to any of their uses. Also if *A.* disseise one to the use of *B.* who knoweth not of it, & *B.* assent to it, in this case til the agreement, *A.* was tenant of the land, & after agreement *B.* is tenant of the land, but both of them be disseisors: for *omnis ratiobabitio retrotrahitur & mandato equiparatur*. (4) And it is worthie of the observation, and implied also in the latter &c. that seeing coadjutors, counsellors, commanders, &c. are all disseisors, that albeit the disseisor which is tenant dieth, yet the assise lieth against the coadjutor, counsellor, commander, &c. and tenant of the land, (5) though he be no disseisor. (6)

Post. 245. a. 258. a.)

(1. Ro. Abr. 663.)

[4] 50. E. 3. 2. (Cro. Cha. 303. 1. Ro. Abr. 661. 662. Post. 223. a.)

[a] The demandant and others in a *præcipe* did disseise the tenant to the use of the others, and the writ did not abate; for the demandant was a disseisor, but gained no tenancy in the land, for that he was but a coadjutor.

A man disseiseth tenant for life to the use of him in the reversion, and after he in the reversion agreeth to the disseisin, it is said, that he in the reversion is a disseisor in fee, for by the disseisin made by the stranger, the reversion was divested, (7) which (say they) cannot be reversed

(1) See ant. 169. b. post. 183. b. Hob. 171. and Shephard's Common Assurances 189. In the two latter books, especially in Hobart, there is a variety of curious matter expounding the nature and use of a *feilicet* and how far it may qualify the *premisses* or *habendum* in a conveyance. See also 1. P. Wms. 18. and the case of a bond to two with a *feilicet* severing the money between them in Dy. 350. Lord Hobart seems to consider the *feilicet* as a sort of *ancillary* clause, which may explain, but cannot operate in absolute contradiction of the *premisses* or *habendum*. In a Coke upon *Littleton* I have the learned annotator considers the *feilicet* as less potent than the *habendum*, observing upon the case here stated by lord Coke, that though the *feilicet* cannot sever the joint estate given in the *premisses* and the *habendum*, yet that the *habendum* might so controul the *premisses*. He therefore holds, that if the grant of ten pounds had been to *A.* and *B.* *habendum* to *A.* till he be married, and to *B.* till he be advanced to a benefice, there they would be tenants in common. This nice distinction between the *habendum* and the *feilicet* in point of effect I leave to the consideration of the learned reader.

(2) See post. 186. a.—Lord Coke in his reports qualifies this by adding *till office found under the great seal*. 5. Co. 52. b. But if the natural-born subject survives the alien, and then the king's title is found by office, shall it by relation to the creation of the jointenancy defeat the subject's title by survivorship? The words of lord Coke both here and in the 5th report are ambiguous. His first words here favour the surviving jointenant. But his subsequent introduction of the rule of *nullum tempus occurrit regi*, with the qualification in the 5th report, tends to a different conclusion. Though too lord Coke takes notice of a joint purchase by an alien and a subject, yet there is not enough to solve the difficulty. See post. 288. a. See as to this point of relation in offices finding the king's title W. Jo. 78. and Nichols's case Plowd. 481.

(3) See the statute *de conjunctim feoffatis* 34. E. 1. lord Coke's notice of it in 2. Inst. 527. and Theloall's Dig. Orig. Br. in the chapter on jointenants in b. 2. fol. 456.

(4) But infants and femes covert are exceptions to this rule; for commandment before or agreement after is not sufficient to make them disseisors, but it must be by their actual entry or their own proper act. Post. 357. b. F. N. B. 179. G. 3. H. 4. 17. a. Also in the case of persons of full age, if a disseisin to the use of another be accompanied with a forcible entry, his subsequent agreement, though it makes him a disseisor, shall not charge him with the force on the statute of 8. Hen. 4. actual entry being necessary for that purpose. Ant. 16. a. & b.

(5) That is, he that is seised of the freehold by title from the disseisor, as by feoffment lease or descent from him.

(6) See ant. 154. b.

(7) Why disseisin of tenant for life makes a fee in the disseisor is thus accounted for by lord Hobart with his usual peculiarity and energy of phrase. "A grant to *J. S.* and his heirs during the life of *J. D.* is no fee, but a special occupancy, as is resolved in Chudleigh's case. But a disseisin of an estate for life by necessity in law makes a *quasi* fee; because wrong is unlimited, and ravens all that can be gotten, and is not governed by terms of the estates, because it is not contained within rules." Hob. 223.

revested by the agreement of him in the reversion, for that it maketh him a wroug doer, and therefore no relation of an estate by wrong can helpe him. (1)

Coadjutor. *Coadjutor est qui auxiliatur alteri*, and is derived à *coadjuvando*, *Anglicè* a fellow helper.

Sect. 279.

ET nota que disseisin est properment, l'ou un home entra en ascun terres ou tenements l'ou son entre n'est pas congeable, & ousta celuy que ad franktenement, &c.

AND note that disseisin is properly, where a man entreth into any lands or tenements where his entry is not congeable, & ousteth him which hath the freehold, &c. THIS description of a disseisin and the &c. in this place is understood onely of such lands and tenements whereunto an entry may bee made, and not of rents, commons, &c. (2) whereof sufficient hath been said before (3) in the chapter of rents; and so in effect *Littleton* described it before the edition of his book. And note here, that every entry is no disseisin, unlesse there be an ouster also of the freehold. And therefore *Littleton* doth not set downe an entrie onely but an ouster also, as an entry and a claimer, or taking of profits &c. Now as there be joyntenants by disseisin, so are there joyntenants by abatement, intrusion, and usurpation, all which are included in the latter &c.

3. E. 4. 2. 34. Aff. 11. 12. 26. Aff. 17. 41. Aff. 10. 24. E. 3. 31. Pl. Com. 89. Parson de Hony Lane 7. Aff. 10. 11. Aff. 25. 12. E. 3. tit. Aff. 88. 45. Aff. 7. 9. Aff. 19. 39. Aff. 1. 13. E. 2. Aff. 374.

Sect. 280.

ET est asavoir, que la nature de joyntencie est, que celuy que survesquist avera solement l'entier tenancie selonques tiel estate que il ad, si le joynture soit continue, &c. Sicome si trois joyntenants sont en fee simple, & l'un ad issue & devie, uncore ceux que survesquent averont les tenements entier, & l'issue n'avera riens. Et si le second joyntenant ad issue & devie, uncore le tierce que survesquist avera les tenements entier, & eux avera a luy & a ses

AND it is to be understood, that the nature of joyntencie is, that he which surviveth shall have only the entire tenancie according to such estate as he hath, if the joynture be continued, &c. As if three joyntenants bee in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joyntenant hath issue and dye, yet the third which surviveth shall have the whole tenc-

SI le joynture soit continue, &c.

Here by this &c. many points of learning are to bee observed. As that it is proper to joyntenants onely to have lands by survivor; for no survivor of other tenants *pro indiviso* shall have the whole by survivor, but onely joyntenants; and this is called in law *jus accrescendi*. *Omnes scissati sunt simul habendi & tenendi, nec totum nec partem separatam nec per se, sed ut quilibet eorum totum habeat cum aliis in communi; & cum unus moriatur, non descendit aliqua pars heredi morientis, nec separata nec in communi ante mortem omnium, sed pars illa communis per jus accrescendi accrescit superstitionibus de persona ad personam usque ad ultimum superstitem.* But although survivorship bee proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, soli & semper*; for there may bee joynt-

Bracton lib. 4. fol. 262. b. Britton cap. 35. Ficta lib. 3. ca. 4. & ca. 10. 49. E. 3. fol. 5. 6.

(1) Acc. 277. b. To what lord Coke has written on *disseisin by procurement*, a learned annotator in a Coke upon *Littleton* I have adds the following references relative to *procurers of trespasss*, namely 11. H. 7. 6. a. 12. H. 7. 14. a. 21. H. 7. 22. a. 13. ii. 7. 13. a.

(2) In respect to disseisin of rents, read post. 306. b. 323. a. & b.

(3) Ant. sect. 233. and the comment thereon.

joyntenants, though there be not equall benefit of survivor on both sides. As if a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* dyeth, *A.* shall have all by the survivor, but if *A.* dyeth *B.* shall have nothing. (1)

Two or more may have a trust or an authoritie committed to them jointly, and yet it shall not survive. But herein are divers diversities to be observed. First, there is a diversitie betweene a naked trust or an authoritie, and a trust or authoritie joynted to an estate or interest. (2) Secondly, there is a diversitie between authorities created by the partie for private causes, and authoritie created by law for execution of justice. As for example, [b] if a man devise that his two executors shall sell his land, if one of them dye, the survivor shall not sell it; (3) but if he had devised his lands to his executors to be sold, there the survivor shall sell it; which diversitie is implied by our author, for hee saith, that he that surviveth shall have the entire tenancie.

If a man make a letter of attorney to two, to do any act, if one of them dye, the survivor shall not do it: but if a *venire facias* be awarded to four coroners to impannell, and returne a jury, and one of them dye, yet the other shall execute and returne the same.

If a charter of feoffment [c] be made, and a letter of attorney to four or three jointly and severally to deliver seisin, two of them cannot make livery; because it is neither by them four or three jointly, nor any of them severally: but if the sherie upon a *capias* directed to him make a warrant to four or three jointly or severally to arrest the defendant, two of them may arrest him, because it is for the execution of justice [d] which is *pro bono publico*, and therefore shall be more favourably expounded, then when it is onely for private; and so hath it bene adjudged. (4) *Jura publica ex privato promiscue decideri non debent.*

Et devie. Note there is a naturall death and a civill death, and *Littleton's* case is to be intended of both; and therefore [e] if two joyntenants be, and one of them entreth into religion, the survivor shall have the whole. (5)

Sect. 281.

ET come le survivor tient lieu enter joyntenants, (6) en mesme le maner il tient lieu enter eux queux ont joynt estate ou possession ove auter de chattel real ou personal. Sicome si leas de terres ou tenements soit fait a plusieurs par terme des ans, celui, que survesquist de les leseees, avera les tenements a luy entier durant le terme per force de mesme le leas. Et si un cheval ou un au-

AND as the survivor holds place betweene joyntenants, in the same manner it holdeth place betweene them which have joynt estate or possession with another of a chattell, reall or personall. As if a lease of lands or tenements bee made to many for terme of yeares, hee, which survives of the leseees, shall have the tenements to him only during the terme by force of

ter

(9. Co. 75. b.)

(1. Sid. 6)

[a] 39. Aff. p. 17. 30. H. 8. tit. devie B. Dyer 3. Eliz. 190. 49. F. 3. 16. 2. Eliz. Dyer 177. 23. Eliz. Dyer 371. 4. Eliz. Dyer 210. (Mo. 61. 311.)

10. H. 4. 2. & 3. 14. H. 4. 31. 30. H. 6. 12. 31. Aff. 20. 33. H. 8. joynt. Br. 62. 30. H. 8. condition Br. 190.

[c] 38. H. 8. Dyer 62. 27. H. 9. fol. 6. [5. Co. 61. Yelv. 25. 26. Cro. Eliz. 913. 914.]

[d] Pasch. 45. E. 2. in the king's bench between King and Hobbes. (Hunt. 127.)

[e] 21. R. 2. judgment 263. (Ant. 129. b.)

(1) See further as to benefit of survivorship on one side only, post. 193. a. 239. b. & Dy. 10. b.

(2) See ant. 112. b. 113. a. post. 297. a.

(3) In a former part I have ventured to make a doubt of this, and to contend that the power to sell being given to the executors by reason of an office and interest, which do go to the survivor, may well survive with them. See ant. note 2. to 113. a.

(4) See acc. as to warrant of the peace to two, Lambard's Justice ed. 1602 p. 84.

(5) See ant. note 7. of fol. 3. b. and note 1. of fol. 132. b. Add Ley's case 2. Ro. Abr. 43.

(6) See in L. & M. and Roh.

ter chattel personal sont done a plusors, celui que survesquist a- vera le cheval solement. the same lease. (1) And if a horse, or any other chattell personall be given to many, hee which surviveth shall have the horse onely.

HEREBY it is manifest, that survivor holdeth place regularly as well betweene joynte- (Cro. Eliz. 33. 2. Ro. Abr. 86. nants of goods and chattels in possession or in right, as joyntenants of inheritance or 87.) freehold.

Chattell, Or Catell, whereof commeth the word used in law [*f*] *Catalla*, and is as [*f*] Regist. origin. 139. 244. Bract. lib. 2. 39. H. 6. 36. Littleton here teacheth, twofold, viz. reall and personall, and putteth examples of both. Standford Pr. 45.

Sect. 282.

EN mesme le maner est de dets & duties, &c. car si un obligation soit fait a plusors pur un debt, celui que survesquist avera tout le det ou dutie. Et issint est d'autres covenants & contracts, &c. (3) IN the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, hee which surviveth shall have the whole debt or dutie. And so is it of other covenants and contracts, &c.

NOW he speaketh of debts, duties, covenants, contracts, &c. (2)

Dets & duties, &c.

Here by force of this &c. (1. Ro. Abr. 6.) an exception is to be made of two joynt merchants; for the wares, merchandizes, debts, or duties, that they have as joynt-merchants or partners, shall not survive, but shall goe to the executors of him that deceaseth; and this is *per legem mercatoriam*, which (as hath beene said)

(Ant. 172. 2. Cro. Jam. 306. 1. Ro. Abr. 6. Cro. Cha. 301. 1. Sid. 236. 179.) (5)

is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*, for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. (4)

And to the latter &c. in this section the like exception must be made.

sect. 283.

ITEM ascuns joyntenants poient estre, que poient aver joint estate, et estre joyntenants pur terme de leur vies, et uncore ils ont severall enheritances. Si come terres soient dones a deux homes et a les heires de leur deux corps engendres, en cest case les donees ont joint estates pur terme de leur deux vies, et uncore ils ont ALSO there may be some joyntenants, which may have a joint estate, & be joyntenants for terme of their lives, & yet have severall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have severall inheritances; for if one of

ILS ont joynt estate pur terme de leur deux vies, &c.

Vide sect. 296. (P. 189. b.)

Note, albeit they have severall inheritances in taile, and a particular estate for their lives, yet the inheritance doth not execute and so breake the joynttenancy, but they are joyntenants for life, and tenants in common of the inheritance in taile.

Si come home & sem poient aver, &c.

Here a diversity is implied, when the estate of inheritance is limited by one conveyance,

Vide Westcote's case 2. Co. 60. 61. (1. Sid. 83.)

(1) And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry. Ant. 46. b.

(2) See further, as to things of which there shall be a survivorship, and where expresse words are necessary to give that benefit, 11. Co. 3. b. 2. Ro. Abr. 86. B. 2. 2. P. Wms. 672. and tit. *survivor* in Vin. Abr. and tit. *joyntenants* B. 1. & D. ibid.

(3) No &c. in L. & M. or Rob.

(4) See more fully as to this 2. Brownl. 99. See also acc. Noy 55.

(5) These additional references are retained, though they scarce deserve it; for they only relate to different instances of the *lex mercatoria*, and do not touch the particular rule against the *jus accrescendi*.

as in this case it is, there are no severall estates to drowne one in another. But when the states are divided in severall conveyances, their particular estates are distinct and divided, and consequently the one drownes the other. As if a lease bee made to two men for terme of their lives, and after the lessor granteth the reversion to them two, and to the heires of their two bodies, the joynture is severed, and they are tenants in common in possession. And it is further implied, that in this case of *Littleton* there is no division betwene the estate for lives, and the severall inheritances; for in this case they cannot convey away the inheritances after their decease, (1) for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed, as shall bee said hereafter.

If a man make a lease for [f] life, and after granteth the reversion to the tenant for life and to a stranger and to their heires, they are not joyntenants of the reversion, but the reversion is by act of law executed for the one moiety in the tenant for life, and for the other moiety he holdeth it still for life the reversion of that moiety to the grantee.

And so it is, if a man maketh a lease [g] to two for their lives, and after granteth the reversion to one of them in fee, the joynture is severed, and the reversion is executed for the one moiety, and for the other moiety there is tenant for life the reversion to the grantee (2).

If lessee for life granteth his estate to him in the reversion, and to a stranger, the joynture is severed, and the reversion executed for the one moiety by the act of law. (3)

severall inheritances; car si l'un des donees ad issue et devy, l'auter que survesquist avera tout per le survivor pur terme de sa vie, et si celui que survesquist auxy ad issue et devy, donques l'issue del un avera l'un moitie, et l'issue del auter avera l'auter moitie de la terre, et ils tiendront la terre enter eux en common, et ne sont pas joyntenants, mes sont tenants en common. Et la cause, pur que tielx donees en tiel cas ont joynt estate pur terme de leur vies, est, pur ceo que al commencement les terres fueront dones a eux deux, les queux parols sans plus dire sont joint estate a eux pur terme de leur vies. Car si home voit lesser terre a un auter per fait ou sans fait, nient feasant mention quel estate il averoit, et de ceo fait liverie de seisin, en ceo case le lessée ad estate pur terme de sa vie; et issint entant que les terres fueront dones a eux, ils ont joint estate pur terme de leur vies. Et la cause, pur que ils averont severall inheritances est ceo, entant que ils ne peuvent aver per nul possibi-

the donees hath issue and dye, the other which surviveth shall have the whole by the survivor for terme of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moiety, & the issue of the other shall have the other moiety of the land, and they shal hold the land betwene them in common, and they are not joyntenants, but are tenants in common. And the cause, why such donees in such case have a joynt estate for terme of their lives, is, for that at the beginning the lands were given to them two, which words without more saying make a joynt estate to them for terme of their lives. For if a man will let land to another by deed or without deed, not making mention what estate he shall have, and of this make liverie of seisin, in this case the lessee hath an estate for terme of his life; and so in as much as the lands were given to them, they have a joint estate for term of their lives. And thereason why they shall have severall inher-

lity

Vid. 12. E. 4. 2. b.

(Sect. 283.)

[f] 39. H. 6. 2. b.
(4. Leon. 37. Post. 299. b. Cro.
Jam. 260. 261.)

[g] *Wesons case, ubi supra.*

Ibidem 7. H. 6.

(1) See post. 154. b.

(2) *Vid. Hil. 35. Eliz. B. R. rot. No. 96. Perkins & Pecke Dr. 12. 41. E. 3. 21. 21. H. 6. 40. 40. Aff. 45. E. 3. 2. — Hil. 37. Eliz. Dickson v. Marsh B. R. rot. No. 103. Devisé to eldest son and another for life. Held, that they are jointenants though the fee descends; but male. Hal. MSS. See as to the latter case Cro. Jam. 260.*

(3) See post. 192. 200. b. 335. 2.

lity un heire enter eux engender, sicome home et feme poient aver, &c. doncque la ley voet que leur estate et leur enberitance soit tiel come reason voet, solonque la forme et effect des parols del donee, &c. ceo est a les beires que l'un engendra de son corps per aucun de ses femes (1) *[Sales beires quel auter engendra de son corps per aucun de ses femes] &c. issint il covient per necessitie de reason, que ils averont several inberitances. Et en tiel cas si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad aucun issue en vie de son corps engendre, doncque le donor ou son heire poit enter en la moity come en son reversion, &c. coment que l'autre des donees ad issue en vie &c. Et la cause est, que entant que les enberitances sont several &c. le reversion de eux en ley est several, &c. et le survivor del issue del auter ne tiendra pas lieu d'aver l'entierie.*

vor of the issue of the other shall hold no place to have the whole.

And the reason of this is, for that it is a maxime in law, that every man's grant shall bee taken by construction of law most forcible against himselfe. *Quelibet concessio fortissimè contra donatorem interpretanda est*; which is so to be understood, that no wrong be thereby done, for it is another maxime in law, *quid legis constructio non facit injuriam*. And therefore if tenant for life maketh a lease generally, this shall bee taken by

ritances is this, inas-much as they cannot by any possibility have an heir between them ingendred, as a man and woman may have, &c. the law will that their estate & inheritance be such as is reasonable, according to the forme & effect of the words of the gift, & this is to the heires which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives, &c. so as it behoveth by necessitie of reason, that they have several inheritances. And in this case if the issue of one of the donees after the death of the donees dye, so that he hath no issue alive of his body begotten, then the donor or his heire may enter into the moity as in his reversion, &c. although the other donee hath issue alive, &c. And the reason is, forasmuch as the inheritances be several &c. the reversion of them in law is several &c. and the survivor

If a man maketh a lease for life and granteth the reversion to two in fee, the lessee granteth his estate to one of them, they are not joyntenants of the reversion; for there is an execution of the estate for the one moitie, and an estate for life, the reversion to the other of the other moity. (2)

Here Littleton hath well resolved a doubt, for of ancient time it hath beene said, [b] that when lands have beene given to two women and to the heires of their two bodies begotten (which case our author putteth in the next section) that the husband having issue should bee tenant by the courtesie living the other sister; for that as some held the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband to be tenant by the curtesie, which hee could not bee if the women had a joynt estate for terme of their lives; and likewise it was said [i] that the issue of the one should recover the moity in a *formedon* living the other sister. But, *verba sunt hæc*, and Littleton, grounding himselfe upon good authority in law, hath cleared this doubt.

Nient feasant mention quel estate il averoit.

Here Littleton addeth materially (not making mention of what estate) for [k] if in the premisses lands bee letten, or a rent granted, the general intendment is, that an estate for life passeth; but if the *habendum* limit the same for yeares or at will, the *habendum* doth qualifie the general intendment of the pre-

[h] 17. E. 3. 51. 78. 18. E. 3. 39. 50. E. 3. Statham tit. done. 50. E. 3. leoffements & faitz 97.

(Ant. 13. a.)

[i] 44. E. 3. taile 13. 8. Aff. 33. 24. E. 3. 29. 7. H. 4. 16. Corbet's case 1. Co. 84. b. 4. Mariae Dier 145. See before in the chapter of ten by the curtesie sectione. (Ant. 30. a. 2. Ro. Abr. 90.)

[k] Pl. Com. in Throgmorton's case. (2. Co. 23. 55. 5. Co. 111. 2. Ro. Abr. 66.)

Regula. (5. Co. 8. a. Plowd. 161. a. Ant. 42. a.)

(1) In L. & M. & Roh. the following words here placed between brackets are omitted.

(2) But it is otherwise on a *surrender*; for that enures to both jointenants of the reversion. Post. 192. a. See further Perk. Sect. 80.

construction of law an estate for his owne life that made the lease, for if it should be a lease for the life of the lessee it should be a wrong to him in the reversion. And so it is if tenant in taile make a lease generally, the law shall conuise this to be such a lease as hee may lawfully make, and that is for terme of his owne life, for if it should be for the life of the lessee, it should be a discontinuance, and consequently the state which should passe by construction of law should worke a wrong. (1)

Et issint entant que les terres fueront dones a eux ils ont joynt estate pur leur vies. This is plaine, but with this exception, unlesse the *habendum* doth other-

[1] 8. E. 3. 227. tit. tenem. & suis 73. 30. H. 8. tit. joint. Br. 53. Dyer fo. 361. Pl. Com. 169. (Hob. 171. Post 190. b. 2. Ro. Abr. 65. 68. 1. Leon. 10. 11.)

wise limit the same. And therefore if a lease be made [1] to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premises, (2) and so hath it beene oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moiety to the one, and the other moiety to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explaine the other, and no repugnancy betweene them, *et semper expressum facit cessare tacitum.* (3)

Braston.
(2. Ro. Abr. 66. 5. Co. 19. a. Hob. 313.)

Per nul possibilitie. Here it is to be observed, that where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibilitie may take effect, which is worthy of observation. *Benigne faciendæ sunt interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.*

Issint il covient per necessitie de raison. The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge. But when hee findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many other; for *cognitio legis est copulata & complicata*; and this knowledge will long remaine with him. All which is plainly implied by the words and *Ec.* of our author in this section.

Et en tiel case si l'issue d'un des donees apres la mort des donees devie issint que il n'ad ascun issue en vie de son corps engendres, donques le donor ou son heire poe enter en le moitie. This is mistaken in the imprinting, and varieth from the originall, (4) which is, *si l'un donee ou l'issue d'un des donees apres la mort des donees devie, issint que il n'ad ascun issue, &c.* For it is evident, that if the one donee himselfe dieth without issue, the inheritance doth revert for a moiety, and after the decease of the other donee, the donor may enter into that moiety; and whether the issue of the one donee dieth without issue at any time, either in the life of the other donee, or after his decease, it is not materiall, for whensoever no issue is remaining of the one donee, so as the state taile is spent, the donor may after the decease of the surviving donee enter into that moiety. (5)

Arist. 1. Metaphys.

Et la cause est, que entant que les inheritances, &c. Littleton in this chapter hath often said, *et la cause est*, which is worthe of observation, for then wee are truly said to know any thing when we know the true cause thereof. *Tunc unumquodque scire dicimus, cum primam causam scire putamus. Scire autem propriè est rem ratione & per causam cognoscere.*

Ving. 1. Georg.

Felix qui potuit rerum cognoscere causas.

And therefore all students of law are to apply their principall indeavour to attaine therunto, all which is implied by the words and severall *Ec.* in this section.

(Post. 191. b. Hob. 33.)

Here the cause of the entrie of the donor into a moiety in this case is, that in as much as the inheritance is severall, the reversion is severall. Therefore upon the severall determination of the estate in taile, the donor may enter. And the law termeth a reversion to bee expectant upon the particular estate; because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect or looke for to enjoy the lands or tenements againe.

Dyer 14. El. 300.

Le reversion de eux en ley est severall, &c. Hereby, and by this *Ec.* is implied, that upon one joynt or entire gift or lease there is one joynt or entire reversion, and upon severall gifts or leases there bee severall reversions. And this is to be understood of the reversion in the donor or his heirs. But albeit the gifts or leases be severall, yet if the donors or lessors grant the reversion to two or more persons and their heirs, they are joyntenants of the reversion. And so it is of a remainder. And therefore if a gift be made to two men and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joyntenants for life, tenants in common of the state taile, and joyntenants of the

fee

(1) Acc. ant. 41. a. and there the reason is more fully expressed.

(2) Acc. Perk. sect. 174.

(3) Acc. sect. 298. See also 2. Co. 55. a. & b. ant. 180. b. post. 189. a. 199. b.

(4) But lord Coke's correction is not conformable either to L. & M. or the Roh. edition.

(5) See Hob. 33.

fee simple in remainder; for they are joynt purchasers of the fee simple, and the remainder in fee is a new created estate, but the reversion remaining in the donor or his heires is a part of his ancient fee simple. (2. Co. 60. b. post. 299. b.)

Sect. 284.

ET sicome est dit de males, en mesme le manner est l'ou terre est done a deux females, & a les heires de leur deux corps engendres.

AND as it is said of males, in the same manner it is where land is given to two females, and to the heires of their two bodies engendred. the law will never intend a possibility upon a possibility, as first to marry the one, and then to marry the other (1); secondly, the form of the gift is, to the heires of their three bodies, which is not possible, and therefore they shall have several inheritances. And so it is, if a gift be made to one man and to two women, *mutatis mutandis*. In the same manner, if a gift in taile be made to a man and his mother, [m] or to a man and his sister (2), or to him and his aunt, &c. in this and like cases, albeit the gift is made to a man and a woman, yet they have severall inheritances; because they cannot marry together, and are within the rule and reason of our author.

IF a man giveth lands to two men and one woman, and the heires of their three bodies begotten, in this case they have severall inheritances; for albeit it may be said, that the woman may by possibility marry both the men one after another: yet first she cannot mar-

44. E. 3. tit. Taile 13. (Ant. 25. b.)

(a. Ro. Abr. 48. 1. Co. 120. 156. b. Ant. 46. b. 10. Co. 50. b.)

[m] 18. E. 3. 39. 7. H. 4. 16.

Sect. 285.

ITEM si terres soyent dones a deux & a les heires de l'un de eux, ceo est bone jointure, et l'un ad franktenement, et l'auter ad fee simple. Et si celui que ad le fee devie, celui que ad le franktenement ave-ra l'entiertie per le survivor pur terme de sa vie. En mesme le manner est, l'ou tenements sont dones a deux & les heires del corps d'un de eux engendres, l'un ad franktenement, & l'auter ad fee taile, &c.

estate in possession, the words in the writ be true, that he was seised *in dominico suo ut de feodo* (4). Likewise the heir may have a writ of right, which also in some sort proves the fee simple executed; or the heir may have a *scire facias* to execute the fine, by which the heir supposeth that

ALSO if lands be given to two and to the heires of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entiertie by survivor for terme of his life. In the same manner it is, where tenements be given to two & the heires of the body of one of them engendred, the one hath a freehold, & the other a fee taile, &c.

BY this section, and the &c. in the end of it, they are joyntenants for life, and the fee-simple or estate taile is in one of them; and because it is by one and the same conveyance, they are joyntenants, and the fee-simple is not executed to all purposes, as hath been said before (3).

If a fine be levied to two, [u] and to the heires of one of them, by force whereof hee is seised, he that hath fee dieth, and after the joyntenant for life dieth, and an estranger abates, in this case the heir may either suppose the fee simple executed, and have an assise of *Mortdauncester*, the words of which writ be, *Si R. pater fuit seifitus die quo obiit in dominico suo ut de feodo*; which cannot be said of him that hath but a remainder expectant upon an estate for life; but in respect that he is seised of a fee simple, and of a joynt

(2. Co. 60. b.)

(Sect. 283.)

[u] 42. E. 3. 9. 10. 11. H. 4. 55. 31. E. 3. *scire facias* 19. 29. H. 8. Mortd. B. 59. 4. E. 3. 37. F. N. B. 196. & 219. 4. E. 3. Itinere Derby. 24. E. 3. 70.

(2. Co. 61.)

(1. Ro. Abr. 686.)

(1) Yet in fol. 20. b. lord Coke allows a present estate tail in a case of double possibility equal to that here supposed; namely the case of a gift to the husband of A. and the wife of B. and the heirs of their bodies. See further on this head Vin. Abr. tit. *possid. in*, and Fearn on Conting. Rem. 3d ed. 176.

(2) See Dy. 326. a.

(3) Ant. 182. b. See also post. 297. b. Fearn on Conting. Rem. 23. 24. 26. 28. 29. Bro. Nouv. Caf. pl. 260. 303. 387. These references will introduce the reader to most of the learning on this curious point.

(4) See however Bro. Nouv. Caf. pl. 115. which is *contra*.

(Post. 281.)

that the fee was not executed, or he may maintaine a writ of intrusion where the heire maketh the like supposition, and shall terme it a remainder. (1) And yet when land is given to two and to the heires of one of them, he in the remainder cannot grant away his fee simple, as hath beene said. (2)

Sect. 286.

CLaimer riens per discent de son compaignon, &c. By which &c.

F. N. B. 204. E. 207. 7. H. 6. 2. 13. H. 7. 22. 10. E. 3. 34. 17. R. 2. tit. charge 15. 5. H. 5. 8. Vide sect. 289. (6. Co. 79. a.)

is implied, that so it is if one joyntenant acknowledge a recognisance or a statute, or suffreth a judgment in an action of debt, &c. and dieth before execution had, it shall not bee executed afterwards. (5) But if execution be sued in the life of the consor, it shall bind the survivor. And it is further implied, that both in the case of the charge and of the recognisance statute and judgement, if he that chargeth, &c. survive, it is good for ever.

[e] 9. H. 6. 32. (Hob. 3. Plowd. 418. b.)

And so it is [e] if a man bee possessed of certaine lands for term of yeares in the right of his wife, and granteth a rent charge, and dyeth, the wife shall avoyd the charge; (6) but if the husband had survived, the charge is good during the terme.

If a villeine purchase lands, and binde himselfe in a recognisance, if the lord enter before [p] execution, the lord shall avoyde the same, as it hath beene said. But otherwise it is if he had made a lease for yeares, for the reason that *Littleton* here yeeldeth in this section. (7)

[f] 8. E. 3. tit. execution Statutam.

If two joyntenants bee of a terme, [g] and the one of them grant to I. S. that

[j] 14. H. 8. 22. Pl. Com. 263. 6. in dame Hales case.

ITEM si deux joyntenants sont seises d'estate en fee simple, & l'un graunt un rent charge per son fait a un auter hors de ceo, que a luy affiert (3) en cest case durant la vie le grantor le rent charge est effectuell; mes apres son deceffe le grant de le rent charge est void, quant a charger la terre, car celui que ad la terre per le survivor tiendra tout la terre discharge. Et la cause est, pur ceo que celui que survesquist clayma & ad la terre per le survivor, (4) & ne my ad, ne poet de ceo claymer rien per discent de son compaignon, &c. Mes auterment est de parceners, car si soient deux parceners des tenements en fee simple, et devant ascun partition fait l'un charge ceo que a luy affiert per son fait d'un rent charge, &c. et puis morust sans issue, per que ceo, que a luy affiert, discent a l'auter parcenter, en cest case l'auter parcenter tiendra la terre charge, &c. pur ceo que il vient a cel moitie per discent, come heire, &c.

ALSO if two joyntenants be seised of an estate in fee simple, and the one grants a rent charge by his deed to another out of that which belongeth to him, in this case during the life of the grantor the rent charge is effectuell; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shall hold the whole land discharged. And the cause is, for that he which surviveth claimeth & hath the land by the survivor, and hath not, nor can claime any thing by descent from his companion, &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, & before any partition made the one chargeth that which to her belongeth by her deed with a rent charge, &c. & after dieth without issue, by which that which belongeth to her descends to the other parcenter, in this case the other parcenter shall hold the land charged, &c. because shee came to this moity by descent, as heir, &c.

if

(1) Acc. F. N. B. 204. E. So also such heir shall have a writ of entry in *consimili casu*, where the surviving tenant for life aliens in fee. F. N. B. 207. B.

(2) See ant. 182. b.—There is a seeming difficulty in this passage. But I conceive lord Coke's meaning to be, that, though for some purposes the estate for life of the jointenant having the fee is distinct from and unmerged in his greater estate, yet for granting it is not so, but both estates are in that respect consolidated notwithstanding the estate of the other jointenant; and therefore that the fee cannot in strictness of law be granted as a remainder *eo nomine*, and as an interest distinct from the estate for life. This explanation is confirmed by a note in a Coke upon Littleton I have, in which it is strongly observed, that "the two estates, viz. for life and in fee, or rather one knotted estate, are so confounded together in one person, that he cannot sever them and make them distinct estates, for he cannot grant the estate for life reserving to himself the fee simple, nor can he grant the fee simple and reserve the estate for life, but he may put away all his interest by feoffment or he may forfeit all." See Bro. Nouv. Cuf. pl. 115. It also much agrees with the language of lord Coke's report of Wiscot's case, especially where he observes, that when an estate is made to three and the heirs of one, *he, who hath the fee, cannot grant over his remainder, and continue in himself an estate for life*, for which lord Coke cites 12. E. 4. 2. b. See 3. Co. 61. a. Besides if the passage here should be understood to signify, that the jointenant having the fee could not in any form pass away the fee subject to the estate of the other jointenant, it would not only be contrary to the power of alienation necessarily incident to a fee simple, but would be inconsistent with lord Coke's own doctrine in a subsequent part of his commentary. See the case of an estate to father and son and the heirs of the father, post. 367. b. See also post. sect. 578. Indeed lord Coke's position thus qualified appears to have a strictness in it, which with some may perhaps render it questionable. However he seems justified by the words of the year-book, which he cites as his authority; for they are, that, *if two have land to them and the heirs of one, he who hath fee cannot grant the reversion of his companion to another; but if both alien all passeth*. See further as to grant of a remainder or reversion by one having a present and previous estate, Sheph. Touchstone 237. and Sheph. Common Assur. 12. 13.

(3) &c. in L. and M. & Roh.

(4) &c. in L. and M. & Roh.

(5) See acc. 7. H. 7. 13. b. & 2. Ro. Abr. 88.

(6) Yet the husband's alienation of term itself or of any part of it binds the wife surviving. Post. 351. 2. The reason of this difference is explained post. 185. a. It is also well explained in Finch's L. 98. and in the New Abridgement tit. *baron & feme*. C. 2. See further 1. Vern. 306.

(7) See also the reason given in sect. 289.

if he pay to him ten pound before *Michaelmasse*, that then he shall have his terme, the grantor dyeth before the day, *I. S.* payes the summe to his executors at the day, yet hee shall not have the tearme, but the survivor shall hold place; for it was but in nature of a communication: (1) but if he had made a lease for yeares, to begin at *Michaelmasse*, it should have bound the survivor. (2)

And where *Littleton* putteth the case of a rent charge, it is so likewise implied, that if one joyntenant granteth a common of pasture, or of turbary, or of estovers, or a corody, or such like, out of his part, or a way over the land, this shall not bind the survivor: for it is a maxime in law, that *jus accrescendi præfertur oneribus*; and there is another maxime, that *alienatio rei præfertur juri accrescendi*.

If one joyntenant in fee simple be indebted to the king, and dyeth, [r] after his decease no extent shall be made upon the land in the hands of the survivor.

If a recovery be had against one joyntenant, who dyeth before execution, the survivor shall not avoid this recovery; because that the right of the moitie is bound by it.

If one joyntenant in fee take a lease for yeares of an estranger by deed indented and dyeth, the survivor shall not be bound by the conclusion; because he claymes above it, and not under it.

Et la cause est, pur ceo que celui que survesquist clame & ad la terre per survivor, &c. Here againe *Littleton* sheweth the reason: and the cause, wherefore the survivor shall not hold the land charged, is, for that he claymeth the land from the first feoffor, (3) and not by his companion, which is *Littleton's* meaning when he saith, (that he claymeth by survivor) for [s] the surviving feoffee may plead a feoffment to himselfe without any mention of his joynt feoffee. (4) And this is the reason, that if two joyntenants be in fee, and the one maketh a lease for yeares, reserving a rent and dyeth, the surviving feoffee [t] shall have the reversion by survivor, but he shall not have the rent, because he claymeth in from the first feoffor, which is paramount the rent. If there be two joyntenants in fee, and the one joyntenant granteth a rent charge out of his part, and after releaseth to his joynt companion and dyeth, he shall hold the land charged; for that he is out of the reason and cause set downe by *Littleton*, because he claymeth not by survivor, in as much as the release prevented the same. And of this opinion was *Littleton* himselfe [u] before the edition of his booke. But all men agree, that if *A. B.* and *C.* be joyntenants in fee, and *A.* chargeth his part, and then releaseth to *B.* and his heirs, and dyeth, that the [w] charge is good for ever; because in that case *B.* cannot be in from the first feoffor, because he hath a joynt companion at the time of the release made, and several writs of *præcipe* must be brought against them. (5) And albeit the release of one joyntenant to the residue of the joyntenants makes no degree in supposition of law, neither is there any severall estate between them, but the estate of him that releaseth is as it were extinguished and drowned in their estate and possession, so as one *præcipe* lyeth against them, (7) yet shall they hold the land charged as is aforesaid. As if tenant for life grant a rent charge, and after surrendreth his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet hee shall hold it charged. (8)

Mes autrement est de parceners, car si sont deux parceners, &c. This is to be intended as well of parceners by custome as of parceners by the common law; and here is implied the reason of the diversity, for that the survivor doth claime above the charge, and the heire by descent under the charge. (9)

Sect. 287.

ITEM si sont deux joyntenants des terres en fee simple deins un burgh, l'un les terres & tenements sont devisables per testament, & si l'un de les dits deux joyntenants devise ceo que a luy affiert per son

ALSO if there bee two joyntenants of land in fee simple within a borough, where lands and tenements are devisable by testament, & if the one of the said two joyntenants deviseth that which to him be-

PER son testament,

&c. Either in writing, or nuncupative, according to the custome.

Et la cause est, pur ceo que nul devise poet prendre effect mes apres le mort le devisor (10) & per sa mort tout la terre maintenant devient per la ley a son companion, &c.

(1) See Dy. 337. a.

(2) See post. sect. 289.

(3) For this same reason a wife shall not have dower out of lands of which her husband was joyntenant. Ant. 37. b. See post. 385. a. a case of warranty depending on the same principle.

(4) Acc. F. N. B. 219. B.

(5) As to the partial effect of such a release on the jointenancy, see post. sect. 304.

(6) It should be 12. a.

(7) See the case of waste in Brownl. Rep. 238.

(8) Acc. 338. b. 233. b.

(9) In Calthrop's reading on Copyholds 64. the doctrine of admission on the death of copyholders being jointenants or parceners is stated according to this diversity.

(10) Acc. ant. 112. a. b. as a reason for the goodness of a devise by husband to wife.

Pl. Com. in Fulmerston's case.

(Plowd. 258. b. Ant. 30. a.)

(Plowd. 418. Hob. 3. Cro. Eliz. 33.)

1. II. 5. executors 108.

[*] Fleta lib. 2. cap. 50. (3)
 Bracton lib. 2. fol. 60. Britton
 fol. 178.

Lamb. fol. 119. 58

Ec. Here doth their claimes commence at one instant: and although an instant *est unum indivisibile tempore quod non est tempus nec pars temporis, ad quod tamen partes temporis connectuntur*, and that *instans est finis unius temporis & principium alterius*; (1) yet in consideration of law there is a prioritie of time in an instant, as here the survivor is preferred before the devise, for *Littleton* saith, that the cause is that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion. Whereby it appeareth, that *Littleton* by these words *post mortem & per mortem*, though they jump at one instant, yet alloweth priority of time in the instant which he distinguisheth by *per & post*. And the reason of this prioritie is, that the survivor claymeth by the first feoffor (as hath bin said) and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise void, and the rule of law is that *jus accrescendi præfertur ultimæ voluntati*. (2)

Two fems joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattels reals are given to the husband, if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage the feme continued sole possessed; for, if the husband dyeth, the feme shall have it, and not the executors of the husband. (3) But otherwise it is of personall goods.

If a man be seised of a house, and possessed of divers heirlomes, that by custome have gone with the house from heire to heire, and by his will deviseth away the heirlomes, this devise is void; for as *Littleton* here saith, the will taketh effect after his death, and by his death the heirlomes by ancient custome are vested in the heire (4), and the law preferreth the custome before the devise. And so it is if the lord ought to have a herriot when his tenant dieth, and the tenant deviseth away all his goods, yet the lord shall have his herriot for the reason aforesaid. And it hath beene anciently said, that the herriot shall bee paid before the mortuary. [x] *Imprimis autem debet quilibet, qui testaverit, dominum suum de meliore re quam habuerit recognoscere, & postea ecclesiam de alia meliore, &c.* wherein the lord is preferred, for that the tenure is of him. This dutie to the lord is very antient; for in the lawes before the conquest it is said, *sive quis incuriâ, sive morte repentinâ, fuerit intestat' mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito* (6). In the Saxon tongue it is called *heregeat*, as much to say (as I take it) as the lords best; for *here* is lord, and *geat* is best. But let us returne to *Littleton*.

Mes auterment est de parceners seises des tenements devisable en tiel casé del devise, &c. causâ quâ suprà.

The reason is evident, for that there is no survivor between coparceners, but the part of the one is descendible, and consequently may be devised.

Sect.

(1) Therefore in Fitzwilliam's case 6. Co. 32. it was argued, that the indulgence of the law in connecting two times to make one instant time cannot be extended to three times. See post. 298. a. a case in which priority of time in an instant is allowed, for sake of saving the remainder in fee of a rent from the effect of a suspension of the particular estate.

(2) Acc. as to goods, Office of Exec. ed. 1676. p. 26. Perk. sect. 226. Swinb. on Testam. part 3. sect. 6.

(3) See ant. 46. b. post. 351. a. and the case of a purchase by husband and wife jointly, the former being a villein, in 2. Ro. Abr. 733. D. pl. 2.

(4) Acc. ant. 18. b.

(5) It should be cap. 57.

(6) See this same passage cited ant. 176. b.

testament, &c. & mortuif, ceo devise est voide. Et la cause est, pur ceo que nul devise poit prender effect mes apres la mort le devisor, et per sa mort tout la terre maintenant devient per la ley a son companion, que survive, per le survivor; le quel il ne claime, ne ad reins en la terre per my le devisor, mes en son droit de mesme per le survivor solongue le course de ley, &c. & pur cel cause tiel devise est voide. Mes auterment est de parceners seises des tenements devisables en tiel casé de devise, &c. causâ quâ suprà.

longeth by his testament, &c. and dieth, this devise is voide. And the cause is, for that no devise can take effect till after the death of the devisor: and by his death all the land presently commeth by the law to his companion, which surviveth, by the survivor; the which hee doth not claime, nor hath any thing in the land by the devisor, but in his owne right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. *causâ quâ suprà.*

Sect. 288.

ITEM *il est communement dit, que chescun joyntenant est seisie de la terre qu'il tient joyntment (1) per my et per tout; et ceo est autant adire qu'il est seisie per chescun parcel et per tout, &c. et ceo est voier, car en chescun parcel, et per chescun parcel, et per tous les terres et tenements, il est joyntment seisie ovesque son companion. (2)*

them two and their heires, I may enter into a moiety.

And where all the joyntenants joyne in a feoffment, every of them in judgment of law do give but his part. (6) If an alien and a subject purchase lands joyntly, the king upon office found shall have but a moiety. (7) And *Littleton* afterwards in this chapter (8) saith, that one joyntenant hath one moiety in law, and the other the other moiety. And therefore if two joyntenants be [2] and both they make a feoffment in fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moiety, because no more in judgment of law passed from him: (9) and so it is of a gift in taile or a lease for life, &c.

Yet every joyntenant may warrant the whole; [a] because a man may warrant more then passeth from him. (10)

If two joyntenants make a feoffment in fee [b] and one of the feoffors dye, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part; but otherwise it is on the part of the feoffees, as hath beene said before.

And where two joyntenants be, the one of them [c] may make the other his baylife of his moiety, and have an action of account (11) against him. And one joyntenant [d] may let his part for yeares or at will to his companion.

If two joyntenants be of certaine lands, and the one of them by deed indented [e] bargaineth and selleth the lands, and the other joyntenant dyeth, and then the deed is inrolled, there shall passe nothing but the moiety which the bargainer had at the time of the bargain. (12)

ALSO it is commonly said, that every jointenant is seised of the land which hee holdeth joyntly *per my & per tout*; and this is as much to say, as he is seised by every parcell & by the whole, &c. and this is true, for in every parcell, and by every parcell, and by al the lands and tenements, he is joyntly seised with his companion.

ITEM *est communement dit &c.* That is, it is the common opinion, and *communis opinio* is of good authoritie in law. *A communis observantia non est recedendum*, (3) which appeareth here by *Littleton*.

Per my & per tout. Et sic totum tenet & nihil tenet, s. totum conjunctim, & nihil per se separatim. And albeit they are so seised (as for example where there bee two joyntenants in fee) yet to divers purposes each of them hath but a right to a moiety; as to encoffe give or demise, or to forfeit (4) or lose by default in a *præcipe*. (5) If my villein [y] and another purchase lands to

Vide sect. 697.

(Post. 350. a. a. Co. 65. b. a. Ro. Abr. 86.) Vide *Bracon* lib. 5. fo. 430. *Britton* cap. 35. *Fleta* lib. 3. cap. 4. 40. E. 3. 40. 18. E. 2. bre. 831. 35. H. 6. 39. Vide the second part of the Institutes upon the 6. chapter of the statute de bigamis. *Fleta* lib. 1. cap. 28. 40. Alf. 79. 48. E. 3. 16.

[y] Vid. 6. E. 3. 4. 7. E. 4. 29. 11. El. Dyer 183. (a. Co. 58. a. Cro. Jam. 91. 1. Leon. 47.)

[2] Pl. Com. in *Browning's* case, fol. (133. a.) (Post. 192. a.)

[a] Vide the second part of the Institutes upon the 6. chapter of the statute de bigamis.

[b] 14. E. 4. 5. and the other bookes abovesaid.

[c] 21. E. 3. 60. (Post. 200. b.)

[d] 11. H. 3. 60. 33. (Post. 193. b. 335. a.)

[e] 6. E. 6. tit. Faits inroll. 9. Br. (Cro. Cha. 217. 569. 1. Co. 173.)

Sect. 289.

ITEM *si deux joyntenants sont seies de certain terres en fee simple, & l'un lessa ceo que a luy affiert a un estranger pur terme de 40 ans, & devie devant le term com-*

ALSO if two joyntenants bee seised of certain lands in fee simple, and the one letteth that to him belongeth to a stranger for terme of forty yeares, and dyeth before the

PER *force de mesme le dit lease, &c.*

By this &c. is implied, [f] that where our author speaketh of joyntenants seised in fee, that so it is if two be seised for life, and one make a lease to begin presently or in

[f] Vid. sect. 286. & 660. & sect. 2.

(1) &c. in L. & M. & Roh.

(2) &c. in L. & M. & Roh.

(3) This fine maxim is cited post. 229. b. and 364. b. In *Wingate's Maxims* 751. there is a variety of cases collected to illustrate the application of this rule. Other rules immediately connected with this are, that *communis error facit jus* and *res judicata pro veritate habetur*, and also that *minimè mutanda sunt que certam interpretationem habuerunt*, as to which see post. 365. a. Hob. 147. *Wing. Max.* 758. and ant. 51. b. in the margin.—In a late ecclesiastical case of great importance, in which bonds of resignation were condemned by the supreme court of appellant jurisdiction, these four maxims appear to me to have included the chief topic of argument in favour of such bonds.

(4) Acc. as to copyholders being jointenants *Calthrope's Reading* 97. *Kitch. French* ed. 82. a.

(5) See ant. 125. b.

(6) Acc. 11. H. 7. a. pl. 5.

(7) See ant. 180. and note 2. there.

(8) Post. sect. 291.

(9) See ant. 47. a. & post. 214. a. the case of a lease by two jointenants with reservation of rent to one, and the difference there taken between such a lease by *parol* and one by *deed indented*. See also *Dy.* 263. a.

(10) See post. sect. 700.

(11) See ant. 171. a.

(12) See ant. 147. b.

(Dy. 187. a. 2. Ro. Abr. 89.)

[6] 11. H. 4. 90. 14. H. 8. 6. 17. E. 4. 6. a. 9. H. 6. 52. 21. H. 7. 29. 14. H. 7. 4. 18. E. 3. execution 56. 11. El. Dy. 285. Plow. Com. 160. a. Temps E. 1. Aff. 422. 20. H. 6. 4. 7. H. 7. 13. 10. H. 7. 24. (Ant. 4. b.)

in futuro, and dieth, this lease shall binde the survivor, as it hath been adjudged. (4) [g] And if one joyntenant grant *vestituram terræ*, or *herbagium terræ*, for yeares, and dieth, this shall binde the survivor; for such a lessee hath right in the land. So it is if two joyntenants be of a water, and the one granteth the severall pishary.

L'un lessa. The one letteth. If two joyntenants bee of an advowson, and [b] the one presenteth to the church, and his clerke is admitted and instituted, this in respect of the privity shall not put the other out of possession; (5) but if that joyntenant that presenteth dieth, it shall serve for a title in a *quare impedit* brought by the survivor. (6) But yet if one joyntenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unless they joyn in presentation, and after the fixe moneths he may in that case present by lapse (7).

[1] Brañ. li. 4. fo. 238. 245. 247. Brit. fo. 223. 45. Ed. 3. Fines 41. 18. E. 2. Quar. Imp. 176. 38. H. 6. 9. 19. E. 3. ib. 50. 5. H. 5. 10. F. N. B. 34. V. (Plowd. 332. b. 333. a. 10. Co. 135. b. 2. Ro. Abr. 346. F. N. B. 33. E. Ant. 166. b. Poil. 243. a & sect. 299.)

But if two or more coparceners bee, [i] and they cannot agree to present, the eldest shall present; and if her sister doth disturbe her, she shall have a *quare impedit* against her; and so shall the issue and the assignee of the eldest, and yet he is tenant in common with the youngest. (8) And in the same manner the tenant by the curtesie of the eldest shall present. But if there bee foure coparceners and the eldest and the second present, and the other two present jointly or severally, the ordinary may refuse them all; for the eldest did not present alone, but she and one other of her sisters. But now let us returne to *Littleton*. (9)

mence, ou deins le terme, en cest case apres son decease le lessee poet enter et occuper la moitie a luy lesse durant le terme, &c. coment que le lessee n'avoit unques possession de ceo en la vie le lessor, per force de mesme le lease, &c. Et le diversitie perenter le case de grant de rent charge (1) [avant dit, et cest case est ceo. Car en grant de rent charge per] joyntenaunt, &c. les tenements demurgent tous foits come ils fueront adevant, sans ceo que ascun ad ascun droit d'aver ascun parcell de les tenements forsque eux mesmes, et les tenements sont en tiel plyte, come ils fueront devant le charge, &c. Mes ou lease est fait per un joyntenant a un auter pur terme des ans, &c. maintenaunt per force de le lease le lessee ad droit en mesme la terre, cestascavoir, de tout ceo que a son lessour affiert, et d'aver ceo per force de mesme le lease durant son terme. (2) Et ceo est la diversitie. (3)

term beginneth, or within the terme, in this case after his decease the lessee may enter and occupie the moitie let unto him during the terme, &c. although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. And the diversitie betweene the case of a grant of a rent charge aforesaid, and this case, is this. For in the grant of a rent charge by a joyntenant, &c. the tenements remaine alwayes as they were before, without this that any hath any right to have any parcell of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joyntenant to another for terme of yeares, &c. presently by force of the lease the lessee hath right in the same land, (*videlicet*) of all that which to the lessor belongeth, and to have this by force of the same lease during his terme. And this is the diversitie.

Sect.

(1) The following words between brackets not in L. & M. or Roh.

(2) *Vie* instead of *terme* in L. & M. & Roh.

(3) *Ec.* in L. & M. & Roh.

(4) See acc. Cro. Jam. 91. & 2. Brownl. 175.

(5) See post. 243. a. 249. a.

(6) Acc. more fully 2. Inst. 365. According to F. N. B. 34. the law is the same between coparceners, which agrees with lord Coke's doctrine about them in 2. Inst. 365. & post. 243. a. See further the case of usurpation of a right of presenting ant. 149. a. See also the case of attornment to one of two joyntenants, post. sect. 566. Add 5. Co. 97. b.

(7) See 5. H. 7. 8. a. Burn. Ecc. L. tit. *advowson*, Watf. Compl. Incumb. c. 8.

(8) See my note on this subject ant. 166. b. Hob. 119. Dy. 55. a.

(9) See further on presentation where more than one have an interest in an advowson, 2. Gibf. Cod. 1st ed. 804. ant. 17. b. 18. a. 17. Vin. Abr. 345. Mallory's 2^d.

Sect. 290.

ITEM joyntenants (s'ils voilent) poient faire partition enter eux, et la partition est assés bon; mes de ceo faire ils ne ferront compels per la ley; mes s'ils voilent faire partition de leur proper volunt & agreement, le partition estoiera en sa force.

ALSO joyntenants (if they will) may make partition betweene them, and the partition is good enough; but they shall not bee compelled to doe this by the law; but if they will make partition of their own will and agreement, the partition shal stand in force.

POyent faire partition. But this partition must bee [k] by deed [k] Vid. sect. 259. 318. (Ant. as hath beene said before. 169. a. F. N. B. 62. f.) But joyntenants for yeares may [l] make partition without deed.

(Post. 198. b.)

Ilz ne serra compell.

This is true regularly; but, by the custome of some cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the custome, to make partition. (1)

F. N. B. 62. b.

tenants and tenants in common generally are compellable to make partition by writ framed upon the statutes [m] of 31. & 32. H. 8. as before hath been said. (2) And albeit they be now compellable to make partition, yet, seeing they are compellable by writ, they must pursue the statutes, and cannot make partition by *parol*, for that remaines at the common law. And by *Littleton's* authoritie herein it seemeth to me, that if one joyntenant or tenant in common disseise another, and the disseisee bring his assise for the moytie, that in this case, though the plaintife prayeth it, yet no judgement shall bee given to hold in severaltie, for then at the common law there might have beene by compulsion of law a partition between joyntenants and tenants in common, and by rule of law the plaintife must have judgement according to his pleint or demand.

If two joyntenants be [n] of land with warranty, and they make partition by writing, the warrantie is destroyed; but if they make partition by writ of partition upon the statute, the warrantie remaines, because they are compellable thereunto, (3)

[m] 31. H. 8. ca. 1. 32. H. 8. ca. 32. Vid. sect. 264. 247. 259. Mich. 16. & 17. El. 1. 340. Inter Harris & Eden adjudge. acc. 18. El. Dyer 350. b. Vide before in the chapter of partition, many bookes cited concerning this matter. (Ant. 175. a. sect. 250. Mo. 29. Dy. 350. Ant. 167. b.) 3. E. 3. 48. F. N. B. 9. b. 7. Aff. 10. 7. E. 3. 29. 10. Aff. 17. 10. E. 3. 40. 43. 12. Aff. 15. 17. 12. E. 3. judgement 102. 20. E. 3. Aff. 62. 28. Aff. 35. 23. Aff. 10. 7. H. 6. 4. 19. H. 6. 45. 3. E. 4. 10. Vid. sect. 247. Brit. fo. 112. lb. 6. fo. 12. & 13. Morrice's case.

[n] 29. E. 3. tit. Garr.

Sect. 291.

ITEM si un joynt estate soit fait de terre a le baron & a sa feme & a un tierce person, en ceo cas le baron et sa feme n'ont en ley en leur droit forsque le moitie, &c. (4) [et le tierce person avera tant come le baron et sa feme ont, s. l'auter moitie, &c.] Et la cause est, pur ceo que le baron et sa feme ne sont forsque un person en

ALSO if a joynt estate be made of land to husband and wife and to a third person, in this case the husband & wife have in law in their right but the moity, and the third person shall have as much as the husband & wife, viz. the other moity, &c. And the cause is, for that the husband and wife are but one person in

LE baron & sa feme n'ont en ley en leur droit forsque le moitie, &c.

(Post. 299. b. 351. a. 2. Co. 68.)

William Ocle and *Joane* his wife [o] purchased lands to them two and their heires; after *William Ocle* was attainted of high treason for the murder of the king's father *E. 2.* and was executed; *Joan* his wife survived him; *E. 3.* granted the lands to *Stephen de Bitterly* and his heires; *John Hawkins* the heire of the said *Joan* in a petition to the king discloseth this whole matter, and upon a *scir. facias* against the patentee hath judgement to recover the lands,

[o] Mich. 33. E. 3. coram rege Salop. in Thesaur. (Post. 326. a. 1. Ro. Abr. 389. 388. 9. Co. 140.)

(1) For instances of such custom, see for London F. N. B. 62. b. and for gavelkind land ant. sect. 265. and *Robins. on Gavelk.* 108.

(2) Ant. 169. a.—In a Coke upon *Littleton* I have, there is the following note on the extent of the statutes of 31. and 32. H. 8. "Adjudged by St. John cheife justice and Windham and Archer justices, Hillary 1659 in the common bench, in the cause "between Major and the lord Coventry, that a tenant by elegit may have a writ of partition by the statute of 32. H. 8. and it is "within the meaning thereof." This is followed with a reference to Cro. Cha. 44. where it is said, that the statute doth not extend to copyholds.

(3) Acc. ant. 165. a. and b. as to parceners, because they are compellable to make partition at common law. See the case of aid between parceners after partition ant. 174. a. and b.

(4) The words following between brackets not in L. and M. or Roh.

Vide sect. 665.

lands, for the reason here yeelded by our author.

But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities between them, which is implied in these words of our author, *baron & sa feme*. (2)

Forsque un person en Ley. *Bract.* saith [p] *vir & uxor sunt quasi unica persona, quia caro una & sanguis unus.*

(3) It hath bin said, that if a reversion bee granted to a man and a woman and their heires, and before attornment they entermarry, and then attornment is made, that the husband and wife shall have no moities in this case, (4) no more than if a charter of feoffment be made to a man and a woman, with a letter of attornie to make livery, they entermarry, and then livery is made *secundum formam chartæ*, in which case it is said that they have no moities. But certain it is, that if a feoffment were made before the stat. of 27. H. 8. of uses to the use of a man [q] and a woman, and their heires, and they entermarry, and then the statute is made, if the husband alien it is good for a moiety; for the statute executes the

possession according to such qualitie, manner, forme, and condition, as they had in the use, so as though it vest during the coverture, yet the act of parliament executes severall moities in them, seeing they had severall moities in the use. (5)

If an estate be made to a villeine and his wife [r] being free, and to their heires, albeit they have severall capacities, *viz.* the villeine to purchase for the benefit of the lord, and the wife for her owne, yet if the lord of the villeine enter, and the wife surviveth her husband, she shall enjoy the whole land, because there be no moities betweene them.

A man makes a lease to A. and to a baron and feme, *viz.* to A. for life, to the husband in taile, and to the feme for yeares, in this case it is said, that each of them hath a third part in respect of the severallie of their estates.

If a feoffment be made to a man and a woman and their heires with warrantie, [s] and they entermarry, and after are impleaded and vouch and recover in value, moities shall not be betweene them; for though they were sole when the warrantie was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moities.

Albeit baron and feme (as *Littleton* here saith) be one person in law, so as neither of them can give any estate or interest to the other, (6) yet if a charter of feoffment bee made to the wife, the husband as attorney to the feoffor may make livery to the wife; (7) and so a feme covert, that hath power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the state passeth from the feoffor or devisor.

If a husband, wife, and a third person purchase lands to them and their heires [t] and the husband before the statute of 32. H. 8. cap. 1. had aliened the whole land to a stranger in fee, and died, the wife and the other joyntenant were joyntenants of the right, and if the wife had

ley, et sont en semblable case, sicome estate soit fait a deux joyntenants, ou l'un ad per force de joynture l'un moitie en ley, & l'auter l'auter moitie, &c. (1) *En mesme le maner est l'ou estate est fait a le baron et a sa feme et as auters deux homes, en tiel cas le baron et sa feme n'ont forsque la tierce part, et les auters deux homes les auters deux parts, &c.* *Causâ quâ suprà.*

law, and are in like case as if an estate be made to two joyntenants, where the one hath by force of the joynture the one moiety in law, and the other the other moiety, &c. In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *causâ quâ suprà.*

PLUS serra dit del matter touchant joyntenancie, en le chapter de tenants en common, et tenant per elegit, et tenant per statute merchant.

MORE shall be said of the matter touching joyntenancy in the chapter of tenants in common, & tenant by elegit, and tenant by statute merchant.

[p] *Bract.* li. 5. fo. 416. 20. H. 3. *Dilcent* 52. lib. 4. fo. 68. *Toker's case.* Pl. Com. 483. *Nichols case.*

[q] 4. Mar. Dyer 149. 3. Mar. Dyer 122. 29. H. 8. Dyer 32.

[r] 40. Aff. p. 7.

[s] Pl. Com. 483. *Nichols case.*

10. H. 7. 20.

[t] 11. E. 3. cui in vita 9. 16. E. 3. ibid. 36. E. 3. ib. 20. 35. Aff. pl. 15. 31. H. 6. tit. Ent. congeable 54. 19. H. 6. 45. F. N. B. 193. k.

(1) No *Sec.* in L. & M. or Roh.

(2) See acc. as to this difference between a joint estate to husband and wife before marriage and one after, *Calthrope's Read.* on Copyh. 92. F. N. B. 194. B. See further case of *Butler and Baker* 3. Co. the case of *Margery More* ant. 133. a. the case of 4. Aff. 4. cited in 1. Ro. Abr. 271. and the case of *Ward and Walthew* Yelv. 101.

(3) See ant. 112. a. where the same passage from *Bract* on is cited.

(4) See acc. post. 310. a. and there the doctrine is more positively expressed. See further the case of a lease for life to baron and feme and afterwards confirmation, post. 299. b.

(5) See Dy. 200. a.

(6) Acc. ant. 112. a. and observe note 6. there.

(7) Acc. ant. 52. a.

had died, the other joyntenant should have had the whole right by survivor (1); for that they might have joynted in a writ of right (2), and the discontinuance should not have barred the entrie of the survivor, for that he claymed not under the discontinuance, but by title paramount above the same by the first feoffment (3), which is worthie of observation. But if the husband had made a feoffment in fee but of the moiety, and he and his wife had dyed, their moiety should not have survived to the other.

And for the better understanding of this diversity divers things are worthy of observation.

First, that a right of action and a right of entrie may stand in joynture; for at the common law the alienation of the husband was a discontinuance to the wife of the one moiety, and a disseisin of the other, so as after the death of the husband, the wife hath a right of action to the one moiety, and the other joyntenant a right of entrie into the other, but they are jointenants of the right, because they may joyne in a writ of right.

Vide sect. 302.
(Post. 327. b.)

Secondly, that a right of action or a bare right of entrie cannot stand in joynture with a freehold or inheritance in possession, and therefore if the husband make a feoffment of the moiety, this was a discontinuance of that moiety, * and the other jointenant remained in possession of the freehold and inheritance of the other moiety, which for the time was a severance of the jointure (4); and so are all the bookes, which seemed to varie amongst themselves, cleerely reconciled.

* Vide the statute of 32. H. 8. 2. it is no discontinuance at this day.

If two joyntenants be of a rent, and the one of them disseise the tenant of the land, [u] this is a severance of the joynture for a time; for the moiety of the rent is suspended by unitie of possession (5), and therefore cannot stand in joynture with the other moiety in possession. And this is to be observed, that there shall never bee any survivor, unlesse the thing be in joynture at the instant of the death of him that first dyeth: (6) for the rule is, *nihil de re accrescit ei, qui nihil in re quando jus accresceret habet*.

[u] Pl. Com. 419. Bratchbridge's case.

Also if a man demise lands to two, to have and to hold to the one for life, and the other for yeares, they are no joyntenants; for a state of freehold cannot stand in joynture with a terme for yeares: and a reversion upon a freehold cannot stand in joynture with a freehold and inheritance in possession, as shall be said in the next chapter (7). Neither can a seisin in the right of a politique capacity stand in joynture with seisin in a natural capacity, as shall be said hereafter (8).

46. E. 3. 21. 19. H. 6. 45. 37. H. 8. 8. 3. E. 4. 10.

If two femes be jointly seised, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have severall writs of *cui in vita* at their election; but when they have recovered in those severall writs, they shall be joyntenants againe. But if the barons had aliened severally, this had bin a severance of the joynture for a time, for the reason abovesaid.

If two joyntenants, the one for life, and the other in fee, lose by default, the one shall have a writ of right, and the other a *quod ei de forceat*; and yet when they have severally recovered, they shall be joyntenants againe (9). So it is if two joyntenants bee disseised, and an assise is brought, and the one is summoned and severed, and the other recover the moiety, and after another assise is brought, and he that recovereth is summoned and severed, and the other recover, albeit they severally recover, yet they are joyntenants againe (10).

And in all cases where the joyntenants pursue one joynt remedy, and the one is summoned and severed and the other recover, he that is summoned and severed shall enter with him; but where their remedies be severall, there the one shall not enter with the other, till both have recovered: and the same law is of coparceners. If lands [w] be demised for life, the remainder to the right heires of *I. S.* and of *I. N. I. S.* hath issue and dieth, and after *I. N.* hath issue and dieth, the issues are not joyntenants, because the one moiety vested at one time, and the other moiety vested at another time (11). And yet in some cases there may be joyntenants, and yet the estate may vest in them at severall times.

Vid. Lit. cap. Remitter, the last case. (Post. 364. b.)
10. H. 6. 10. 31. H. 6. tit. Entre congeable. 46. E. 3. 21. b. 3. E. 4. 10. 37. H. 6. 8.
[w] 24. E. 3. 29. 18. E. 3. 28. 38. E. 3. (Cro. Jam. 259.)

If a man [x] make a feoffment in fee to the use of himselfe and of such wife as he should afterwards marrie, for terme of their lives, and after he taketh wife, they are joyntenants, and yet they come to their estates at severall times (12).

[x] 17. El. Dyer Brent's case (12)

And so it is if I disseise one to the use of two, and the one agrees at one time, and the other at another, yet they are joyntenants.

In this section are three &c. the first and second are at large explained before, the last is intended where more parties take then three.

Cap.

(1) Acc. 2. Ro. Abr. 88. D. pl. 3.

(2) See post. 337. a.

(3) See post. 364. b. and ant. 185. a.

(4) Acc. post. 337. b.

(5) See ant. 148. b.

(6) Acc. post. 193. a.

(7) Post. sect. 302. near the end.

(8) Post. sect. 297.

(9) See post. 214. a. and Bro. Abr. *jointenants* 6.

(10) A like case of parceners is stated before, and resolved in the same way. Ant. 164. a. See further 19. H. 6. 45. b.

(11) For other cases, where *joint* words are construed to operate *severally* for the like reason, see the arguments in *mr. justice Windham's case*, 5. Co. 7. 2.

(12) It is in Dy. 339. b. pl. 48. but without any name. It is also much at large in 2. Leon. 14.

(13) See *contra* as to an estate at *common law*, the case of a gift to one and his children ant. 9. a. The reason of the difference is, that in the case of the *use* the estate is vested and settled in the feoffees till the future use comes in to *esse*. See further as to this difference and the reason of it, 1. Co. 100. b. 101. a. and Dy. 274. b.

Cap. 4. Of Tenants in Common. Sect. 292.

TENANTS en common sont ceux, que ont terres ou tenements en fee simple, fee taile, ou pur terme de vie, &c. les queux ont tielx terres ou tenements per severall titles, & nemy per joint title, et nul de eux sca-voit de ceo son severall, mes ils doivent per la ley occuper tiels terres ou tenements en common, & pro indiviso a prendre les profits en common. Et pur ceo que ils aviendront a tielx terres ou tenements per severall titles, et nemy per un joynt title, et leur occupation et possession serra per la ley perenter eux en common, ils sont appels tenaunts en common. Sicome un home enfeoffa deux joyntenants en fee, et l'un de eux alien ceo que a luy affiert a un auter en fee, ore le alienee et l'auter joyntenant sont tenants en common; pur ceo que ils sont eins en tiels tenements per severall titles, car l'alienee vient eins en la moitie per la feoffement d'un des joyntenants, et l'auter joyntenant ad l'auter moitie per force de le premier feoffement fait a luy et a son compaignion, &c. (1). Et issint ils sont eins per severall titles, cestascavoir, per severall feoffements, &c. (2)

TENANTS in Common are they, which have lands or tenements in fee simple, fee taile, or for terme of life, &c. and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and *pro indiviso* to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joynt title, and their occupation and possession shall be by law betweene them in common, they are called tenants in common. As if a man infeoffe two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common; because they are in such tenements by severall titles, for the alienee cometh to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffement made to him and to his companion, &c. And so they are in by severall titles, that is to say, by severall feoffements, &c.

(Noy 13.)

Flet. li. 3. ca. 4.

Littleton having spoken of parceners, which are onely by descent, and of joyntenants which are onely by purchase and by joint title, speaketh now of tenants in common, which may be by three meanes, *viz.* by purchase, by descent, or by prescription, as hereafter in this chapter shall appeare (3).

Ou

(1) No &c. in L. & M. or Roh.

(2) No &c. in L. & M. or Roh.

(3) See sect. 310. which gives an instance of tenancy in common by prescription.

Ou pur terme de vie, &c. Here &c. implyeth *pur terme d'auter vie*, or for term of yeares, or for any other fixed estate in the land.

And here it appeareth, that the essential difference betweene joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right, (1) and tenants in common by severall titles or by one title and by severall rights; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie is common to them both, *viz.* that their occupation is undivided, and neither of them knoweth his part in severall.

Vide sect. 296.

The example that *Littleton* putteth in this section is perspicuous, and needeth no explication.

Sect. 293.

ET est asavoir, que quant il est dit en ascun livre que home est seise en fee sauns plus dire, il ferra entendue en fee simple; car il ne ferra entendue per tiel paroll (en fee) que home est seise en fee taile, sinon que soit mis a ceo tiel addition, fee taile, &c.

AND it is to bee understood, (Ant. 1. b. 11. Co. 38.) that when it is said in any booke that a man is seised in fee, without more saying, it shall bee intended in fee simple, for it shall not bee intended by this word (in fee) that a man is seised in fee taile, unlesse there bee added to it this addition, fee taile, &c.

THIS is evident, and *secundum excellentiam* it shall be taken for the highest and best fee, and that is fee simple. Vide devant sect. 99. (Ant. 73. a.)

Addition in fee taile, &c. Here is implied a maxime in law, *viz.* that *additio probat minoritatem*; as it is vulgarly said, the younger sonne giveth the difference (2).

Sect. 294.

ITEM si trois joyntenants sont, & un de eux alien ceo que a luy affiert a un auter home en fee, en cest cas l'alienee est tenant en common ovesque les auters deux joyntenants; mes uncore les auters deux joyntenants sont seises des deux parts joyntment que remayne (3), & de ceux deux parts le survivor enter eux deux tient lieu, &c. (4)

ALSO if three joyntenants bee, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joyntenants; but yet the other two joyntenants are seised of the two parts which remain joyntly (5), and of these two parts the survivor between them two holdeth place, &c.

THIS needeth no explication, onely the &c. in the end of this section implyeth, that the same law is where there be more joyntenants than three.

Sect.

(1) See post. 299. b. the first line.

(2) The difference of arms is meant. See more particularly as to this ant. 140. b.

(3) *Que remayne* not in L. & M. or Roh.

(4) No &c. in L. and M. or Roh.

(5) See sect. 304. & 312.

Sect. 295.

ITEM si soient deux joynt-
nants en fee, & l'un dona ceo
que a luy affiert a un auter en le
tayle⁽¹⁾ [& l'auter done ceo que
a luy affiert a un auter en le
taile] les donees sont tenants en
common, &c.

ALSO if there bee two joynte-
nants in fee, and the one giveth
that to him belongeth to another
in tayle, and the other giveth that
to him belongs to another in taile,
the donees are tenants in com-
mon, &c.

Vide sect. 300.

THE &c. in the end of this section implyeth, that so it is when a lease for life or *per auter vie* is made, for in that case also the lessees are tenants in common.

Sect. 296.

SI terres
sont do-
nes a deux
homes, &c.

Of this suffi-
cient hath been
spoken in the
chapter [a] of
joyntenants.

[a] Sect. 283. (Ant. 182. 2.)

Mes si
terres sont
dones a deux
abbes, &c.

In this case of
the two ab-
bots in respect
of their several
capacities, al-
beit the words
bee joynt, yet
the law [b] doth
adjudge them
to be severally
seised (3).

(1) Saund. 319.

[b] 7. H. 7. 9. b. 16. H. 7. 15.
b. 3. H. 7. 11. 10. E. 4. 16. b.
5. H. 7. 25. 18. E. 3. 27. 49. E. 3.
25. b. (2. Ro. Abr. 91. 2. Saund.
319.)

Vide sect. 200.

The &c. in
the end of
this section
implyeth, that
so it is, if any
[c] body po-
litique or cor-
porate, be they
regular, as
dead persons in
law (whereof
our author here
speaketh) or
secular: as if

[c] 4. H. 7. 45. 18. E. 3. 27. b.

MES si terres sont
dones a deux homes,

& a les heires de leur deux
corps engendres, les do-
nees ont joint estate pur
terme de leur vies; & si
chescun de eux ad issue &
devy, leur issues tiendront

en common, &c. Mes si

terres sont dones a deux
abbes, sicome al abbe de
Westminster & al abbe de

S. Albon, a aver & tener

a eux & a leur successors, en

cest cas ils ont mainte-
nant al commencement

estate en common, & nemy
joynt estate. Et le cause

est, pur ceo que chescun ab-
be, ou auter souveraigne,

de meason de religion, de-
vant que il fuit fait abbe,

ou souveraigne, &c. il fuit
forsque come mort person

en ley, et quant il est fait
abbe (2), il est come un home

person able en ley tant sole-
ment a purchaser et aver

terres ou tenements ou

BUT if lands be given to two
men, and to the heires

of their two bodies begot-
ten, the donees have a joynt

estate for tearme of their
lives; and if each of them

hath issue and dye, their is-
sues shall hold in common,

&c. But if lands be given to

two abbots, as to the ab-
bot of Westminster and to

the abbot of Saint Albons,

to have and to hold to them
and to their successors, in

this case they have present-
ly at the beginning an estate

in common, & not a joynt
estate. And the reason is, for

that every abbot or other
soveraigne of a house of re-
ligion, before that hee was

made abbot or soveraign,
&c. was but as a dead person

in law, and when he is made
abbot, he is as a man person

able in law onely to pur-
chase and have lands or te-
nements or other things to

the use of his house, and
auters

(1) The words between brackets not in L. & M. or Roh.

(2) &c. in L. & M. and Roh.

(3) Here joint words are construed to make several estates in respect of the several capacities of the donees. In a former part vesting at several times makes joint words to operate severally. Ant. 84. a. and mr. justice Wyndham's case 5. Co. 7. a. there cited in a note. A few passages further, lord Coke gives an instance of joint words passing two entire things to two grantees in consequence of the several quality of the things granted. Post. 190. the case of a corrody. See further as to the effect from several capacities in the grantees, post. 191. b. and ant. 183. b. near the end.

autres choses al use de sa meason, et nemy a son proper use, come auter seculer home poit, & pur ceo al commencement de leur purchase ils sont tenants en common, et si l'un de eux devie, l'abbe que survesquist n'avera my tout per le survivour, mes le successeur de l'abbe que morust tiendra le moitie en common ove l'abbe que survesquist, &c.

not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common, and if one of them die, the abbot which surviveth shall not have the whole by survivor, but the successor of the abbot which is dead shall hold the moiety in common with the abbot that surviveth, &c.

lands be given to two bishops, to have and to hold to them two and their successors: albeit the bishops were never any dead persons in law, but alwayes of capacite to take, yet seeing they take this purchase in their politique capacite, as bishops, they are presently tenants in common, be-

cause they are seised in severall rights, for the one bishop is seised in the right of his bishoprick of the one moiety, and the other is seised in the right of his bishoprick of the other moiety, and so by severall titles and in severall capacities, whereas joyntenants ought to have it in one and the same right and capacite, and by one and the same joynt title. The like law is, if lands be given to two parsons and their successors or to any other such like ecclesiasticall bodies politique or incorporate, as hath bin said.

(5. Co. 8. a. justice Wyndham's case.)

If a corodie be granted to two men and their heires, in this case, because the corodie is incertaine and cannot be severed, it shall amount to a severall grant to each of them one corodie; for the persons be severall, and the corodie is personall. (1)

Sect. 297.

ITEM si terres soient dones a un abbe & a un seculer home, a aver & tener a eux, s. al abbe & a ses successeurs, & al seculer home a luy & a ses heires, donques ils ont estate en common, causâ quâ suprà.

ALSO if lands be given to an abbot & a secular man, to have and to hold to them, viz. to the abbot and his successors, and to the secular man to him and to his heires, they have an estate in common, causâ quâ suprà.

AND so it is, if lands be given to the parson of Dale and to a lay man, to have and to hold to them, that is to say, to the parson and his successors, and to the lay man and his heires, they are presently tenants in common for the causes abovesaid. So of a bishop, &c. Et sic de similibus.

F. N. B. 49. I. 16. E. 3. joindre en action 27. 16. Aff. pl. 1. 2. R. 3. 16. 7. H. 7. 9. 13. H. 8. 14. (5. Co. 8.)

If lands be given to the king and to a subject, to have and to hold to them & to their heires, yet they are

Pl. Com. in feig. Barkley's case.

tenants in common, and not joyntenants; for the king is not seised in his naturall capacite, but in his royall and politique capacite, *in jure coronæ*, which cannot stand in joynture with the seisin of the subject in his natural capacite. So likewise if there be two joyntenants, and the crowne descend to one of them, the joynture is severed, and they are become tenants in common. But if lands be given to A. de B. bishop of N. and to a secular man, to have and to hold to them two and to their heires, in this case they are joyntenants; for each of them take the lands in their naturall capacite.

(Ant. 16. a.)

If lands be given to John bishop of Norwich and his successors and to John Overall doctor of divinity and his heires, being one and the same person, he is tenant in common [d] with himselfe. But our author's rules doe not hold in chattels reals or personals; for if a lease for yeares be made or a ward granted to an abbot and a secular man, or to a bishop and secular man, or if goods be granted to them, they are joyntenants, because they take not in their politique capacity. (2)

(Post. 310. b. 2. Ro. Abr. 91.) [d] 13. H. 8. 14. 16. H. 7. 15. 9. H. 6. 25. 45. E. 3. 25.

Sect.

(1) Lord Coke cites no authority for this. But in 8. E. 4. 17. there is a case, which tends to confirm and explain his doctrine as to a corrody's not being grantable to more than one. The case arose on grant of a corrody by Hen. 6. to two and the longer liver, where one was dead, the question being, whether during the life of the survivor this was sufficient to justify the prior of Friswith, on whom the corrody was chargeable, in refusing a new grantee sent by Edward the fourth. Upon this case NELE serjeant argued for the king, that a corrody which is for one man cannot be given to two, for two men cannot have the maintenance of one man; and thence he inferred, that the grant to the two was void. But the judges distinguished; for they all said, that if the corrody be to have certain bread and certain service, this may be granted to twenty men, &c. as to have 20 breads or 6 gallons of ale, &c. but that a corrody to sit every day in the hall of the prior and to be served as the men of the prior are, this cannot be granted to many, for every one of them would have as much as one had heretofore, which would not be reason, &c.—I was carried to this case in the year book of E. 4. by a reference in Fitzherbert's *Natura Brevium*, which in the commentary on the writs *de corrodio habendo* & *de annua pensione* contains a great variety of learning on this antiquated subject. See F. N. B. 230. F.

(2) In a former part lord Coke explains the reason of this to be, that no chattel can go in succession in the case of a sole corporation, no more than a lease for yeares to one and his heirs can go to heirs. Ant. 46. b. But there are exceptions to this rule. The king is mentioned as one by lord Coke ant. 90. a. Another is, where there is a special custom, as the care of the chamberlain of London, for orphanage monies. Fulwood's case 4. Co. 65. a. to which add Arundel's case Hob. 64. and ant. 10. 9. a. note 1. there. 92. a. And the case of a bond to a lay person and an abbot in F. N. B. 120. B.

Lib. 3. Cap. 4. Of Tenants in Common. Sect. 298, 299, 300.

Sect. 298. (1)

AND the reason is, because they have severall freeholds and an occupation *pro indiviso*.
(Cro. Cha. 75. Ant. 183. a. b.)

Here is to be observed, that the *habendum* doth sever the premises that *prima facie* seemed to be joynt; for an expresse estate controllis an implied estate, as hath beene said.
(1. Ro. Abr. 89. 90. Ant. 183. b.)

ITEM si terres soient dones a deux a aver, et tener, s. l'un moitie a l'un et a ses heires, et l'auter moitie a l'auter et a ses heires, ils sont tenants en commun.

ALSO if lands bee given to two to have and to hold, s. the one moity to the one and to his heires, and the other moity to the other & to his heires, they are tenants in common.

Sect. 299.

11. Aff. pl. 16.

45. E. 3. 18. 44. Aff. 11.

21. E. 4. 22. b.

AND the like law is, if the feoffment bee made of a third part or a fourth part, &c. And if there be an advowson appendant, they are also tenants in common of the advowson. (3) And albeit it is said, that such a feoffment of a moitie or third part, &c. is not good without writing, for that (as they say) a man cannot create an uncertain estate in land by parol; yet is the law cleere, that such a feoffment is good by parol without writing, and such an uncertain estate shall passe by livery, and so it appeareth in our bookes.

If a verdict finde, that a man hath *duas partes manerii*, &c. in *tres partes divisas*, this shall not be intended to be in common; but if verdict bee in *tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict. (4)

But if a man be seised of a manor whereunto an advowson is appendant, and maketh a feoffment of three acres parcell of the manor together with the advowson to two, to have and to hold the one moity together with the moitie of the advowson to the one and his heires, and the other moity together with the other moity of the advowson to the other and his heires, this cannot be good without deed; for the feoffor cannot annex the advowson to these three acres, and disannex it from the rest of the manor, without deed. (5)

21. E. 4. 22. b.

5. E. 3. 23. 67. Temp. E. 1. Feoffments 115. 34. E. 1. quar. impd. 179. 10. Eliz. Dyer 28. 22. E. 3. 6. Feoffments 116. 6. E. 3. 56. 39. E. 3. 38. 9. E. 3. 16. 17. E. 3. 3. 18. E. 3. 43. 43. E. 3. 26. 23. Aff. 8. 33. H. 6. 5. 2. (Post. 333. b. Cro. Cha. 433. Cro. Jam. 15.)

ITEM si home seise de certain terres enseoffa un auter de le moitie de mesme la terre sans ascun parlance de assignement ou limitation de mesme la moitie en severaltie al temps del feoffment, donques le feoffee & le feoffor tiendront leur parts de la terre en commun.

ALSO if a man seised of certaine lands infeoffe another of the moitie of the same land without any speech of assignement or limitation of the same moity in severaltie at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common (2).

Sect. 300.

ET est ascavoir, que en mesme le maner come est avantdit de tenants en common, de terres ou tenements en fee simple, ou en fee taile, en mesme le maner poit estre

AND it is to be understood, that in the same manner as is aforesaid of tenants in common, of lands or tenements in fee simple, or in fee taile, in the same

(1) In L. & M. and Roh. this section is placed immediately after sect. 300.

(2) Brooke in his Abridgment title *feoffments de terres* pl. 75. cites this section of Littleton, and in support of it refers to various cases in Fitzherbert's Abridgment. See further Bro. Nouv. Caf. 154. 124. 6. Co. 1. and Dy. 187. a. pl. 5.

(3) See post. 307. a.

(4) In a case in the king's bench during lord Holt's time, the question was, how the surrender of a copyhold to the use of three sons and two daughters *equally to be divided* and their *respective* heirs ought to be construed; and this passage of the Coke upon Littleton was much relied upon by two of the judges as an authority to shew, that the words *equally to be divided* imply a *tenancy in common*. But lord Holt, who was for a *jointenancy*, observed, that no such matter appears in the case of 21. E. 4. here cited by lord Coke in the margin as his authority, and that he was not positive therein, but only wrote it as his conjecture. 1. P. Wms. 19. in the case of Fisher v. Wigg, which is also reported in Salk. 391. Com. 88. 92. 12. Mod. 296. and 1. L. Raym. 622. In the two latter books and in P. Williams this case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to, wherever the doubt is, whether there shall be a tenancy in common or jointenancy. See also the case of the earl of Anglesey v. Ram. in Dom. Proc. Sept. 1727. Barker v. Gyles. 2. P. Wms. 280. and 3. Brown. Parl. Caf. 297. Hall v. Digby and others. 4. Brown. Parl. Caf. 224. Hawes v. Hawes. 1. Will. 165. and Gaskin v. Gaskin Mich. 18. G. 3. B. R. in Mr. Henry Cowper's Reports just published. In this last case the word *equally* was deemed sufficient to create a tenancy in common in a *will*; and lord Mansfield declared the opinion of the two judges who differed from Holt to be the better and more liberal one; and Mr. Justice Aston noticed, that *equally to be divided* had been adjudged a *tenancy in common* even in a *deed*. I am happy in having this early opportunity of citing a collection of reports, which promises so much new and useful information to the profession. See further as to the words sufficient to make a tenancy in common, particularly the cases in equity on the subject, 2. Com. Dig. 175. and continuation to the same work 201.

(5) Besides the references in the margin, see Dy. 48. b. pl. 3. and Doderide on Advowsons 30.

*de tenants a terme de vie. Sicome deux joyntenants sont en fee, et l'un lessa a un home ceo que a luy affiert pur terme de vie, et l'auter joyntenant lessa ceo que a luy affiert a un auter pur terme de vie, &c. les deux lesses sont tenants en common pur leur vies, &c. **

manner may it be of tenants for terme of life. As if two joyntenants bee in fee, and the one letteth to one man that which to him belongeth for terme of life, and the other joyntenant letteth that which to him belongeth to another for terme of life, &c. the said two lessees are tenants in common for their lives, &c.

Vid. Sect. 295. where this is sufficiently explained before.

Sect. 301.

Item si home lessa terres a deux homes pur terme de leur vies, & l'un granta tout son estate de ceo que a luy affiert a un auter, donques l'auter tenant a terme de vie, et celui a que le graunt est fait sont tenants en common, durant le temps que ambideux les lesses sont en vie.

Also if a man let lands to two men for terme of their lives, & the one grants all his estate of that which belongeth to him to another, then the other tenant for terme of life, and he to whom the grant is made, are tenants in common during the time that both the lessees be alive.

Et memorandum, que en tous autres tiels cases, coment que ne sont icy expressément moves ou specifies, si sont en semblable reason, sont en & semblable ley.

And memorandum, that in all other such like cases, although it be not here expressly moved or specified, if they be in like reason, they are in the like law.

of the Common Law, That wheresoever there is the like reason, there is the like law. *Ubi eadem ratio, ibi idem jus*; or *ubi eadem ratio, ibi idem jus esse debet*; for *ratio est anima legis*. And therefore *ratio potest allegari deficiente lege*. But it must be *ratio vera et legalis et non apprens*. And here it appeareth that *argumentum à simili* is good in law. *Sed similitudo legalis est casuum diversorum inter se collatorum similis ratio, quod in uno similitum valet, valebit in altero, dissimilium dissimilis est ratio.*

AND so it is if lands^(2. Roll. Abr. 89. 90. 1. Rep. 84. b.) bee letten to two for terme of their lives, *et eorum alterius diutius viventi* (1), and one of them granteth his part to a stranger, whereby the joynture is severed, and dyeth, here shall bee no survivour, but the lessor shall enter into the moiety, and the survivour shall have no advantage of these words, *et eorum alterius diutius viventi*, for two causes. First, for that the joynture is severed.^(4. Rep. 73. b. 2. Cro. 378. 417. 696.) Secondly, for that those words are no more then the Common Law would have implied without them, and expressed *eorum quæ tacite insunt nihil operatur*. Hereby it appeareth that in case of leases for life it is more beneficiall for the lessor to have the joynture severed then to have it continue.

Si soient en semblable reason sont en semblable ley. Here Littleton

citeth one of the Maximes of the Common Law, That wheresoever there is the like reason, there is the like law. *Ubi eadem ratio, ibi idem jus*; or *ubi eadem ratio, ibi idem jus esse debet*; for *ratio est anima legis*. And therefore *ratio potest allegari deficiente lege*. But it must be *ratio vera et legalis et non apprens*. And here it appeareth that *argumentum à simili* is good in law. *Sed similitudo legalis est casuum diversorum inter se collatorum similis ratio, quod in uno similitum valet, valebit in altero, dissimilium dissimilis est ratio.*

* &c. not in L. and M. or Roh. not in Roh.

† Mesme added L. and M. but not in Roh.

‡ les added in L. and M. but

|| Semble L. and M. and Roh.

(1) Here lord Coke speaks only of a jointenancy for life; in which case, the words *and the survivor of them* are merely words of surpluage; as without them the lands, upon the death of one jointenant, go to the survivor. But in the creation of a jointenancy in fee, particular care must be taken not to insert these words. For the grant of an estate to two *and the survivor of them, and the heirs of the survivor*, does not make them jointenants in fee; but gives them an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor. Whether, during their joint lives, the fee continues in the grantor, or remains in abeyance; and whether they can convey their estate; and what is the proper mode of conveyance to be used for this purpose; are points which have been much agitated, and which, perhaps, are not yet quite settled. They were all mentioned in the case of *Vick v. Edwards*, 3. P. Will. 372. In that case, lands were devised to B. and C. and the survivor of them, and the heirs of such survivor in trust to sell: lord chancellor Talbot held that the fee was in abeyance; that the trustees joining in a fine of the premises, might make a title to a purchaser by way of estoppel; and that the heirs joining might be of use, as it would supply the want of proving the will; but that, in every other respect, it would be void. Five years before this case was heard, the duchess of Marlborough having contracted to purchase an estate from the devisees in trust of Sir John Wittewronge's will, where the devise was worded in a manner similar to that upon which the case of *Vick v. Edwards* arose, application was made to Parliament for an act to enable the trustees to convey the estate to her.—In the preamble of the act it is mentioned, "That the devise of the premises by the will of Sir John Wittewronge was not effectual in the law to vest the absolute fee simple thereof in the trustees therein named, there being, by the words of the will, no fee vested but upon a contingency of survivorship, and which could not vest or take effect till after the death of two of the trustees." But notwithstanding the case of *Vick and Edwards*, it seems now to be the prevailing opinion that, in these cases, the fee is not in abeyance, but remains pending, and subject to the contingency, in the grantor and his heirs.—In support of which it is said, that the whole fee must be supposed to be in the grantor at the time of the conveyance; that so much of it as he does not part with continues in him; that in this case there is something undisposed of, viz. the intermediate estate, till by the death of one of the parties the remainder vests, and is executed in the survivor; which, therefore, continues in the grantor, as part of his old reversion: That if a remainder is limited on a contingency, and the contingency fails, the donor has the land again.—This is called his possibility of reverter; and that this possibility of reverter is in fact nothing but his old reversion. Besides, the law never supposes the fee to be in abeyance, unless where it is necessary to recur to that construction for preserving some estate or right. But that in the present case no such necessity exists. The cases of *Carter and Barnardiston*, 1. P. W. 505. *Purefoy v. Rogers*, 2. Saund. 380. and many other cases of authority, strongly favour this latter opinion. — As to the question, whether the contingent remainder,

Sect. 302.

SI deux joyntenants en fee, &c.

This needeth no explanation.

Et sur ceo case un question poert surder, &c.

Here Littleton maketh a question, and sheweth the reasons on both sides, and concludes with a Quare. When Littleton maketh a question, and sheweth the reason on both sides, the latter is ever his owne, [a] and the better. But time hath made this question without question; for now all agree, that the joynture is severed for the time, according to the latter opinion here set down in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes an alteration or change of the reversion. As if tenant in taile, or the husband seised in the right of his wife, or tenant for life, make a lease for life of the lessee, in everie of these cases the lessor doth gaine a new reversion by wrong, as shall be said more at large in the chapter of Discontinuance; and if the elder brother grant the reversion (expectant upon a freehold) for life, it shall cause *possessio fratris*, as hath beene layd.

Per mesme le reason le reversion que est dependant sur mesme le franktenement est sever de le joynture, &c.

If two joyntenants in fee be, and they both joyne in a lease to an abbot and a secular man for term of their lives, here the reversion that is dependant upon severall freeholds is severed. And so it is if they joine in a lease to two secular men, to have and to hold the one moiety to the

*ITEM * si deux joyntenants en*

fee sont, et l'un lessa

ceo que a luy affiert

a un auter pur terme

de sa vie, le tenant

a terme de vie durant

sa vie, et l'auter joyn-

tenant que ne lessa

pas, sont tenants en

common. Et sur ceo

case un question puit

surder; † si come en

tiel case mittomus que

le lessor adissuet devie

vivant l'auter joyn-

tenant son compari-

on, et vivant le tenant

a terme de vie, le que-

stion poert estre tiel:

Si le reversion de la

moitie ‡ que le lessor

avoit descendra a l'issue

le lessor, ou quel auter

joyntenant avera ||

cel reversion per le sur-

vivor? Afcuns ont dit

en cest case, quel auter

joyntenant avera cel

reversion per le survi-

vor: et leur reason est

tiel, scilicet que quant

les joyntenants fue-

ront joyntment seises

§ en fee simple, &c. co-

ment quel un de eux fist

estate de ceo que a luy

affiert pur terme de ¶

sa vie, et coment que il

adsever le franktene-

ment de ceo que a luy

ALSO if there bee

two joyntenants in

fee, and the one let-

teth that to him be-

longeth to another for

terme of his life, the

tenant for term of life

during his life, and the

other jointenant which

did not let, are tenants

in common. And up-

on this case a question

may arise; as in such

case admit that the les-

sor hath issue and die,

living the other joyn-

tenant his companion,

and living the tenant

for life, the question

may be this, Whether

the reversion of the

moiety which the lessor

hath shall descend to

the issue of the lessor,

or that the other join-

tenant shall have this

reversion by the survi-

vor? Some have said in

this case, that the other

jointenant shall have this

reversion by the survi-

vor: and their reason is

this, *scil.* That when the

jointenants were joint-

ly seised in fee simple,

&c. although that the

one of them make an e-

state of that to him be-

longeth for term of his

life, and although that

hee hath severed the

affiert

Vid. 33. H. 6. 4. b.

[a] Vide Sect. 340. 375. 439. 440. 462. 463. 464. 482. 483. 648. 720. 729. Vid. Sect. 170.

Vid. Sect. 8. 7. H. 5. (Ant. 15. a.)

7. H. 7. 9.

(Ant. 189. b.)

* Si deux not in Roh. but in L. and M. Roh. || Cel reversion-*ceo* in L. and M. and Roh. and M. or Roh.

† Si not in L. and M. or Roh.

§ En-*de* in L. and M. and Roh.

‡ &c. added in L. and M. and Roh. § Sa not in L.

mainder, in this case, can be conveyed? it may be observed, that, supposing the reversion remains in the donor, if he and the donees join together in a common conveyance by lease and release, or bargain and sale, the estate for life of the donees will merge in the reversion, the contingent remainder be destroyed, and the fee effectually conveyed to the purchaser.—But, supposing the fee to be in abeyance;—on admitting it to be in the donor and his heirs, and supposing them not to join, the only modes of conveyance for this purpose now in use are a fine or a common recovery, in which the person entitled to the contingent fee comes in as vouchee. Lord Talbot, as was mentioned before, held, in the case of *Vick v. Edwards*, that the trustees joining in a fine might pass a good title to a purchaser by estoppel. It should be observed that, in this case, the word Estoppel must not be understood in its strict technical sense; all that is meant by it is, that the fine operates by way of conclusion upon, or bar to, the vendors, till the contingency happens upon which the fee is to arise, and then passes it to the purchaser. This doctrine is open to objection; but it seems to be generally acquiesced in; and, perhaps, the liberality of succeeding times may think a common conveyance by lease and release, or bargain and sale, sufficient in these cases to pass the fee, without either a fine or a common recovery.

affiert per le lease, uncore il n'ad sever le fee simple, mes le fee simple demurt a eux joyntment come il fuyt adevant. Et issint semble a eux, que l'auter joyntenant que survesquist, avera le reversion per le survivour, &c. Et auters ont dit le contrarie, & ceo est lour reason, scilicet, que quaut l'un des joyntenants lessa ceo que a luy affiert a un auter pur terme de sa vie, per tiel lease le franktenement est sever de le joynture. Et per mesme le reason le reversion que est dependant sur mesme le franktenement, est sever de le joynture. Auxy si le lessor ust reserve a luy un annual rent sur le leas, le lessor solement averoit le rent, &c. le quel est un prooffe que le reversion est solement en luy, et que l'auter n'ad riens en cel reversion, &c. Auxy si le tenant a term de vie fuit impleade, &c. & fist default apres default, donques le lessor ferroit de ceo solement receive a defendre son droit, et

freehold of this which to him belongs by the lease, yet he hath not severed the fee simple, but the fee simple remains to them jointly as it was before. And so it seemeth to them, that the other joyntenant which surviveth shall have the reversion by the survivor, &c. And others have said the contrary, and this is their reason, *scilicet*, that when one of the join-tenants leaseth that to him belongeth, to another for terme of his life, by such lease the freehold is severed from the joynture. And by the same reason the reversion which is depending upon the same freehold is severed from the joynture. Also if the lessor had reserved to him an annual rent upon the lease, the lessor onely should have had the rent, &c. the which is a prooffe, that the reversion is onely in him, and that the other hath nothing in the reversion, &c. Also if the tenant for terme of life were impleaded, & maketh default after default, the lessor shall be only received for this, to defend

one for life, and the other moiety to the other for life, for both these cases are warranted by the authority of *Littleton*.

If two joyntenants be of a lease for twenty one years, and the one of them letteth his part for certaine yeares, part of the terme, the joynture is severed, and survivor holdeth not place, for a terme for a small number of yeares is as high an interest as for many more yeares; and so was it resolved *Hil. 18. El. Regina, in Communi Banco*, * which I myselfe heard. (Post. Sect. 319. 199. a.)

If two coparceners be in fee, and the one make a lease for life, this is no severance of the coparcenary, for notwithstanding the lord shall make one avowrie upon them both.

But if two joyntenants be, and one maketh a lease for life, this is a severance of the joynture, as *Littleton* here taketh it, and several avowries shall be made upon them (1). (Ant. 167. a.)

Auxy si le lessor ust reserve un annual rent, le lessor solement avera le rent, &c. But

if two joyntenants make a lease for life, reserving a rent to one of them, the rent shall enure to them both, because the reversion remains in jointure, unless the reservation be by deed indented, and then he onely to whom it is reserved shall have it. But if they make a lease by deed indented, reserving or saving the reversion to one of them, that is void, because they had the reversion before, but the rent is newly created. (Ant. 47. a.) (Post. 214. a.)

And so it is if such a lessee for life should surrender to one of them, it shall enure to them both, for that they have a joynt reversion. But if the lessee grant his estate to one of them, no part of it shal enure to his companion, because for the moiety belonging to his companion, it is in effect in

(1) Upon the death of either of the lessees, one moiety of the estate goes to the surviving lessee or his assignee, and the reversioner may enter upon the other moiety. See Dy. 67. *fir W. Jones* 55. 2. P. Will. 740. But this is to be understood where the jointenants are for life; for if the jointenants are in fee, and the jointure is severed, the right of survivorship is wholly taken away, and their shares go to their respective heirs. So if there be jointenants of a term of years, and the jointure is severed, their shares go to their respective personal representatives. See 1. Salk. 158. It should also be observed, that the case put by *Littleton* supposes the jointenant to grant his estate for his own life only; for if he grants it for a longer term than that of his own life, or for the life of any other person, it is a forfeiture. See 4th Leon. 236.

Lib. 3.

Cap. 4. Of Tenants in Common. Sect. 302.

38. H. 6. 24. b. 2. R. 3. 11c.
Extinguishment 3.

(4 Lco. 187.)

Post. 352. b.)

(f) W. 2. cap. 3. 20. E. 1.
Statute de defensione
Juris. 13. R. 2. cap. 16.

in him to whom the grant is made, the reversion to the other in fee.

If two joyntenants make a lease for life, the remainder to his companion in fee, this is a good remainder of his moitie to his companion.

Donques le feoffor serra de ceo solement receive, &c.

Receive, Receipt, Receptio, is in many cases where a person, partie to a writ, or an estranger thereunto, to whom a reversion or remainder appertaineth, shall in default of another person be received to defend his or her freehold or inheritance, the law saith, *Admittatur, &c.* And this admission or receipt is given by sundry statutes

(f) (and this is that which the civilians call, *Admissio tertie persone pro interesse*). Et in casibus prædictis due concurrunt actiones: una inter potentem & tenentem, & alia inter tenentem, ius suum ostendentem & potentem.

Pur ceo que un franktenement ne poet per nature de joynture, estre annexe a un reversion. And this is the principal reason, and of this sufficient hath beene said in the chapter of Joyntenants, Sect. 291.

&c. This *&c.* in the end of this section, implieth any other heir lineal or collateral.

*son compaignon en cest case en nul man-
ner serroit receive, le
quel prove * le rever-
sion del moity d'estre
tantsolement en le
lessor: et sic per con-
sequens, si le lessour
morust vivant le les-
see per terme de vie,
le reversion descendra
al heire de lessour, et
nemy deviendra a
l'auter joyntenant per
le survivor, Ideo
quare. Mes en cest
case si celuy joynte-
nant que ad le frank-
tenement ad issue et
devie, vivant le lessor
& lessee, donques il
semble, que mesme
l'issue avera cest moitie*

*en demesne, et en fee
per discent, pur ceo
que † un franktene-
ment ne poet per
nature de joynture
estre annexe a un re-
version, &c. Et il est
certaine, que celuy
que lessa fait seisie de
le moitie en son de-
mesne come de fee, et
nul avera ascun joyn-
ture en son frankte-
nement, Ergo ceo dis-
cendra a son issue, &c.
Sed quare.*

his right, and his com-
panion in this case in
no manner shall be re-
ceived, the which pro-
veth the reversion of
the moitie to be onely
in the lessor: and so by
consequent, if the les-
sour dieth living the
lessee for terme of
life, the reversion shall
descend to the heir of
the lessour, and shall
not come to the other
joyntenant by the sur-
vivor, *Ideo quare*. But
in this case if that join-
tenant which hath the
freehold hath issue, &
dies living the lessor
and the lessee, then it
seemeth that the same
issue shall have this
moitie in demesne, and
in fee by descent, for
that a freehold cannot
by nature of joynture
bee annexed to
a reversion, &c. And
it is certaine, that hee
which leaseth was sei-
sed of the moitie in
his demesne as of
fee, and none shall
have any joynture in
his freehold, there-
fore this shall descend
to his issue, &c. *Sed
quare.*

* *que* added in L. and M. and Roh.

† *ne* not in L. and M. or Roh.

Sect. 303.

MES si issint soit que la ley en cest cas est tiel, que si le lessor devie vivant le lessée, & vivant l'auter joyntenant que ad le franktenement de l'auter moitie, que le reversion descendra al issue del lessor, dunque est le joynture & title que aucun de eux poit aver per le survivor, & le droit de le joynture anient, et tout ousterment defeat a tous jours. En mesme le maner est, si celui joyntenant que ad le franktenement devie vivant le lessor & le lessée, si la ley soit tiel que son franktenement & fee que il ad en le moitie descendra a son issue, dunque le joynture serra defeat a tous jours.

BUT if it be so that the law in this case be such, that if the lessor die living the lessée, and living the other joyntenant which hath the freehold of the other moity, that the reversion shall descend to the issue of the lessor, then is the joynture and title which any of them may have by the survivor, and the right of the joynture taken away, and altogether defeated for ever. In the same manner it is, if that joyntenant which hath the freehold dye living the lessor and the lessée, if the law be so as his freehold and fee which he hath in the moity shall descend to his issue, then the joynture shall be defeated for ever.

DOnque est le joynture & title, &c. & le droit de le joynture anient, &c.

And the reason of this is, for if the joynture be severed at the time of the death of him that first deceased, the benefit of survivor is utterly destroyed for ever, as hath beene said (*) afore in the chapter of Joyntenants. But in the case aforesaid, if tenant for life dyeth in the life of both the joyntenants, they are joyntenants againe as they were before.

If two joyntenants be in fee, and the one letteth his part to another for the life of the lessor and the lessor dieth, some say that his part shall survive to his companion, for by his death the lease was determined. And others hold the contrary; and their reason is, first, for that at the

time of his death the joynture was severed, for so long as he lived the lease continued. And secondly, that notwithstanding the act of any one of the joyntenants there must be equall benefit of survivor as to the freehold. But here if the other joyntenant had first died, there had been no benefit of survivor to the lessor without question.

Sect. 304.

ITEM, si trois joyntenants sont, & l'un releffa per son fait a un de ses companions tout le droit que il avoit en le terre, dunque ad celui a que le releas est fait le tierce part de les ter-

AND if three joyntenants be, & the one release by his deed to one of his companions all the right which he hath in the land, then hath he to whom the release is made the third part of

UPON this case these two things are to be observed (1). First, that in this case this release doth enure by way of *mitten l'estate*, and not (*) by way of extinguishment, for then the release should enure to his companion also, and he is in the *per* by him that maketh the release. [2] But if hee had released to the other two, then had it wrought no degree

(Post. 318. a. 6. Rep. 78. b. Ant. 185. a.)
(*) 9 Eliz. Dyer 263.
19. H. 6. 17.

[1] 40. E. 3. 41. 13. E. 3.
tit. Carr.

35. E. 3. release 43. 22 H. 6. 42.
24. E. 3. Briefe 28. 19. H. 6. 17.
37. H. 6. 5. 28. H. 6. 2. 37. H. 8.
Alienation 31. 8. H. 4. 8. 10. E.

but 4. 3.

(1) Some observations on Sir Edward Coke's commentary upon this and the four succeeding Sections will be offered in the chapter of Releases.

(Post. 385. a.)

[6] 9. Eliz. Dyer 263. 19. H. 6.

27.

(Ante 9. b.)

but in supposition of law, for many purposes they to whom the release is made (as hath beene said) shall bee supposed in from the first feoffor, as they shall deraigne the first warrantie for the whole. [6] The second thing to bee observed is, that he to whom the release is made hath a fee simple without these words (heires), as hath beene touched in the first chapter of the first booke; for that he to whom the release is, is seised *per my*, & *per tout*, of the fee and inheritance, as hath been

said in the chapter of Joyntenants. And note, the like law is between coparceners: and further, if there be two coparceners, and the one hath issue twentie daughters and dieth, the other may release to any one of the daughters her whole part, albeit she to whom the release is, hath not an equall part; but for the privitie, and the individed estate, the release is good.

But if two joyntenants be of twenty acres, and the one maketh a feoffment of his part in eightene acres, the other cannot release his entire part; but only in two acres, for that the joynture is severed for the residue.

*res per force de le dit releas, & il & son companion teigneront les autres deux parts * en joynture. Et quant al tierce part, que il ad per force de releas, il tient cel tierce part oue luy mesme & son companion en commun.*

the lands by force of the said release, and he and his companion shall hold the other two parts in joynture. And as to the third part, which he hath by force of the release, he holdeth that third part with himselfe and his companion in common.

Sect. 305.

THIS is evident upon that which hath beene said before. [c] And it is to bee understood, that a release may enure foure manner of wayes. First, by way of *mitter l'estate*, as here it appeareth. Secondly, by way of *mitter la droit*. Thirdly, by way of extinguishment. Fourthly, by way of creation or enlargement of an estate, as hereafter in this chapter shall appeare. And it is to bee observed, that upon a release that creates or enlargeth an estate, or enures by way of *mitter l'estate*, a rent may bee reserved, but not upon a release that enureth by way of *mitter la droit*, or which enures by way of extinguishment.

The (Ec.) in the end of this section implieth a diversitie

ET est ascavoir, que aucun foits † un releas prendra effect, & urera par mitter l'estate de celui que fist le releas a celui a que le releas est fait, sicome en le cas avant dit, & auxy sicome joynt estate soit fait a le baron & sa feme, & a la tierce person ‡, & la tierce person releffa tout son droit que il ad || a le baron, adonque ad le baron la moitie que le tierce avoit, & la feme de ceo n'ad riens. Et si en tiel case le tierce releffa § a la feme nient noismant le baron en le releas, donques ad la feme le moitie que le tierce avoit, &c. & le baron n'ad riens de ceo forsque

AND it is to be observed, that sometimes a deed of release shal take effect, & enure to put the estate of him which makes the release to him to whom the release is made, as in the case afore-said, and also, as if a joynt estate bee made to the husband and wife, and to a third person, and the third person release all his right which hee hath to the husband, then hath the husband the moitie which the third had, and the wife hath nothing of this. And if in such case the third release to the wife not naming the husband in the release, then hath the wife the moitie which the

en

* *En jointure—jointment*, in L. and M. and Roh. in L. and M. || *&c.* added in L. and M. and Roh.

† *Un fait et*, added in L. and M. and Roh. § *&c.* added in L. and M. and Roh.

‡ *Que* added

en droit sa feme, pur ceo que en tiel case le release vrera de faire estate a celuy a que le release est fait, de tout ceo que affiert a celuy que fait le release, &c.

that which belongeth to him which maketh the release, &c.

third had, &c. And the husband hath nothing of this but in right of his wife, because that in this case the release shal enure to make an estate to whom the release is made of all

that which maketh

between a release which enures by way of *mitter l'estate* (whereof *Littleton* here speaketh) and a release that enures by way of extinguishment: for of a release enuring by way of extinguishment made to the husband, the wife shall take benefit, or to the wife, the husband shall take benefit, as hereafter shall more at large be said.

Sect. 306.

*ET en ascun cas un releas vrera de mitter tout le droit que il que fait le releas ad a celuy a que le release est fait. Sicome home seise de certain tenements est disseisee per deux disseisors, si le disseisee per son fait releas tout son droit, &c. a un des disseisors, donque celuy a que le releas est fait avera & tiendra tous les tenements a luy solement, et oustera son companion de chescun occupation de ceo. Et le cause est, pur ceo que les deux disseisors fueront eins * encounter la ley, et quant un de eux happe le releas de celuy que ad droit d'entre, &c. cest droit en tiel cas + vestera en celuy a que le releas est fait, et est en tiel plyte, sicome † il que avoit droit || avoit enter, et luy enseffia*

AND in some case a release shal enure to put all the right which he who maketh the release hath to him to whom the release is made. As if a man seised of certaine tenements is disseised by two disseisors, if the disseisee by his deed release all his right, &c. to one of the disseisors, then hee to whom the release is made shal have and hold al the tenements to him alone, and shal oust his companion of every occupation of this. And the reason is, for that the two disseisors were in against the law, and when one of them happeth the release of him which hath right of entry, &c. this right in such case shal vest in him to whom the release is made, and he is in like plite, as hee which

HERE *Littleton* pursueth the second part of his division, viz. where a release shall enure by way of *mitter le droit*.

Disseisee per deux disseisors, &c. The like law is, where there bee two joynt abators or intrudors which come in meere by wrong. But if two men doe usurpe by a wrongfull presentation to a church, and their clarke is admitted, instituted and inducted, and the rightfull patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in meere by wrong, but their clarke is in by admission, and institution, which are judiciall acts. (d) And therefore an usurpation shal worke a remitter to one that hath a former right.

Donques celuy a que le release est fait avera & teignera tous les tenements, &c. Here by operation of law presently upon the deliverie of the release the whole freehold and inheritance is vested in him to whom the release is made, and al the state that the other disseisor had, wholly devested: for right and wrong cannot consist together, but the wrongfull estate giveth place to the rightfull. And the reason hereof is for that, as hath been said, the disseisor to whom the release

was

(c. Roll. Abr. 409. 414. Post. 276. a.)

(d) Fitz. N. B. 35. in 11. R. 2. quare imp. 148. (1 Roll. Abr. 661. 662. Post. 368. a. Ant. 180. b. 181. a.)

* Ses tenements per tort, per eux fait, added in L. and M. and Roh. fil in L. and M. and Roh.

† Vesteri-vest in L. and M. and Roh. || &c. added, avoit enter, et, not in L. and M. and Roh.

‡ II

Lib. 3. Cap. 4. Of Tenants in Common. Sect. 307, 308.

(c) Brit. fol. 116. 26. Aff. pl. 39.
39. E. 3. 29. 21. H. 6. 41. 22. H.
6. 22. 7. E. 4. 25. 9. E. 4. 6.
11. H. 7. 12. 20. H. 7. 5. 21.
H. 7. 18. 12. E. 4. tit. Discon-
tin. 1. 9. H. 6. 37. 21. H. 6.
82.

was made was seized *per my*
Et per tout, whereunto when
the right commeth it excludeth
the wrong (c), for right which
is lawfull, and wrong that
is contrary to law, cannot
stand together.

*En tiel plite, sicome
il que avoit droit, avoit
entrer & luy enfeoffe, &c.*

This (&c.) doth imple that this is true *secundum quid*, but not *simpliciter*; for as to the hold-
ing out of the joynt disseisor, it amounts to as much as if he had entred and infeoffed him to
whom the release is made, but it doth not amount to an entrie and feoffment *simpliciter* to all
purposes, as shall be said hereafter in his proper place in the chapter of Releases.

*Et la cause est, pur ceo que il que avoit
adevant estate per
tort, scilicet, per dissei-
sin, &c. ad ore per le
releas un estate droi-
turel. **

hath the right had en-
tred & enfeoffed him,
&c. And the reason is,
for that he which be-
fore had an estate by
wrong, *scilicet*, by dissei-
sin, &c. hath now by the
release a rightful estate.

Sect. 307.

HERE Littleton spea-
keth of the third kind
of releases. And the rea-
son of this diversitie (implied
in the (&c.) in the end of this
section,) between the dissei-
sors & their feoffees, is for that
the feoffees comming in by
title and purchase, are inten-
ded in law to have a war-
rantie (which is much esteem-
ed in law); and therefore
lest the warrantie should be
avoided, the release shall en-
sure to both the feoffees in fa-
vour of purchasors, and so
the right and benefit of every
one saved. (f) And in anci-
ent time if the disseisor had
made a feoffment in fee, or a
gift in taile, or a lease for life,
and the feoffee, donee, or
lessee had continued in seisin
quietly a yeare and a day, the
entrie of the disseisor had not
been lawfull upon him; and
the reason was, for the benefit
and safeguard of the warran-
ty (which was intended by
law) should have bene de-
stroyed by the entrie. But
hereof also more shall be said
in his proper place in the
chapter of Releases.

(f) 2. H. 3. Aff. 432. 1. Aff.
13. 9. Aff. 15. 21. 21. Aff. 28.
17. Aff. 68. 32. 29. Aff. 54. 43.
Aff. 17. 40. E. 3. 24. 52. E. 3.
21. 3. R. 2. entry cong. 38.
13. E. 3. tit. Aff. 9. 12. Aff. 20.

*ET en ascun cas
un releas vre-
ra per voy d'extin-
guishment, et en tiel
case tiel releas aydera
le joyntenant a que le
releas ne fuit fait, au-
xybien come † luy a
que le releas fuit fait.
Sicome ‡ un home
soit disseise, & le dis-
seisor fait feoffment a
deux homes en fee, § si
|| le disseisee releassa
per son fait a un de les
feoffees, donques ¶ cel
releas vrera a ambi-
deux les feoffees, pur
ceo que les feoffees ont
estate per la ley, scili-
cet, per feoffment, et
nemy per tort fait a
nulluy, &c. (1)*

AND in some case
a release shall in-
ure by way of extin-
guishment, and in such
case such release shall
aide the joyntenant to
whom the release was
not made, as well as
him to whom the re-
lease was made. As if
a man be disseised, and
the disseisor makes a
feoffment to two men
in fee, if the disseisee
release by his deed to
one of the feoffees,
this release shal enure
to both the feoffees,
for that the feoffees
have an estate by the
law, *scilicet*, by feoff-
ment, and not by wrong
done to any, &c.

Sect. 308.

*EN mesme le maner est, si le
disseisor fait un lease a un
home pur terme de sa vie, le remain-*

IN the same manner it is, if the
disseisor maketh a lease to a
man for terme of his life, the re-
der

* &c. added in L. and M. and Roh.
in Roh. § Si not in L. and M. or Roh.

† Luy a celuy in L. and M. and Roh.
|| Et added in L. and M. and Roh.

‡ Si added in L. and M. but not
¶ Cel-tiel in L. and M. and Roh.

(1) In the 42d and 44th chapters of Britton, is much curious learning on the estate of a disseisor, and his different situa-
tions previous and subsequent to his acquiring an established possession, and previous and subsequent to his acquiring a title to
his estate, and on the consequential differences of the situation and remedies of the disseisee in these respects.—These chapters
throw great light upon Sir Edward Coke's commentary on this section, and strongly confirm the observations made by Lord
Mansfield, in the famous case of Taylor v. Horde, 1 Burr. 60.

der ouster a un auter en fee, si le disseisee releffa a le tenant a terme de vie tout son droit, &c. cel release vrera auxy bien a celuy en le remainder come a la tenant a terme de vie. Et la cause est, pur ceo que le tenant a terme de vie vient a son estate per course de ley, & pur ceo cel release vrera, et prent effect per voy d'extinguishment de droit de celuy que releffa, &c. Et per cel release le tenant a terme de vie n'ad plus ample ne greinder estate, que il avoit devant le release fait a luy, et le droit celuy que releffa est tout ousterment extinct. Et entant que cest release ne poit enlarge l'estate de le tenant a terme de vie, il est reason que cel release vrera a celuy en le remainder, &c.

Pluis serra dit de releases en le chapitre de Releases.

Cest release vrera auxy bien a celuy en le remainder, come a le tenant a terme de vie, &c.

Tout son droit, &c.

mainder over to another in fee, if the disseisee release to the tenant for terme of life all his right, &c. this release shall inure as well to him in the remainder, as to the tenant for terme of life. And the reason is, for that the tenant for life commeth to his estate by course of law, and therefore this release shall enure and take effect by way of extinguishment of the right of him which releaseth, &c. And by this release the tenant for life hath no ampler nor greater estate than hee had before the release made him, and the right of him which releaseth is altogether extinct. And inasmuch as this release cannot enlarge the estate of the tenant for life, it is reason that this release shal enure to him in the remainder, &c.

(2. Roll. Abr. 400.)

More shall be said of releases in the chapter of Releases.

Of this and the rest of this Section, for avoyding of repetition, more shall be said in his proper place in the chapter of Releases.

Here by this (&c.) is implied, title, demand, and other words which may transerre the right, &c. Also here is implied of in or to the land.

Sect. 309.

ITEM si soient deux parceners, & l'un alien ceo que a luy affiert a un auter, donques l'auter parcenier et l'alienee sont tenants en common.

ALSO if two parceners be, and the one alieneth that to her belongeth, to another, then the other parcenier and the alienee are tenants in common.

This is evident, and needeth no explication.

Sect. 310.

ITEM nota, que tenaunts en common soient estre per † title de prescription, sicome l'un et ses auncesors, ou ceux que estate il*

ALSO note, that tenants in common may bee by title of prescription, as if the one and his ancessors, or they whose

ad

* Nota que not in L. and M. or Roh.

† Title de not in Roh.

*ad en un moity ont tenus en com-
mon mesme le moitie, ove l'auter
tenant que ad l'auter moitie & ove
ses auncestors ou ove ceux que e-
state il ad pro indiviso*, de temps
dont memory ne curt, &c. Et di-
vers auters manners poient faire
et causer homes d'estre tenaunts
en common, que ne sont icy ex-
presses † &c.*

11. E. 3. Trans. 212. 13. E. 5.
Bribe 674. 8. H. 6. 16. b. lib.
Annot. 23.

Of this, besides *Littleton*, there is good authoritie in law, as there is for all his other cases throughout his three bookes; but joyntenants cannot be by prescription, because there is survivor betweene them, but not betweene tenants in common.

The two (&c.) in this section are evident.

estate hee hath in one moitie have holden in common the same moitie with the other tenant which hath the other moity, and with his ancestors, or with those whose state he hath undivided, time out of minde of man. And divers other manners may make and causemen to be tenants in common, which are not here exprest, &c. (1)

Sect. 311.

1. Post. 200. Cro. Jac. 231. Noy
23. Post. Litt. Sect. 314.

IN this section wee learne two things: first, that in reall actions, and in actions also that are mixt with the personalty, tenants in common shall sever in action, because they have severall freeholds, and claime in by severall titles; and therefore as they shall bee severally by others impleaded, so shall they severally implead others in al real and mixt actions, unless it be in case of necessity for a thing entire, as hereafter in this chapter shall appeare. And *Littleton* here putteth the case of the assise which is mixt with the personalty, and therefore hee needed not to put any case of any *præcipe quod reddat*; for if it bee so in case of assise, a fortiori in writs of higher nature, which is necessarily implied in the (&c.) Now of suits that found in the realty, and of personall actions, *Littleton* speaketh hereafter in this chapter.

4. E. 4. 18. b.
(Ant. 180. b.)

ITEM en ascun cas tenants en common voyent aver de leur possession severall actions, et en ascun cas ils joindront en un action. Car si sont deux tenants en common, et ils sont disseisies, ils doient aver † deux assises, et nemy un assise; car chescun de eux covient aver un assise de son moitie, &c. Et la cause est, pur ceo que tenants en common furent seises, &c. per severall titles. Mes autrement est de joyntenants; car si soyent vint joyntenants, et ils sont disseisies, ils averont en tous leur nesmes forsque un assise, pur ceo que ils n'ont forsque un joynt title.

ALSO in some case tenants in common ought to have of their possession severall actions, and in some cases they shall joyne in one action. For if two tenants in common be, and they be disseised, they must have two assises, and not one assise; for each of them ought to have one assise of his moity, &c. & the reason is, for that the tenants in common were seised, &c. by severall titles. But otherwise it is of jointenants; for if twenty jointenants be, and they bee disseised, they shall have in al their names but one assise, because they have not but one joynt title.

The second thing here to bee learned, is the diversitie betweene tenants in common and joyntenants, which both of it selfe, and upon that which hath been said, is apparant.

Sect.

* &c. added in Roh.

† &c. not in Roh.

‡ *Envers le disseisor* added in Roh.

(1) When lands are given in undivided shares to two or more for particular estates, so as that upon the determination of the particular estates, in any of those shares, they remain over to the other grantees, and the reversioner or remainder-man is not let in till the determination of all the particular estates, then the grantees take their original shares as tenants in common, and the remainders limited to them on the determination of the particular estates, are known by the appellation of cross remainders.—These remainders may be raised both by deed and will: in deeds they can only be created by expresse words, but in wills they may be raised by implication.—In the case of *Gilbert v. Witty*, Cro. Jac. 655, it was said by Justice Dodderidge, that cross remainders should never be raised by implication between more than two. This doctrine received some countenance from what was said by the courts in the cases of *Cole v. Levingstone* 1. Ventris 224. *Holmes v. Mzyneil*, Sir Thomas Raymond 452, and some other cases. But it seems entirely exploded by the cases of *Burden v. Burville*. B. R. East. Term. 23. Geo. 3. *Duke of Richmond v. Earl of Cadogan*, determined in the Court of Chancery in May 1773. *Wright v. Lord Cadogan*, *Holford*, and others, B. R. Easter Term 1773. Cowp. 31, and some other subsequent cases. It seems however to be admitted in these cases, that to raise cross remainders between more than two, stronger implication is required, than to raise them between two only.

(2) The reader will find what *Littleton* and his commentator say on this subject confirmed and exemplified by the cases cited in *Viner* and *Bacon's Abridgments*, and *Comyns's Digest*, under the title *Conditions*.

Sect. 312.

ITEM si soient trois joyntenants, & un release a un de ses companions tout le droit que il ad, &c. et puis les * auters deux sont disseises de l'entiertie, &c. en cest case les deux auters averont † severalx assises, &c. en cest forme, scilicet, ils averont en leur ambideux nosmes un assise de les deux parts, &c. pur ceo que les deux parts ils teignent jointment al temps de le disseisin. Et quant a le tierce part, celui a que le release fuit fait, covient aver de ceo un assise en son nosme demesne, pur ceo que ‡ il (quaunt a mesme le tierce part) est de ceo tenant in common, &c. pur ceo que il vient a cel || tierce part per force del release, et nemy tant solement per force del joyn-ture.

ALSO if three joyntenants bee, (Noy 13. Ant. 193.) and one release to one of his fellowes all the right which hee hath, &c. and after the other two be disseised of the whole, &c. in this case the two others shall have severall assises, &c. in this manner, viz. they shall have in both their names an assise of the two parts, &c. because the two parts they held joyntly at the time of the disseisin. And as to the third part, he to whom the release was made, ought to have of that an assise in his owne name, for that hee (as to the same third part) is thereof tenant in common, &c. because hee commeth to this third part by force of the release, and not only by force of the joyn-ture.

This is put for an example (which ever doth illustrate the rule) and is evident of it selfe: and the (&c.) in this section needeth no further explication.

Sect. 313.

ITEM quant a fuer des actions que touchant § le realtie, y sont diversities perenter parceners que sont eins per divers descents, & tenaunts en common. Car si ¶ home seise de certaine terre en fee ad issue deux ** files †† et morust, et les files entrent, &c. et chescun de eux ad issue un fits, & devieront sauns partition fait enter eux, per que l'un moity descendist a le fits d'un parcener, & l'auter moitie descendist al fits d'auter parcener, et ils

ALSO to the suing of actions (Ant. 164. a.) which touch their realty, there bee diversities betweene parceners which are in by divers descents, and tenants in common: for if a man seised of certain land in fee, hath issue two daughters and dyeth, and the daughters enter, &c. and each of them hath issue a sonne, and die without partition made between them, by which the one moity descends to the sonne of the one parcener, and the other moity descends to the
entrent

* Auters not in Roh. † &c. added in Roh.
‡ Home—deux parceners in Roh.
&c. et chescun de eux ad issue un fits, not in Roh.

† Il not in Roh.
** Files—fies in Roh.

|| Tierce not in Roh. § En ad-
†† Et morust et les files entrent,

Lib. 3.

(8. Rep. 86. b.)

Cap. 4. Of Tenants in Common. Sect. 314.

*entront et occupient en common et sont disseises, en cest case ils averont en leur deux nosmes un assise, et nemy deux assises. Et la cause est, que coment que ils veignent eins per divers descents, &c. uncore ils sont parceners, et brieve de Partitione faciendâ gist enter eux. Et ils ne sont parceners, eyant regarde ou respect tant seulement a * le seisin et possession de leur meres, mes ils sont parceners pluis, eyant respect a l'estate que descendist de leur ayeul a leur meres, car ils ne poyent estre parceners si leur meres ne fueront parceners avant, † &c. Et issint a tiel respect et consideration, scilicet, quant a le primer descent que fuit a leur meres, ils ont un title en parcenarie, le quel fait eux parceners. Et auxy ils ne sont forsque come un heire a leur common aunces-
tor, scilicet, a leur ayeul, de que la terre descendist a leur meres. Et pur ceus causes devant partition enter eux, &c. ils averont un assise, coment que ils veignent eins per severaux descents ‡.*

sonne of the other parcener, and they enter and occupie in common and bee disseised, in this case they shall have in their two names one assise, and not two assises. And the cause is, for that albeit they come in by divers descents, &c. yet they are parceners, and a writ of partition lieth betweene them. And they are not parceners, having regard or respect onely to the seisin and possession of their mothers, but they are parceners rather, having respect to the estate which descended from their grandfather to their mothers, for they cannot bee parceners if their mothers were not parceners before, &c. And so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a title in parcenarie, the which makes them parceners. And also they are but as one heire to their common ancestor, viz. to their grandfather, from whom the land descended to their mothers. And for these causes, before partition between them, &c. they shall have an assise, although they come in by severall descents.

(Ant. 164. a.)
Vid. Sect. 241.

This, upon that which hath beene said in the chapter of Parceners, is evident: where you may see excellent points of learning, and diversities concerning this matter; all which are here either expressed or implied, as the studious and diligent reader will observe.

Sect. 314.

EN cest case quant a le rent et liver de pepper, ils averaunt deux assises, & quant a l'esperver ou le cheval forsque un assise.

But for the better understanding hereof it is to bee knowne, that if two te-

ITEM si sont deux tenants en common de certaine terre en fee, et ils donneront cel terre a un home en le taile, ou lefferont a un home pur terme

*ALSO if there bee two tenants in common of certaine lands in fee, and they give this land to a man in taile, or let it to one for terme of life, ren-
de*

* Le—leur in Roh.

† &c. not in Roh.

‡ &c. added in Roh.

de vie, rendant a eux annuellement un certaine rent, & un liver de pepper, & un espervier ou un cheval, & ils sont seizes de cest service, & puis tout le rent est a derere, & ils distreignent pur ceo, & le tenant a eux fait rescous. En cest cas quant a le rent & liver de pepper ils a-veront deux assises, & quant a l'espervier ou le cheval forsque un assise. Et la cause pur que ils a-veront deux assises, quant a le rent & liver de pepper, est ceo, en-tant que ils fueront te-nants en common en severall titles, et quant ils fieront un done en le tayle ou leas pur terme de vie, s'avant a eux le reversion, & rendant a eux certaine rent, &c. tiel reservation est inci-dent a leur reversion, & pur ceo que leur rever-sion est en common, & per severall titles, sicome leur possession fuit de-vant le rent & outers choses que poient estre severses, et fueront a eux reserves sur le done, ou sur le leas, queux sont incidents per le ley a leur reversion, tiels choses issint reserves fueront de la nature del reversion. Et entant que le reversion est a eux

dring to them yearely a certaine rent, & a pound of pepper, and a hawke or a horse, and they bee seised of this service, and afterwards the whole rent is behind, and they distraine for this, and the tenant maketh rescouse. In this case as to the rent and pound of pepper they shall have two assises, and as to the hawke or the horse but one as-size. And the reason why then they shall have two assises as to the rent and pound of pepper is this, insomuch as they were tenants in common in severall titles, and when they made a gift in taile or lease for life, saving to them the reversion, and rendering to them a certaine rent, &c. such reservation is incident to their reversion, and for that their reversion is in common, and by severall titles, as their possession was before the rent and other things which may be severed, and were re-served unto them upon the gift, or upon the lease, which are incidents by the law to their rever-sion, such things so re-se-rved were of the nature of the reversion. And in as much as the reversion is to them in common by severall titles, it beho-

nants in common (Ante 147. b.)
bee, and they grant a Pl. Com. Hill & Granges case
rent of 20 shillings 171. Vide Sect. 219.
per annum out of (5. Rep. 7. b. Plow. 289. b.)
their land, the gran-
tee shall have two
rents of 20 shillings,
for that every man's
grant shall bee taken
most strongly against
himselfe, & therefore
they be severall grants
in law.

But if they two
make a gift in taile, a
lease for life, &c. refer- (5. Rep. 111. Ant. 148. b.)
ving twenty shillings
rent to them and their
heires, they shall have
but one 20 shillings,
for they shall have no
more then themselves
reserved: and the do-
nee or lessee shal pay
but 20 shillings ac-
cording to their own
expresse reservation:
and albeit the refer-
vation of rents sever-
able bee in joynt
words, yet in respect
of the severall rever-
sions the law makes
thereof a severance.
Now for the rent, as
namely 20 shillings
or a pound of pepper
may bee severed, the
one tenant in com-
mon may have an as-
sise for the moiety of
20 shillings, and the
moitie of a pound of
pepper, *de medietate
unius libr' piperis*, but
he cannot have an as-
sise of ten shillings,
or *de dimidio libræ
piperis*. But for the
hawke or horse, al-
beit they be tenants
in common, they shal
joyne in an assise, for
otherwise they should
bee without remedie,
for one of them cannot
make his plaint in
assise of the moiety of
a hawke, or of a horse,
for the law will ne-
ver suffer any man to
demand any thing a-
gainst the order of na-
ture

Vide 16. Ass. pl. 1. 16. E. 3.
Joyndre en action. 27.

Lib. 3.

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Regula.
Vide Sect. 129.

[1] Lib. 5. fol. 21.
Regula.

Regula.

(2. Cro. 159. Ant. 137. 2. Hob.
43. 267.)

(*) 3. E. 3. 19. 2.
(1. Roll. Abr. 107. Noy 184.
Ant. 137. 2. Rep. 68.)

38. E. 3. 35.
Regula.

[m] 5. H. 7. 8. 13. E. 2. quare
imp. 170. 33. H. 6. 11. 6. E. 4.
10. 15. E. 3. darr. presentment.
10.
[n] 6. H. 4. 6. 7.
45. E. 3. 10. 30. H. 6. Aff. 39.
18. E. 3. 56.
(Moor 184. 1. Roll. Rep. 243.)

18. E. 3. 56.

29. E. 3. 51. 43. E. 3. 24.
46. E. 3. 27. 5. H. 4. 3.
34. H. 4. 31. 3. H. 6. 57.
12. H. 6. 22. 22. H. 6. 14.
18. E. 4. 30. 2. R. 3. 16.
10. H. 7. 27. 21. H. 7. 22.
37. H. 6. 35. 21. E. 4. 12.

ture or reason, as be-
fore it appeareth by
Littleton, section 129.
Lex enim spectat na-
turæ ordinem. Also
the law will never
enforce a man to de-
mand that which he
cannot recover, and a
man cannot recover
[1] the moitie of a
hawke, horse, or of
any other entire thing:
Lex neminem cogit ad
vana, seu inutilia. But
in that case they shall
joyne in assise, and
the reason is, *Ne cu-*
ria Domini Regis de-
ficeret in justitiâ exhi-
bendâ, or *Lex non debet*
deficere conquerentibus
in justitiâ exhibendâ.
And if they should
not joyne, they should
have *damnum & inju-*
riam, and yet should
have no remedie (*) by
law, which should be
inconvenient, but the
law will, that in
every case where a
man is wronged, and
endammaged, that he
shall have remedie.
Aliquid conceditur ne
injuria remaneret im-
punita quæ aliâs non concederetur.

[m] And tenants in common shall joyne in a *quare impedit*, because the presentation to the advowson is entire.

[n] Also tenants in common of a feignory shall joyne in a writ of right of ward, and ravishment of ward for the bodie, because it is entire.

If two tenants in common be of the wardship of the bodie, and one doth ravish the ward, and the one tenant in common releases to the ravisher, this shall goe in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any barre to him. And so it is if two tenants in common be of an advowson, and they bring a *quare impedit*, and the one doth release, yet the other shall sue forth, and recover the whole presentment.

Two tenants in common shall joyne in a detinue of charters, and if the one be non-suit, the other shall recover.

It is said that tenants in common shall joyne in a *Warrantia Chartæ*, but sever in voucher.

Moitie de chival, &c. Here is implied or any other entire rent or service.

Per divers titles, &c. That is by severall titles, and not by one joynt title, as hath beene said.

en common per severall
titles, il covient que le
rent, et le liver de pep-
per, queux poient estre
severs, soynt a eux en
common, et per severall
titles. Et de ceo ils ave-
ront deux assises, et
chescun de eux en son
assise ferra son plaint
de le moitie de le rent, et
de le moitie del liver de
pepper. Mes de l'esper-
ver ou de chival, que ne
poient estre severs, ils
averont forsque un as-
sise, car home ne poit
faire un plaint en assise
de le moitie d'un esper-
ver, ne de le moitie d'un
chival, &c. En mesme le
maner est d'auter rents
& d'auter services que
tenants en common
ount en grosse per di-
vers titles, &c.

veth that the rent & the
pound of pepper which
may be severed, be to
them in common and by
severall titles. And of
this they shall have two
assises, and each of them
in his assise shall make
his plaint of the moitie
of the rent, & of the moi-
tie of the pound of pep-
per. But of the hawke or
of the horse, which can-
not be severed, they shal
have but one assise, for
a man cannot make a
plaint in an assise of the
moitie of a hawke, nor
of the moitie of a horse,
&c. In the same manner
it is of other rents and
of other services which
tenants in common
have in grosse by divers
titles, &c.

Sect. 315.

*A*Veront tiels ac- *I*TEM, quant al *A*LSO, as to acti-
tions personells actions personnels ons personnels te-
jointment en tous lour tenants en common nants in common may
nosmes, &c. By this averont tiels actions have such action per-
per

*personals joyntment en tous leur nosmes, * sicome de trespass, ou † de offence que touche leur tenements en common, sicome de bruser ‡ leur measons, || de enfreindre de leur closes, de pasture, degaster, & de fouler § des herbes, de couper leur bois, ** de pischer en leur pischarie, & hujusmodi. †† Et en cest cas tenants en common auront un action joyntment et recoveront jointement leur damages, pur ceo que l'action est en le personaltie, & nemy en le realtie, ‡‡ &c.*

sonals joyntly in all their names as of trespassse, or of offences which concerne their tenements in common, as for breaking their houses, breaking their closes, feeding, waisting, and defowling their grasse, cutting their woods, for fishing in their pischarie, and such like. In this case tenants in common shall have one action joyntly, & shall recover jointly their damages, because the action is in the personalty, and not in the realtie, &c.

it appeareth that tenants in (1. Sid. 157. Cro. Ja. 231. 1. Sid. common shall have personall 49. 2. Roll. Abr. 91. 10. Rep. actions joyntly. And it is 134. 2.) to be observed, that where damages are to be recovered for a wrong done to tenants in common, or parceners in a personall action, and one of them die, the survivor of them shall have the action, for albeit the property or estate be severall betweene them, yet (as it appeareth here by Littleton) the personall action is joynt.

Et hujusmodi. Here. Vide Sect. 319. 320. 321.

by is implied a diversity between a chattle in possession, and a personall chose in action belonging unto them. As if two tenants in common be of land, and one doth a trespassse therein, of this action they are jointenants, and the survivor shall hold place. So it is if two tenants in (2. Cro. 19.) 22. H. 6. 12. common be of a mannor, 38. E. 3. 7. 13. E. 3. account 126. and they make a bailife there- 45. E. 3. 13. 14. 37. H. 6. 32. 38. of, and one of them dieth, (1. Noy 135. 2. Roll. Abr. 90. Moor 40. 71. 667.) the survivor shall have the action of account, for the

action given unto them for the arrerages upon the account was joint. So it is if two tenants in common sow their land, and one doth eat the same with his cattle, though they have the corne in common, yet the action given to them for trespassse in the same is joynt, and shall survive. For the trespassse and damage done to them was joynt, all which here is implied by Littleton, who saith, that they shall have an action joyntly, and the same law is of coparceners.

But if two tenants in common be of goods, as of an horse or of any other goods personall, there if one dye, his executors shall be tenant in common with the survivor. (Post. 200. 2. 7. Rep. Hall's case sub. fin. 10. Rep. 134. Ant. 185.)

Et nemy en le realtie, &c. If two tenants in common be of an advowson, and a stranger usurpe, so as the right is turned to an action, and they bring a writ of *Quare impedit* which concerne the realtie, the six months passe, and the one dyeth, the writ shall not abate, but the survivor shall recover, otherwise there should be no remedie to redresse this wrong. And so it is of coparceners, and this is one exception out of our author's rule. 38. E. 3. 5. 17. E. 3. 11. 3 H. 5. Quare Imp. 71. 14. H. 4. 12. 9. H. 6. 30. 22. H. 4. 14. 37. H. 6. 9. b. 10. Eliz. Dyer 279. F. N. B. 35. 9. E. 3. 36. 37. Pl. Com. Signior Barkley's case.

[a] But if three coparceners recover land and damages in an assise of *Mordancester*, albeit the judgement be joynt, that they shall recover the land and damages, yet the damages being accessory, though they bee personall, doe in judgement of law depend upon the freehold, being the principal which is severall. And though the words of the judgement be joint, yet shall it be taken for distributive. And therefore if two of them dye, the entire damages doe not survive, but the third shall have execution according to her portion, and this is another exception out of our author's rule. But if all three had sued execution by force of an *Elegit*, and two of them had dyed, the third should have had the whole by survivor, till the whole damages be paid. [a] 14. E. 3. Execution 75. 45. E. 1. 3. b. (5. Rep. 7. 2. Roll. Abr. 86. 3. Rep. 14. b. Ant. 154. b. 1. Roll. Abr. 838.)

If the aunt and niece joyne in an action of waste, for waste done in the life of the other sister, the aunt shall recover the damages onely, because the same belongs not by law to the niece. And some hold the damages in that case to be the principall. 45. E. 3. 3. b. 48. E. 3. 14. 11. H. 4. 16. b. 35. H. 6. 23. b. 11. E. 2. Wast. 115. 2. Cro. 19. Ant. 53. b.

Sect. 316.

ITEM si deux tenants en common font un lease de ALSO if two tenants in common make a lease of their tenement

* Sicome—est assavoir in Roh.
§ Des—de leur in Roh.

† De not in Roh.
** Et added in Roh.

‡ De added in Roh.
†† Et not in Roh.

|| De not in Roh.
‡‡ &c. not in Roh.

Lib. 3. Cap. 4. Of Tenants in Common. Sect. 317, 318, 319.

(Cro. Jac. 231. 1. Sid. 49.)

*leur tenements a un autre pur terme des ans, rendant a eux certaine rent annualment durant le terme si le rent soit aderere, &c. les tenants en common averont un action de debt envers le lessee, et nemy divers actions, pur ceo que l'action est en * la personalty.*

nements to another for terme of yeares, rendring to them a certaine rent yearely during the terme if the rent bee behind, &c. the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty.

This upon that which hath been said is evident.

Sect. † 317.

MES en avowry pur le dit rent ils covient sever, car ceo est en le realtie, come le assise est supra.

BUT in an avowry for the said rent they ought to sever, for this is in the realty, as the assise is above.

Vid. 9. 3. 36. 87. Pl. Com. Seignior Barkley's case.

This being an addition to Littleton, albeit it be consonant to law yet I omit it.

Sect. 318.

(Stat. 32. H. 8. Ant. 167. a. 187. a.)

ITEM, tenants en common poyent bien faire partition enter eux s'ils voient, coment que ils ‡ ne seront compelles de faire partition per la ley; mes s'ils font enter eux partition per leur agreement et consent, tiel partition est assés bone, come est adjudge en le liver d'assises ||.

ALSO, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition betweene themselves by their agreement and consent, such partition is good enough, as is adjudged in the booke of assises.

* Vid. Sect. 259. 290. 247. 264. 19. Ass. p. 1. 30. Ass. p. 8. 47. E. 3. 22.

Of this sufficient hath beene said in * the chapter of Parceners and Joyntenants.

In le liver d'assises.

This booke is of great authoritie in law, and is so called because it principally containeth the proceeding upon writs of assise of *novel disseisin*, which in those dayes was *festinum & frequens remedium*.

Sect. 319.

*ITEM, si come y sont tenants en common de terres et tenements, &c. come est avantdit, en mesme le manner y sont § de chattels reals et personnels: Si come ** lease soit fait de certaine terres a deux homes pur terme de 20 ans, et quant ils sont de*

ALSO, as there bee tenants in common of lands and tenements, &c. as aforesaid, in the same manner there be of chattells reals and personnels. As if a lease bee made of certaine lands to two men for terme of 20 yeares, and when they be of this possessed, the

ceo

* Is not in L. and M. or Roh. but in L. and M. Roh.

† No part of this section in L. and M. or Roh.

‡ Not in Roh.

|| &c. added in L. and M. and Roh.

§ Possessions et proprietors added in L. and M. and Roh.

** si added in L. and M. and Roh.

ceo posses l'un de les leseees grant one of the leseees grant that which
ceo que a luy affiert durant le to him belongeth to another du-
terme a un auter, donque mesme ring the terme, then hee to whom
celuy a que le grant est fait, et l'au- the grant is made and the other
ter tiendront et occuperont en shall hold and occupie in com-
common. mon.

Grant ceo que a luy affiert. The same law it is if the one lessee in this case
make a lease of part of the terme, the second lessee and the other are tenants in com-
mon, as hath been said in the chapter of Joynttenants. The (&c.) in this section, implyeth
other hereditaments whereof men may be tenants in common, whereof sufficient hath
beene said before.

Vid. Sect. 315.
(Cro. Eliz. 33.
Ant. 192. a.)

Sect. 320.

ITEM *si deux * ont* **AL**so if two have
+ joyntment le garde joyntly the ward-
de corps & deterré d'un ship of the body & land
enfant deins age, et of an infant within
l'un de eux granta a age, & the one of them
un auter ceo que a luy grant to another that
affiert de mesme le which to himsele be-
garde, donque le gran- longeth of the same
tee, et l'auter que ne ward, then the gran-
granta pas, averont tee, and the other
et tiendront ceo en which did not grant,
common, &c. shall have and hold
this in common, &c.

Hereby it appeareth, that
there may bee tenants
in common as well of
chattels reall entire, as ward-
ship of the body, &c. as
of chattels personal, as a
hawke or a horse. If two
tenants in common be of
a seigniory, and a ward
fall, they are tenants in
common of the wardship af-
wel of the body as land. And
so it is if the land it selfe
escheat to them, they shall be
Tenants in common thereof,
and so it is of parceners.

16. E. 3. tit. Aid.

En common, &c. Vid. devant. Sect. 315.
Here (&c.) implyeth any o-
ther entire chattell.

Sect. 321. (1)

EN *mesme le maner est de cha-* **I**N the same manner it is of chat-
teux personnels: Sicome deux tels personnels. As if two have
ont † joyntment per done ou per joyntly by gift or by buying a
achate un cheval ou boefe, &c. horse or an ox, &c. and the one
et l'un grant ceo que a luy affiert grant that to him belongs of the
|| de mesme le cheval ou boefe a same horse or ox to another, the
un auter: donques le grantee, & grantee, and the other which did
l'auter que ne granta pas, averont not grant, shall have and possesse
et possideront tiels chateux person- such chattels personnels in com-
als en common. § Et en tiels mon. And in such cases where di-
cases, ou divers persons ont cha- vers persons have chattels real or
teux reals ou personnels en com- personall in common, and by di-
mon ¶, et per divers titles, si l'un vers titles, if the one of them dieth,
de eux morust, les auters que the others which survive shal not
jurvesquont, n'avera ceo per le sur- have this as survivor, but the exe-

vivor,

* joynttenants added in L. and M. and Roh.
† state, in L. and M. and Roh.
and M. and Roh.

+ joyntment not in L. and M. and Roh.
|| de mesme le cheval ou boefe, not in L. and M. and Roh.
¶ &c. added in L. and M. and Roh.

† joyntment--joint-
§ &c. added in L.

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vivor, mes les executors celuy que morust tiendront et occuperont ceo overque eux que survesquont, si come leur testator fist ou devoit en sa vie, &c. pur ceo que leur titles & droits en ceo fueront severals, &c. cutors of him which dieth shall hold and occupie this with them which survive, as their testator did or ought to have done in his life time, &c. because that their titles and rights in this were severall, &c.

Vid. devant, Sect. 315.

This is evident enough, and hereof sufficient hath beene said before.

Sect. 322.

(Sid. 49.)

PUR terme de ans, &c. For one yeare, halfe a yeare, &c.

(Hob. 120. Pl. 247. Sid. 33. Mo. 123. 375.)

L'un occu pie tout & mist l'auter hors de possession. These are words materially added, for albeit one tenant in common take the whole profits, the other have no remedie by law against him, for the taking of the whole profits is no ejectment: (1) But if he drive out of the land any of the chattell of the other tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have an *ejectione firmæ*, for the one moitie, and recover damages for the entrie, but not for the meane profits.

(1. Rol. Abr. 741. Noy. 14.)

(Cro. Jac. 611.)

Ejectione firmæ de la moity, &c. Here by this and the other (&c.) in these two sections, are to be understood divers diversities between actions which concerne right and interest, (as of *ejectione firmæ*, *ejectment de gard*, *quare eject infra terminum* of a chattell real upon an expulsion or ejectment) and actions concerning the bare taking of the profits rising of the land or doing of trespass upon the land, as here by the examples doe appeare, for the right is severall, and the taking of the profits in common. The second diversity is betweene

21. E. 4. 11. 22. 47. E. 3. 24. 45. E. 3. 13. 22. H. 6. 50. 58. 8. H. 6. 17. 19. H. 6. 57. 32. H. 6. 16. 2. E. 4. 23. 14. E. 4. 8. 18. E. 4. 30. 17. H. 6. 33. 21. E. 3. 29. 12. Aff. 28. 47. E. 3. 22. b. 19. H. 7. 16. F. N. B. 117. a. 17. E. 2. Account 122.

ITEM en le case avantdit, si come deux ont estate en common pur terme d'ans, &c. l'un occu pie tout, et mist l'auter hors de possession et occupation, &c. donques celuy que est mise hors de occupation avera envers l'auter brieve de ejectione firmæ de la moitie, &c.

ALSO in the case aforesayd, as if two have an estate in common for terme of yeares, &c. the one occupy all, and put the other out of possession and occupation, hee which is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moitie, &c.

Sect. 323.

EN mesme le maner est, l'ou deux teignent le gard des terres ou tenements durant le nonage d'un enfant, si l'un ousta l'auter de son possession, il que est ouste avera brieve de ejectment de gard de le moitie, &c. pur ceoque ceux choses son chatteux realx, et poyent estre apportions et severs, &c. Mes nul action de trespas, cestascarvoir, Quare clausum suum fregit, &c. herbam suam, &c.

IN the same manner it is where two hold the wardship of lands or tenements during the nonage of an enfant, if the one oust the other of his possession, he which is ousted shall have a writ of *ejectment de gard* of the moitie, &c. because that these things are chattels reals, and may be apportioned and severed, &c. but no action of trespass (*videlicet*) *Quare clausum suum fregit, & herbam suam*

con-

* *Tel* added in L. and M. and Roh.

(1) But now, by the stat. of the 4th of An. chap. 16. sect. 27. actions of account may be maintained by one jointenant and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his share and proportion, and against the executors and administrators of such jointenant or tenant in common; and the auditors appointed by the court, where such action shall be depending, are empowered to administer an oath, and examine the parties touching the matters in question, &c. See also 1. L. 20. 219.

conculcavit & consumpsit, &c. & hujusmodi actiones, &c. l'un ne poet aver envers l'auter, pur ceo que chescun de eux poet entrer et occuper en common, &c. per my et per tout, les terres & tenements * queux ils teignent en common. Mes si deux sont possesés de chattels personaux en common per divers titres, sicome d'un cheval, ou boef, ou vache, &c. si l'un prent ceo tout a luy hors de possession d'auter, l'auter n'ad nul auter remede mes de prender ceo de luy que ad fait luy le tort pur occuper en common, &c. quant † il poet veier son temps, &c. En mesme le maner est de chattels reaux, que ne poyent estre severes, sicome en le case avantdit, que deux sunt possesés d'un gard de corps d'un enfant deins age, si l'un prent l'enfant hors de possession d'auter, l'auter n'ad ascun remede per ascun action per la ley, mes de prendre l'enfant hors de le possession d'auter quaut il veit son temps ‡.

sumpsit, &c. & hujusmodi actiones, &c. the one cannot have against the other, for that each of them may enter & occupie in common, &c. *per my & per tout*, the lands and tenements which they hold in common. But if two be possessed of chattels personalls in common by divers titles, as of a horse, an ox, or a cowe, &c. if the one take the whole to himselfe out of the possession of the other, the other hath no other remede but to take this from him who hath done to him the wrong to occupie in common, &c. when he can see his time, &c. In the same manner it is of chattels realls, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the bodie of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remede by an action by the law, but to take the infant out of the possession of the other when he sees his time.

chattels realls that are apportionable or severable, as leases for yeares, wardship of lands, interest of tenements by *elegit*, statute merchant, staple, &c. of lands and tenements, and chattels realls entire, as wardship of the body, a villeine for yeares, &c. for if one tenant in common take away the ward, or the villeine, &c. the other hath no remede by action, but he may take them againe. Another diversitie is betweene chattels realls and chattels personalls, for if one tenant in common take all the chattels personalls, the other hath no remede by action, but he may take them againe; and herein the like law is concerning chattels realls entire, and chattels personall for this purpose. But of chattels entire, as of a ship, horse, or any other entire chattell, reall or personall, no survivor shall be betweene them that hold them in common: and tenants in common shall not joyne in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c. for that these actions concerne the right of lands which are severall.

If two tenants in common be of a mannor, to the which waite and stray doth belong, a stray doth happen, they are tenants in common of the same, and if the one doth take the stray, the other hath no remede by action, but to take him againe. But if by prescription the one is to have the first beast happening as a stray, and the other the second, there an action lieth if the one take that which pertaines to the other.

If two tenants in common be of a dove-house, and the one destroy the old doves whereby the flight is wholly lost, the other tenant in common shall have an action of trespass, *quare vi & armis columbare le pl' fregit & decimas columbas pretij 40. s. interfecit per quod volatum* and therefore hee cannot in barre

(Ant. 198. a.)

10. H. 4. Trespas. 178.

11. H. 4. 3.

(Sir Tho. Ray. 15. 1. Lev. 29.)

21. E. 4. 11. 12.

(Ant. Sec. 311. & fol. 197. b.)

13. E. 3. Briefe 674.

(2. Roll. Abr. 566.)

47. E. 3. 22. b.

columbaris sui totaliter amisit: for the whole flight is destroyed,

* &c. added in L. and M. and Roh.

† if not in L. and M. or Roh.

‡ &c. added in L. and M. but not in Roh.

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4. E. 2. Trespas 233.

[c] 1. H. 5. 1. 2. H. 5. 3.

[d] 13. E. 3. Trespas 212. 19.

R. 2. Br. 927. 11. E. 3. Trespas

212. Vi. 18. H. 6. 5.

[e] 13. H. 7. 26.

[f] F. N. B. 127. Reg. 163.

(Ant. 54. b.)

17. E. 2. tit. Account 22. 8. E.

2. Account 115. 30. E. 1. Ac-

count 127. 45. E. 3. 10. 47. E.

3. 22. b. 38. E. 3. 9. 22. E. 3.

60. 3. E. 3. 27. 39. E. 27. 82.

F. N. B. 118. i. 10. H. 7. 16.

2. E. 4. 25. (Ant. 172. a. F. N. B.

118. 1. Roll. Abr. 118. 2. Inlt.

379.)

W. 3. ca. 23.

[g] 27. H. 8. 13. 21. E. 3. 29.

29. E. 3. 39. 3. E. 2. Walt. 35.

F. N. B. 59. d. F. N. B. 49. 1.

* 47. E. 3. 22. 50. E. 3. 3.

10. E. 4. 3. b. 22. H. 6. 42. 21.

E. 3. 47. 17. E. 3. 47. 18. E. 4.

27. 28. E. 3. 4.

(2. Inlt. 423. 11. Rep. 49. Ant.

53. b. F. N. B. 59. d.

(2. Roll. Abr. 85. 403.

Ant. 186. b. Post. 335. a.)

barre plead tenancie in common. And so it is if two tenants in common bee of a parke, and one destroyeth all the deere, an action of trespasse lieth.

[c] If two tenants in common be of land, and of mere stones *pro metis & bundis*, and the one take them up and carrie them away, the other shall have an action of trespasse *quare vi & armis* against him, in like manner as he shall have for destruction of doves.

[d] If two tenants in common be of a folding, and the one of them disturbe the other to erect hurdles, he shall have an action of trespasse *quare vi & armis* for this disturbance.

[e] If two severall owners of houses have a river in common betweene them, if one of them corrupt the river, the other shall have an action upon his case.

[f] If two tenants in common, or jointenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*, and the writ saith, *Ad reparationem & sustentationem ejusdem domus teneantur*, whereby it appeareth, that owners are in that case bound *pro bono publico* to maintaine houses and mills which are for habitation and use of men.

If one jointenant or tenant in common of land maketh his companion his baylife of his part, he shall have an action of account against him, as hath bin said. But although one tenant in common or jointenant without being made baylife take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, baylife, or receiver, as hath beene said before, which he cannot doe in this case, unlesse his companion constitute him his bailife. And therefore all those bookes which affirme that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when the one maketh the other his bailife, for otherwise never his baylife to render an account is a good plea.

If there be two tenants in common of a wood, turbarie, pischarie, or the like, and one of them doth wast against the will of his companion, his companion shall have an action of wast, and he that did the wast before judgement, hath election either to take his part in certaintie by the sherife and the oath of men, &c. or that he grant, that from thenceforth he shal not do wast but according to his portion, &c. and if he make choice of a certain place, then the place wasted shall be assigned to him. [g] But this extends not to coparceners, because they were compellable to make partition by the common law: and this, as it is said, doth extend as well to tenants in common and joyntenants for life, as to an estate of inheritance. But if one tenant in common, or joyntenant of a dove house destroy the whole flight of doves, no action of wast doth lie in that case upon the said statute, * as some doe hold.

If lands be given to two, and to the heires of one of them, and the tenant for life doth wast, he that hath the inheritance shall have no action of wast by the statute of *Gloucester*, but upon the statute of *W. 2.* he shall have an action of wast. And it is to be knowne, that one tenant in common may infeoffe his companion, but not release, because the freehold is severall. Jointenants may release, but not infeoffe, because the freehold is joynt, but coparceners may both infeoffe and release, because their feisin to some intents is joynt, and to some severall (1).

Sect. 324.

ITEM quant un home • voile monstrier un feoffement fait a luy, ou un done en le taile, ou un lease pur terme de vie d'ascun terres ou tenements, la il dirra, per force de quel feoffement, done ou leas il fuit seise, &c. mes l'ou un voile pleade un leas ou grant fait a luy de chattel real ou personal, la il dirra, per force de quel il fuit possesse, &c.

Pluis serra dit de tenants en common en le chapter de Releases † et Tenant per Elegit.

ALSO when a man will shew a feoffement made to him, or a gift in taile, or a lease for life of any lands or tenements, ther he shal say, by force of which feoffement, gift, or lease, he was seised, &c. but where one will plead a lease or grant made to him of a chattell real or personal, then he shal say, by force of which he was possessed, &c.

More shall be said of tenants in common in the chapters of Releases and Tenant by Elegit.

IL fuit seise, &c. Seise is a word of art, and in pleading is onely applied to a freehold at least, as *posse* for distinction sake is to a chattell real or personal.

As

* en pleadant added in L. and M. and Roh.

† et Confirmacions added in L. and M. and Roh.

(1) M. 26. & 27. Eliz. per cur. If one coparcener in tail levies a fine to another sur conusans de droit, &c. it does not enure by way of release, but by way of grant, and it will be a discontinuance and alteration of the estate without execution, because one parcener may infeoff another, and this is a feoffment of record. But one may release to another, and it enures per mitter le droit.—Ld. Nottingham. MSS.

As if B. plead a feoffment in fee, he concludeth, *Virtute cuius prædicti B. fuit seifitus, &c.* (Plow. Com. 507. a. Post. 303. a. Plow. 149. b. Post. 310. b. Noy 26.) But if he plead a lease for yeares, he pleadeth, *Virtute cuius prædictus B. intravit, et fuit inde possessionatus*; and so of chattells personalls, *Virtute cuius fuit inde possessionatus*.

And this holdeth not only in case of lands or tenements which lie in liverie, but also of rents, advowsons, commons, &c. and other things that lie in grant, whereof a man hath an estate for life or inheritance.

Also when a man pleads a lease for life, or any higher estate which passeth by liverie, he is not to plead any entrie, for he is in actuall seisin by the liverie it selfe. Otherwise it is of a lease for yeares, because there he is not actually possessed untill an entrie.

CHAP. 5. Of Estates upon Condition. Sect. (1) 325.

ESTATES que homes ont en terres ou tenements * sur condition sont † de deux maners, scilicet, ‡ ou ils ont estate sur condition en fait, ou sur condition en ley, || &c. Sur condition en fait est, sicome un home per fait endent enfeoffa un autre en fee § simple, reservant a luy & a ses heires annualment certaine rent payable a un feast, ou a divers feasts per an, sur condition que si le rent soit aderere, &c. que bien list al feoffor & a ces heires en mesmes les terres ou tenements de entrer, &c. Ou si terre soit alien a un home en fee rendant a luy certaine rent, &c. & s'il happa que le rent soit aderere per un semaine apres ascun jour de payment de

ESTATES which men have in lands or tenements upon condition are of two forts, viz. either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffes another in fee simple, reserving to him and his heires yearly a certaine rent payable at one feast or divers feasts per annum, on condition that if the rent be behind, &c. that it shall bee lawfull for the feoffor and his heires into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a weeke after any day of payment of it, or by a moneth after any day of payment of it, or by halfe a yeare, &c. that then it shall be lawfull to the feof-

SUR Condition. Littleton having before spoken of estates absolute, now beginneth to intreate of estates upon condition. And a condition annexed to the realtie whereof Littleton here speaketh in the legall understanding, *est modus*, a qualitie annexed by him that hath estate, interest, or right, to the same, whereby an estate, &c. may either be defeated, or enlarged, or created upon an incertaine event. *Conditio dicitur cum quid in casum incertum qui potest tendere ad esse aut non esse confertur.*

Glanvill lib. 10. cap. 8. Braeton lib. 2. cap. 5. 6. 7. &c. lib. 4. fol. 213. Brit. cap. 36. & fol. 89. 99. 114. 130. 205. 206. 207. 249. Fleta lib. 3. cap. 9. & lib. 5. ca. 5. Mirr. cap. 2. sect. 15. & 17.

Sur condition en fait, que est facti, that is, upon a condition expressed by the partie in legall termes of law.

Ou sur condition en ley, &c. quæ est juris, that is, *tacite* created by law without any words used by the partie. Againe, Littleton subdivideth conditions in deed (though not in expresse words) into conditions precedent (of which it is said, *Conditio adimpleri debet priusquam sequatur effectus*) and conditions subsequent. Againe, of conditions in deed some be affirmative, and some in the negative; and some in the affirmative, which imply a negative: some make the estate, whereunto they are annexed, voydable by entrie or clayme, and some make the estate

(Plow. 27. a. 1. Roll. Abr. 420. 2. Rep. 79.)

* sur condition not in L. and M. or Roh.

|| &c. not in L. and M. or Roh.

† de-en in L. and M. or Roh.

§ simple not in L. and M. or Roh.

‡ ou not in L. and M. or Roh.

(1) The doctrine of conditions is derived to us from the feudal law. The rents and services of the feudatary were considered, and are mentioned by the feudal writers as conditions annexed to his fief. If he neglected to pay his rent, or perform his service, the lord might resume the fief. But the payment of rent and the performance of feudal service were, for a long period of time, the only conditions that could be annexed to a fief; and whether they were expressed or not, they were always presumed by the law;—being incident to, and inseparable from, the estate of the feudatary. — In this sense they are called conditions in law, or implied conditions. — Afterwards, when other conditions were introduced, the estates to which they were annexed were ranked among improper fiefs. — See Sir Thomas Craig *De Jure Feudali*, lib. 2. di. 4. sect. 1. 2. 3. Conditions of this last sort were called expresse, or conventional conditions. By an application, in some respects very much forced, of the original principle of conditions, that on the non-performance of them the lord might resume his fief, estates tail, (or rather conditional fees at common law), and some other modifications of landed property, were introduced as estates upon condition. These are often of such a nature, as to make it more natural that a stranger should have the estate on the non-performance of the condition, than the donor; — and that the lord, instead of being confined to his right of resumption, should have it in his power to compel the performance of the condition, or recover from the donee a compensation, or satisfaction, for the breach of it. But as all these estates were introduced as estates upon conditions, the law, where it still considers them as conditions, and except where it has been altered by act of parliament, confines the donor's remedy to the resumption of the estate, and gives that remedy only to the donor and his heirs. — Considered in this sense, the word Condition has, in our law, a much more contracted meaning than it has in the civil law; where it signifies, generally, all those pactions, or agreements, which regulate that which the contractors have a mind should be done, if a case, which they foresee, should come to pass. This is the definition of Domat, lib. 1. tit. 1. sect. 4. We shall afterwards have occasion to make some observations on the interference of courts of equity in cases of conditions.

Mir. cap. 2. sect. 13. & 17.

estate void *ipso facto*, without entrie or claime.

Also of conditions in deed, some bee annexed to the rent reserved out of the land, and some to collaterall acts, &c. some be single, some in the conjunctive, some in the disjunctive, as shall evidently appeare in this chapter, where the examples of these divisions shall be explained in their proper place.

En ley, &c. Of conditions in law more shall be said hereafter in this chapter.

Sur condition en fait est, sicome un home per fait indent, &c.

Here Littleton putteth one example of fixe severall kinds of conditions. That is, first, of a single condition in deed. Secondly, of a condition subsequent to the estate. Thirdly, a condition annexed to the rent, &c. Fourthly, a condition that defeateth the estate. Fifthly, A condition that defeateth not the estate before an entrie. And lastly, a condition in the affirmative, which implieth a negative, (as behind or unpaid implieth a negative) *viz.* not paid. All which doe appeare by the expresse words of Littleton.

Rend a luy certaine rent, &c. Here by this (&c.) is implied for life, in-taile, or in fee.

Et en cest case si le rent ne soit pay a tiel temps, &c. donques poet le feoffor ou ses beires entrer, &c. By this section, and by the (&c.) therein contained, fixe things are to be understood.

First, Where our author saith, *si le rent soit arere*, that though the rent be behind and not paid (b), yet if the feoffor doth not demand the same, &c. he shall never re-enter, because the land is the principall debtor; for the rent issueth out of the land, and in an assise for the rent the land shall be put in view; and if the land be evicted by a title paramount, the rent is avoyded, and after such eviction the person of the feoffee shall not be charged therewith, for the person of the feoffee was only charged with the rent in respect of the grant out of the land.

Secondly, The demand must be made upon the land, because the land is the debtor, and that is the place of demand appointed by law (1).

If the king maketh a lease for yeares, rendring a rent payable at his receipt at *Westminster*, and after the king granteth the reversion to another and his heires, the grantee shall demand the rent upon the land, and not at the king's receipt at *Westminster*; for as the law without expresse words doth appoint the lessee in the King's case to pay it at the King's Receipt, so in case of a subject, the law appoints the demand to be on the land.

If there be a house upon the same he must demand the rent at the house. And he cannot demand it at the backe doore of the house but at the fore doore, because the demand must ever be made at the most notorious place. And it is not material whether any person be ther or no.

Albeit the feoffee be in the hall or other part of the house, yet the feoffor neede not [c] but come to the fore doore, for that is the place appointed by law, albeit the doore be open.

[d] If

* *un—demy* not in L. and M. or Roh.

† *Et* added in L. and M. and Roh.

(1) For the place of performing the condition, see Litt. sect. 340. and the commentary on that section.

[b] 40. Aff. 11. 20. H. 6. 30. 31. 6. H. 7. 7. 19. H. 6. 76. 20. H. 6. 32. 22. H. 6. 46. Pl. com. Kidwelly's case fo. 70. & Hill and Grange's case fol. 73. (Noy 23. 1. Roll. Abr. 459. 460.) (Perk. sect. 827. Noy 23.)

Lib. 4. fol. 72. 73. Boroughe's case.

49. Aff. 5. 15. Eliz. Di. 329.

[c] Bendloes en Tresp. 4. & 5. Pl. & Mar.

(d) If the feoffment were made of a wood only, the demand must be made at the gate of the wood, or at some high way leading through the wood or other most notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which hee will, and albeit the feoffee be in some other part of the wood redie to pay the rent, yet that shall not availe him. *Et sic de similibus.* [4] 15. Eliz. Dyer 329. (Ante 145 a.)

Thirdly, And if the feoffor demand it on the ground at a place which is not most notorious, as at the backe doore of a house, &c. and in pleading the feoffor alleadge a demand of the rent generally at the house, the feoffee may traverse the demand, and upon the evidence it shall bee found for him, for that it was a void demand.

Fourthly, If the rent be reserved to be paid at any place from the land, yet it is in law a rent, and the feoffor must demand it at the place appointed by the parties, observing that which hath bene said before concerning the most notorious place. Lib. 4. Boroughs case fol. 73. Pl. Com. 70.

Fifthly, And all this is to be understood when the feoffee is absent, for if the feoffee cometh to the feoffor at any place upon any part of the ground at the day of payment, and offer his rent, albeit they be not at the most notorious place, nor at the last instant, the feoffor is bound to receive it, or else he shall not take any advantage of any demand of the rent for that day. (1) (Post. 211. a.)

Sixthly, Therefore the place of demand being now known, it is further to be known what time the law hath appointed for the same. This partly appeareth by that which hath bene said. For albeit the last time of demand of the rent is such a convenient time before the sunne setting of the last day of payment as the money may be numbred and received, notwithstanding, if the tender be made to him that is to receive it upon any part of the land at any time of the last day of payment, and he refuseth, the condition is saved for that time, for by the expresse reservation the money is to be paid on the day indefinitely, and convenient time before the last instant, is the uttermost time appointed by law, to the intent (2) that then both parties should meet together, the one to demand and receive, and the other to pay it, so as the one should not prevent the other. But if the parties meet upon any part of the land whatsoever on the same day, the tender shall save the condition for ever for that time. (7. Rep. 28.) (5. Rep. 114. b.) (2. Cro. 423. 500.)

And if the reservation of the rent be (as here *Littleton* putteth the case, at certaine feasts, with condition that if it happen the rent to be behind by the space of a weeke after any day of payment, &c. in this case the feoffor needeth not demand it on the feast day, but the uttermost time for the demand is a convenient time (as hath bene said) before the last day of the weeke, unlesse before that the feoffee meet the feoffor upon the land and tender the rent as is aforesaid. (3) Lib. 5. fol. 114. Wade's case. Pl. Com. Hill. et Granges case 167. 172. 20. H. 6. 30. 31. 6. H. 7. 3.

If a rent be granted payable at a certaine day, and if it be behinde and demanded that the grantee shall distreine for it, in this case the grantee need not demand it at the day; but if he demand it at any time after he shall distreine for it, for the grantee hath election in this case to demand it when he will to inable him to distreine. Mich. 40. & 41. Eliz. inter Stanly & Read. Lib. 7. fo. 28. Maundes case.

Et eux en son primer estate aver, &c. Regularly it is true that he that entreteth for a condition broken shall be seised in his first estate, or of that estate which hee had at the time of the estate made upon condition, but yet this sayeth in many cases. 8. H. 7. 7. b.

1. In respect of impossibility. As if a man seised of lands in the right of his wife, maketh a feoffment in fee by deed indented, upon condition that the feoffee should demise the land to the feoffor for his life, &c. the husband dieth the condition is broken, in this case the heire of the husband shall enter for the condition broken, but it is impossible for him to have the estate that the feoffor had at the time of the condition made: for therein he had but an estate in the right of his wife, which by the coverture was dissolved. And therefore when the heire hath entred for the condition broken and defeated the feoffment, his estate doth vanish, and presently the state is vested in the wife. 4. H. 6. a. lib. 8. fo. 43. 44. Whittinghams case. 5. H. 7. 6. a. (Post. 297. b.)

2. In respect of necessity. If *Cessy que use* after the statute of R. 3. and before the statute of 27. H. 8. had made a feoffment in fee upon condition, and after had entred for the condition broken; in this case he had but an use when the feoffment was made, but now he shall be seised of the whole state of the land. So that as in the former case, the ancestor had somewhat at the making of the condition, and the heire shall have nothing when he hath entred for the condition broken, so in this case the feoffor had no estate or interest in the land at the time of the condition made, but a bare use; yet after his entrie for the condition broken he shall be seised of the whole state in the land, and that also for necessitie, for by the feoffment in fee of *Cessy que use*, the whole estate and right was devested out of the feoffees. And therefore of necessitie the feoffor must gaine the whole estate by his entrie for the condition broken.

Tenant in speciall taile hath issue, and his wife dieth, tenant in taile maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, the feoffor re-enters, she shall have

(1) For the difference of the demand to be made in case of a re-entry to avoid an estate, or the forfeiture of a sum nomine *pence*; and of the demand to be made in case of an entry to distrain; see before 144. 2.

(2) Yet the rent is not due till the last minute of the natural day; for if the lessor dies after sun-set and before midnight, the rent shall go to the heir and not to the executors. 1. Saund. 287. Salk. 576. (Note to the twelfth edition.)

(3) For there is a material difference between a reservation of a rent payable on a particular day, or within a certain time after, and a reservation of a rent payable at a certain day, with a condition, that if it be behind by the space of any given time, the lessor shall enter. In both cases, a tender on the first, or last, day of payment, or on any of the intermediate days, to the lessor himself, either upon, or out of the land, is good. But in the former case, it is sufficient if the lessee attends on the first day of payment, at the proper place; and if the lessor does not attend there to receive the rent, the condition is saved. In the latter case, to save the lease, it is not sufficient that the lessee attends on the first day of payment, for he must equally attend on the last day. 10. Rep. 129. a. Plow. 70. a. b. and the case of Cropp v. Hambleton Cro. Eliz. 48.—It is to be observed that it was once doubted, whether proof of actual entry and ouster was necessary in ejectment, brought on breach of a condition of re-entry.—It was afterwards settled that it was not, but that, notwithstanding the confession of the re-entry, the demand of the rent must be proved. Anon. 1. Vent. 248.—*Little v. Heaton* ad Lord Raym. 750. and 1st Salk. 259. and see Burr. 1896. 1897. But now, by the 4. Geo. 2. c. 28. sect. 2. landlords or lessors having a right by law to re-enter, for non-payment of rent, may, without any formal demand, or re-entry, serve a declaration in ejectment for the recovery of the demised premises; and shall recover judgment and execution, in the same manner as if the rent in arrear had been lawfully demanded, and re-entry made. And if the lessee or tenant permits execution to be executed on such judgment, without paying the rent and arrears, and full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed, he shall be barred and foreclosed from all relief in law or equity, except by writ of error for reversal of such judgment.—By the same statute, sect. 4th, if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear, with the costs, or pays such arrears and costs into court, the proceedings in ejectment shall cease, and the tenant shall be relieved in equity, and hold the lands demised according to the old lease without any new lease. In *Archer v. Snapp*, Andr. 341. lord chief justice Lee observes, that both the courts of law and the courts of equity had, previous to this statute, exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for non-payment of rent, by compelling him to take the money really due to him. The same observation is made in Bull. Ni. Pri. 97. Sec 2. Salk. 397. 8. Mod. 345. 10. Mod. 383. and 2d Vern. 103. 1. Wilfon 75. 2. Stra. 900.

Lib. 3.

(8. Rep. 43. 41.)

(Ante 103. a.)

15. Aff. 12.

(4. Rep. 9. b.)

8. H. 7. 7.

(Post. 350. b.)

2. H. 6. 4.

(1. Roll. Abr. 412.)

43. Aff. 47. 13. E. 4. 4. 2. H.

5. 7. b. 39. Aff. 15. 11. H. 5.

25. 16. Aff. 47.

(1. Roll. Abr. 356. Post. 252. a.)

Cap. 5.

Of Estates

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have but an estate for life, as tenant in taile *apres possibility* of issue extinct by the re-entry, and yet he had an estate taile at the time of the feoffment, and that also for necessity.

3. In some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collateral qualities. As if tenant by homage ancestrell maketh a feoffment in fee upon condition, and entreth upon the condition broken, it shall never be holden by homage ancestrell againe. And so it is if a copihold escheate and the lord make a feoffment in fee upon condition, and entreth for the condition broken. And the reason in both these cases is, for that the custome or prescription for the time is interrupted.

(1) Lord and tenant by fealty and rent, the lord is in seisin of his rent, the lord granteth his feignory to another and to his heires upon condition, the tenant attorneth and payeth his rent to the grantee, the condition is broken, the lord distraineth for his rent, and rescous is made, he shall be in his former estate, and yet the former seisin shall not enable him to have an assise without a new seisin.

If tenant in taile make a feoffment in fee upon condition, and dieth, the issue in taile within age doth enter for the condition broken, he shall be first in as tenant in fee simple as heire to his father, and consequently and instantly he shall be remitted. But if the heire be of full age, he shal not be remitted, because he might have had his *formdon* against the feoffee, and the entrie for the condition is his owne act; but more shall be said hereof in his proper place in the chapter of *Remitter*.

If a man make a feoffment in fee of Blacke Acre and White Acre upon condition, &c. and for breach thereof that he shall enter into Blacke Acre, this is good.

If tenant for life make a feoffment in fee upon condition, and entreth for the condition broken, he shall be tenant for life againe, but subject to a forfeiture, for the state is reduced, but the forfeiture is not purged. (2)

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*EN mesme le manner est si terres sont dones en le taile, ou lesses a terme de vie ou * des ans, sur + condition, &c.* IN the same manner it is if lands be given in taile, or let for terme of life or of yeares upon condition, &c.

Sur condition, &c. This implyeth the severall kindes of conditions in deed before specified.

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ET la terre tener tanque ils soyent satisfies ou paiés de le rent aderere, &c. By this it is implied, that if such a feoffment be made, reserving (b) (for example) 8 markes rent at the feast of Easter, with such a condition as is afore said, the feoffor at the feast day demands the rent, the feoffee paieth unto him 6 markes parcell of the rent, the feoffor entreth into the lands and taketh the profits towards satisfaction. Afterwards the feoffee doth tender the two markes residue of the rent to the feoffor upon the land, who refuseth it. It *MES l'ou feoffment est fait de certaine terres reservant certain rent, + &c. sur tiel condition, que si le rent soit aderere, § que bien lirroit al feoffor, et || ses beires d'entrer, ** et la terre tener tanque ils soient satisfies ou payes de le rent aderere, &c. en cest case si le rent soit aderere, & le feoffor ou ses beires enter, le BUT where a feoffment is made of certaine lands reserving a certaine rent, &c. upon such condition, that if the rent be behind, that it shall be lawfull for the feoffor & his heires to enter, and to hold the land untill he be satisfied or payed the rent behinde, &c. in this case if the rent be behind, and the feoffor or his feoffee*

Vide Sect. 322.

19. E. tit. barre 280. 19. R. 2.

done rent 10.

Pl. com. 524.

[§] 20. E. 3. tit. covenant. 3.

* a terme added in L. and M. and Rob.

§ added in L. and M.

|| a added in L. and M.

+ tiel added in L. and M. and Rob.

** en la terre tenus de eux in L. and M.

+ &c. not in L. and M.

(1) This is seemingly contradicted by the authorities cited in the margin. In that taken from Lord Coke's Reports, it is said, that "If the lord grants his feignory on condition, and the tenant pays the rent to the grantee, and afterwards the condition is broken, and the lord distrains for the services upon rescous made, he shall have assise, for the seisin before is sufficient."—The case reported in the margin from the Book of Assizes is to the same effect.—But it is to be observed, that when the lord distrains, his distress amounts to a new entry. This may serve to reconcile the apparent contradiction, in this instance, between the Commentary and the authorities cited in the margin.

(2) It may be further observed, 1st, That as the entry of the feoffor on the feoffee for a condition broken defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate, as dower, &c. and all the mesne incumbrances of the feoffee. See 1. Roll. Abr. 474. 2dly, That every condition must defeat the entire estate, and that a condition cannot be so framed, as to make one and the same estate in any lands cease as to one person, and remain as to another, or cease for one time, and revive afterwards. 6 Rep. 40. b. 41. a. 3dly, That a condition annexed to land, cannot be apportioned by any of the parties themselves, so as to become void as to one part of the land, and to remain good as to the other. Thus in the case cited by lord Coke, 4 Rep. 120. a. b. a lease was made for twenty-one years, of three manors, rendering rent for manor A. 6l. for manor B. 5l. and for manor C. 10l. to be paid on a place out of the land, with a condition of re-entry into all the three manors for default of payment of the rents. The lessor granted the reversion of part of the manor A. to one and his heires: and afterwards granted the reversion of another part to another and his heires: it was adjudged that the second grantee should not enter for the condition broken, because the condition was entire, and by the severance of part of the reversion was destroyed in all. But a condition may be apportioned by act in law. See the instance put by lord Coke post. 215. a. 4thly, That part of a condition may be good and another part of it may be void in law: as if a person makes a gift in tail to the donor's eldest son, remainder to his youngest son in tail, with a condition that if the eldest son alien in fee, his estate should cease, and the lands should remain to the second son in tail; that part of the condition which prohibits the alienation made by tenant in tail is good in law, but that part of it which says that upon such alienation the lands shall remain over is void, and the donor may re-enter. See Litt. sections 720. 721. 722. 723. and the Commentary page 379. b. 5thly, That if A. be tenant for life, remainder in-contingency, remainder to B. in tail, and A. before the contingency happens surrenders his estate to B. his surrender bars the contingent remainder. But if he surrenders on condition, and before the contingency happens, the condition is broken, and A. enters on the estate, the contingent remainder is revived. See Thompson v. Leach. 1. Lord Raym. 313.

*feoffee n'est pas exclude de ceo tout * net, mes le feoffor avera & tien-dra la terre et prendra ent les profits tanque † il soit satisfe de le rent aderere; & quant il est satisfe, donque poit le feoffee ‡ re-entrer en meisme la terre, & ceo tener || come il tenoit adevant. Car en tiel cas le feoffor avera § la terre forsque en maner come pur un distres, tanque ** il soit satisfe de le rent, &c. coment †† que il prendre les profits en le meane temps ‡‡ a son use demesne, &c.*

heires enter, the feoffee is not altogether excluded from this, but the feoffor shall have & hold the land, and thereof take the profits, until he be satisfied of the rent behinde; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case the feoffor shall have the land but in maner as for a distres until he be satisfied of the rent, &c. though he take the profits in the meane time to his owne use, &c.

profits in nature of a distres. And therefore if a man maketh a lease for life with a reservation of a rent and such a condition, if he enter for the condition broken and take the profits of the land *quousque*, &c. he shall not have an action of debt for the rent *arere*, for that the freehold of the lessee doth continue, and therefore the booke [c] that seemeth to the contrary is false printed, and the true case was of a lease for yeares, as it appeareth afterwards in the same page of the lease.

But herein also a diversity worthy the observation is implied, *viz.* If a man make a lease for yeares reserving a rent with a condition that if the rent be behind, that the lessor shall re-enter and take the profits until thereof he be satisfied, there the profits shall be accounted as parcell of the satisfaction, and during the time that he so taketh the profits he shall not have an action of debt for the rent for the satisfaction whereof he taketh the profits. But if the condition be that he shall take the profits until the feoffor be satisfied or paid of the rent, without saying (thereof) or to the like effect, there the profits shall be accounted no part of the satisfaction but to hasten the lessee to pay it, and as *Littleton* here saith, that until he be satisfied he shall take the profits in the meane time to his owne use (3).

hath beene adjudged that the feoffee upon the refusal may enter into the land, (1) for when the feoffor is satisfied either by perception of the profits or by payment or tender and refusal, or partly by the one and partly by the other, the feoffee may re-enter into the land. And this is within the words of *Littleton*, *viz.* (until he be satisfied.) And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken and retaine the land until he be satisfied of the whole. All which is worthy of observation.

Et en tiel case le feoffor avera la terre forsque en maner come un distres tanque il soit satisfe de la rent, &c.

By this it appeareth that the feoffor by his re-entry gaineth no estate of freehold (2), but an interest by the agreement of the parties to take the

(Autrement in case de obligation ou debt sur contract. Doc. Pla. 109.)

(Sid. 223. 262. 344. Flow. 524. b.)

[c] 2. E. 3. fo. 7.

30. E. 3. 7. Vid. emblable.
27. H. 8. 4. 43. E. 3. 21. 31. Aff. Pl. 26.
Vid. le statute de Merton ca. 6. and observe these words, quod inde percipere possint duplicem valorem, &c.
Et c. 7. without this word (inde) (See Ant. 82. b.)

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ITEM divers parolx (enter || auters) y sont, queux per vertue de eux mesmes font estates sur condition, un est le parol §§ sub conditione: si come A. enfeoffa B.

ALSO divers words (amongst others) there be which by vertue of themselves make estates upon condition, one is the word (*sub condic.*) as if A. inteoffe B. of cer-

HERE in this and the next two sections *Littleton* doth put four examples of words that make conditions in deed, and first *sub conditione*. This is the most expresse and proper condition in deed, and therefore our author beginneth with it.

Talem redditum, &c.

This.

* de added in L. and M. and Roh.
|| come—coment in L. and M. and Roh.
M. and Roh. †† que not in L. and M. or Roh.
added in L. and M. and Roh.

† que added in L. and M. and Roh.

§ avera la terre—ceo aver in L. and M. and Roh.

§§ sub conditione—de condition in L. and M. and Roh.

(Dyer 138. b.)

Sub conditione.

[c] Marie Dyer 138. 27. H. 8. 15. 13. 11. 4. entr. Cong. 57. 29. Aff. 7. 33. Aff. 11. 40. Aff. 13. Bracton ubi supra. Fleta lib. 4. ca. 9. Brit. cap. 36. & ubi supra.

(1) But there must be a previous actual demand, in the same manner as where the condition is general. *Hob.* 82. 133. *Hobart* was of opinion, that the feoffor, to entitle himself to enter by way of penalty, should demand the rent not only on the day when it became due, but on the day after. *Hob.* 208.

(2) This is so, tho' the condition be that the feoffor, his heirs and assigns, may enter; and his interest goes to his executor. But he may maintain an ejectment. 1. *Saund.* 112. 1. *Sid.* 344. 345. *T. Raym.* 135. 158.

(3) Care must be taken with respect to conditions, or powers of entry, to distinguish between, I. a general condition that the lessor shall re-enter; II. a special condition that he may enter and hold until payment or satisfaction; and III. a power of entry, limited by way of use. 1st, A general condition that the lessor shall re-enter is the subject of the foregoing section; 2d, a special condition that he may enter, is the subject of the present section. The distinction when the profits taken by the lessor after entry are, and when they are not, to be in satisfaction of the rent, is not admitted in equity, for the courts of equity will always make the lessor account to the lessee for the profits of the estate during the time of his being in possession of it, and decree him after he is satisfied the rent in arrear, and the costs, charges, and expences attending his entry and detention of the lands, to give up the possession to the lessee, and deliver and pay him the surplus of the profits of the estate and the money arising thereby. 3d, A power of entry limited by way of use. This takes its effect from the Statute of Uses; as if A. by feoffment, lease and release, fine, or common recovery, conveys an estate to B. and his heirs, to the use, intent, and purpose, that B. may receive, out of the lands so conveyed, a certain annual sum; and to this further intent and purpose, that if such annual sum, or any part of it, be unpaid by a certain time, it shall be lawful for B. and his assigns to enter upon, and hold possession of, the land, and receive the rents and profits of it, until the arrears are satisfied: here, as soon as the rent is in arrear, an use which is served out of the original feisin of the feoffee, releasee, confessor, or recoverer, springs up and vests in the person to whom the power is given. This use is immediately transferred into possession by the statute. He has consequently a right to take and keep that possession till the purpose for which it is executed is satisfied, and then the use determines. By virtue of this estate he may make a lease for years to try his title in ejectment, either to obtain the possession of the lands, if it be withheld from him, or to restore it, if it be disturbed or divested; and if he assigns the annual sum, this right of entry, and perception of the rents and profits of the lands charged with the payment of it, passes with it to the assignee. But a distinction must be made between this case and that of a grant of a rent to be issuing out of certain lands, with a proviso, declaration, or covenant, that if the rent be in arrear, the grantee may enter, &c. Here there is no feisin in any person, out of which an use can arise to the grantee on non-payment of the rent; and therefore possession is not in him till he makes an actual entry. But an interest vests in him when the rent becomes in arrear, and he may reduce it into possession by ejectment. See *Haverhill v. Hare*, *Cro. Jac.* 520. 2. *Roll. Rep.* 12. *Poph.* 126. 147. 3. *Bulstr.* 250. *Jennett v. Cowley*, *Sid.* 223. 262. 344. *Raym.* 135. 158. *Saund.* 112.

This (Ec.) implieth any other rent or sum in grosse, or any collateral condition whatsoever, either to be performed by the feoffee, (whereof our author here putteth his case) or by the feoffor, and extendeth to all kinds of conditions in deed, before specified.

de certaine terre, habendum & tenendum eidem B. & hæredibus suis, sub conditione, quòd idem B. & hæredes sui solvant seu solvi faciant præfat' A. & hæredibus suis annuatim talem redditum, &c. En cest case sans aucun plus dire le feoffee ad estate sur condition.*

taine land, to have and to hold to the said B. & his heires, upon condition that the said B. and his heires do pay or cause to be paid to the aforesaid A. & his heires, yearly such a rent, &c. In this case without any more saying the feoffee hath an estate upon condition.

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Proviso. Vid. sect. 220. Dier. 28 H. 8. fol. 13. 27. H. 8. fol. 14. 15. 13. H. 4. Entre Cong. 57. Seignior Cromwell's case, lib. 2. fo. 71. 72. at large. 35. H. 8. tit. condition. Br. lib. 8. 89. Frances case.

PROVISO semper, quòd B. solvat, &c.

Our author putteth his case where a *proviso* cometh alone. And so it is if a man by indenture letteth lands for yeares, provided alwaies, and it is covenanted and agreed between the said parties, that the lessee should not alien, and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words (1).

This word *proviso* shall be also taken as a limitation or qualification, as hereafter in his proper place shall be said. And sometime it shal amount to a covenant. All which do appeare by the authorities in the margin.*

For the (Ec.) in this section explanation is made in the section next before.

Ou fueront tiels,

Ita quod. This is the third condition in deed, whereof our author maketh mention.

AUXY si les parols fueront tiels, Proviso semper, quòd prædict' B. solvat, seu solvi faciat præfato A. talem redditum, &c. ou fueront tiels, Ita quod prædict' B. solvat seu solvi faciat præfato A. talem redditum, &c. en ceux cases sans plus dire, le feoffee § n'ad estate forsque sur condition; issint que s'il ne performast le condition, le feoffor et ses heires poyent entrer, &c.

ALSO if the words were such, provided alwaies that the aforesaid B. do pay or cause to be paid to the aforesaid A. such a rent, &c. or these, so that the said B. do pay or cause to be paid to the said A. such a rent, &c. in these cases without more saying, the feoffee hath but an estate upon condition; so as if he doth not performe the condition, the feoffor and his heires may enter, &c.

(. Rep. 70. b.)

(*) 27. H. 8. 15. &c. Ita quod. Fleta lib. 4. ca. 9. Bracton ubi supra. Britton ubi supra.

(Dyer 13. b.)

Sect. 330.

(Ant. 146. b.)

6. E. 2. Entre Cong. 65. 8. E. 2. Aff. 320. adjudged. Quod si contingat. Pasch. 37. Eliz. Rot. 254. inter Sayer et Hares in com. Banco.

QUOD si contingat, &c.

This is the fourth condition in deed set downe by our author.

D'entrer, &c. Hereby it is evident, that

ITEM auters parols sont en un fait queux causes les tenements estre conditionals. Si come sur tiel feoff-

ALSO there bee other words in a deede which cause the tenements to be conditionall: As if upon such feoffment

* *issint* added in L. and M. and Roh.

† *parols*—conditions in L. and M. and Roh.

‡ *n'ad*—ad in L. and M.

(1) Acc. 1. Roll. Abr. 410. L. 30. tho' it stands indifferent whether it be the speaking of the grantor or grantee; for in that case it shall be referred to the grantor, as no condition can be reserved or made, but on the part of the donor, lessor, or feoffor. Dyer 6. And it is immaterial in what part of the deed the word *proviso* stands, and tho' there be covenants before or after. 2. Rep. 70. 71. 1. Roll. Abr. 407. Dyer. 311. But when it does not introduce a new clause, and only serves to qualify or restrain the generality of a former clause, it is not a condition. Moore 367. 707.—We should carefully distinguish between a condition, a remainder, and a conditional limitation. We have seen that a condition defeats the whole estate; that none but the heir can take advantage, or enter for the breach of it; and that when he enters he is in as of his old estate. Such is the case put by Littleton of a feoffment in fee, reserving a yearly rent, with a condition that if the rent be behind, it shall be lawful for the feoffor and his heirs to enter. A remainder is defined by lord Coke, ant. 143. to be "a remnant of an estate in lands or tenements, existing on a particular estate, created together with the same, at the same time;" so that it waits for, and only takes effect in, possession, on the natural expiration or determination of the first estate: as if a man limits an estate to A. for life, and after his decease to be in fee, this is a remainder: it does not defeat, but it expects the natural end and expiration of the first estate limited to A. for his life; and when that event happens, not the heir, but a stranger has the advantage of it. A conditional limitation partakes of the nature both of a condition and a remainder. It is to be observed, that it was understood by the old lawyers, that whenever either the whole fee, or a particular estate, as an estate for life, or in tail, was first limited, no condition or other quality could be annexed to this prior estate to defeat it, and pass the estate to a stranger; for, as a remainder, it was void, being in abridgement or defeasance of the estate first limited; and as a condition, it was void, as no one but the donor or the heirs could take advantage of a condition broken, and the entry of the donor or his heirs unavoidably defeated the livery upon which the remainder depended. On these principles, it was impossible, by the old law, to limit, by deed, if not by will, an estate to a stranger upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the statute of uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the appellation of conditional limitations: they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as upon the contingency taking place, the estate passes to a stranger. Such is the limitation to A. for life, in tail, or in fee, provided that when C. returns from Rome it shall from thenceforth remain to the use of B. in fee. Of late, however, it has been frequently argued, that the difference between a remainder, and what is generally understood by a conditional limitation, is merely verbal. See Lucas's Rep. 423. and Mr. Douglas's note to page 727. of his Reports.—In addition to what has been mentioned in the concluding note on 202. b. respecting the principle, that when a feoffor enters for a condition broken he is in as of his former estate: it may be observed, that when a tenant for life joins with a remainder man in suffering a common recovery, it is sometimes practised as a precaution against letting

*ment un rent est reserve al feoffor, &c. et puis soit mitte, en le fait * cest parol, Quod si contingat redditum prædictum a retro fore in parte vel in toto †, quod tunc benè licebit a le feoffor et a ses heires d'entrer, &c. Ceo est un fait sur condition.*

a rent be reserved to the feoffor, &c. and afterward this word is put into the deed, that if it happen the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor & his heires to enter, &c. this is a deed upon condition.

some words of themselves do make a condition, and some other (whereof our authour here and in the next section * putteth an example) do not of themselves make a condition without a conclusion and clause of re-entrie: and manie times (si) makes a condition, and sometimes a limitation, as hereafter shall be said in this chapter.

*Inesse potest donationi modus, conditio, sive causa. * Sci to quod (ut) modus est (si) conditio (quia) causa.*

Conditio is explained before.

Modus is at this day properly taken for a modification, limitation, or qualification, for the which also the law hath appointed apt words; and because Littleton speaketh of this also in the end of this chapter, I will reserve this matter to his proper place, where the reader shall perceive excellent matter of learning touching this point.

Causa, the cause or consideration of the grant. And herein there is a diversitie betwene a gift of lands, and a gift of an annuitie or such like. For example, if a man grant an annuitie *pro una acra terræ*, in this case this word *pro* sheweth the cause of the grant, and therefore amounteth to a condition; for if the acre of land be evicted by an elder title, the annuitie shall cease, for *cessante causâ cessat effectus*.

And so if an annuitie be granted *pro decimis*, &c. if the grantee be unjustly disturbed of the tithes the annuitie ceaseth. And so it is if an annuitie be granted *pro consilio*, and the grantee refuse to give counsell, the annuitie ceaseth. So if an annuitie be granted *quod præstaret consilium*, this makes the grant conditionall.

But if *A. pro consilio impenso*, &c. make a feoffment, or a lease for life, of an acre, or *pro una acra terræ*, &c. albeit he denieth counsell, or that the acre be evicted, yet *A.* shall not re-enter, for in this case there ought to be legall words of condition or qualification, for the cause or consideration shall not avoyd the state of the feoffee; and the reason of this diversitie is, for that the state of the land is executed, and the annuitie executorial.

And yet sometime in case of lands or tenements (*causa*) shall make a condition. As if a woman give lands to a man and his heires, *causâ matrimonii prælocuti*, in this case if shee either marrie the man, or the man refuse to marrie her, she shall have the land againe to her and to her heires. [c] But of the other side, if a man give land to a woman and to her heires, *causâ matrimonii prælocuti*, though he marrie her, or the woman refuse, he shall not have the lands againe, for it stands not with the modestie of women in this kind, to aske advise of learned counsell, as the man may and ought: * and the rather for that in the case of the woman shee may averre the cause, (for the reason aforesaid) although it be not contained in the deed, yea though the feoffment be made without deed.

If a man maketh a feoffment in fee, *ad faciendum*, or *faciendo*, or *ad intentionem*, or *ad effectum*, or *ad propositum*, that the feoffee shall doe or not do such an act, none of these words make the state in the land conditionall, for in judgement of law they are no words of condition; and so was it resolved, *Hil. 18. Eliz. in Com. Banco*, in the case of a common person; but in the case of the king the said or the like words doe create a condition, and so it is in the case of a will of a common person, which case I my selfe heard and observed.

But for the avoyding of a lease for yeares, such precise words of condition are not so strictly required as in case of freehold and inheritance. [f] For if a man by deed make a lease of a manor for yeares, in which there is a clause (and the said lessee shall continually dwell upon the capitall messuage of the said manor, upon paine of forfeiture of the said terme) these words amount to a condition.

And so it is if such a clause be in such a lease, *Quod non licebit*, to the lessee, *dare*, *vendere*, *vel concedere statum*, & *sub pænâ forisfacturæ*, this amounts to make the lease for yeares defeasible, and so was it adjudged in the court of common pleas [g] in queene Elizabeth's time; and the reason of the court was, that a lease for yeares was but a contract, which may begin by word, and by word may be dissolved.

* Vid. Sect. 331.

3. H. 6. 7. Si Flet. li. 4. ca. 9. Brañ. lib. 4. fo. 213. b. (5. Rep. 9.)

* 4. Mar. Dyer 138. b.

Brañ. ubi supra.

Pro. 24. E. 3. 34. (Hob. 41. 42. 10. Rep. 42. Flo. 141. a. 7. Rep. 9. b. 10. 28. b. Ant. 141. a. 9. Rep. 50. a. Post. 237. a.) 9. E. 4. 20. 32. E. 3. Annu. 30. 14. E. 4. 15. E. 4. 2. b. 8. H. 6. 23. 5. E. 2. tit. an. 44. 41. E. 3. 19. 32. E. 1. Avowrie. 242. 21. E. 4. 49. 22. E. 4. 28. 35. H. 6. 2. 10. E. 3. 44. 5. E. 2. 9. E. 4. 20. 15. E. 4. 3.

Flet. li. 5. ca. 31. 34. Aff. 1. 40. Aff. 13.

[c] 5. E. 2. cui in vita 34. tit. Condition Br. 5. H. 4. 1.

* 12. E. 1. 1. feoffments & saits 114. F. N. B. 205. L. vid. sect. 365. Ad faciend' ca intentione &c. Dyer 138. 7. H. 4. 22. 31. H. 8. tit. condition 19. Br. Pl. Com. 142. 38. H. 6. 33. 36. 37. Doct. & Stud. li. 2. ca. 34. 27. H. 8. 18. a. 32. E. 3. Breve. 291. (1. Roll. Abr. 407. 408. 409. 410. Moore 57. 2. Leo. 33. 3. Rep. 64. 2. 10. Rep. 42. a.)

[f] 7. E. 6. Dier. 79. 28. H. 8. Dier. 27. a. Sub pænâ forisfacturæ.

Quod non licebit. 3. E. 6. Dy. 65. 66. 4. Mar. 138.

[g] Hil. 40. Eliz. Rot. 1610. inter Browne and Ayer. Vid. Pl. Com. 142. Br. and Bessone's case.

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* *cest parol* not in L. and M. nor in Roh.

† &c. added in L. and M. and in Roh.

in the incumbrances of the remainder man, to annex a condition to the estate of the bargainee or releasee, who is made tenant to the præcipe, on the non-performance of which his estate is to become void. For if *A.* be tenant for life, with remainder in tail to *B.* and *B.* executes leases, confesses judgments, or otherwise incumbers his estates; and afterwards *A.* and *B.* join in suffering a common recovery, all the incumbrances of *B.* are immediately let in upon the fee gained by the recovery; and that fee, and every estate derived out of it, are subject to them. To avoid which, *A.* the tenant for life, by lease and release, or by bargain and sale enrolled, conveys the estate to the intended tenant to the præcipe, to hold to him and his assigns during the joint lives of him and the grantor or bargainor; with a declaration, that such grant and release, or bargain and sale, is made to enable the grantee or bargainee to be tenant of the freehold in the proposed recovery; and a declaration of the uses to which it is intended the recovery shall enure. Then a proviso is inserted, that if the bargainee or releasee do not, within six months, pay the tenant for life 100,000l. or some other very large sum of money, the bargain and sale, or grant and release, shall be void; and that it shall be lawful for the bargainor or grantor to enter as in his former estate. The money is not paid at the day appointed; and thereupon the bargain and sale, or grant and release, is void, and the bargainor or grantor becomes seised of his ancient life-estate. But though the bargain and sale becomes void, yet, as at the time of suing the original writ and the præcipe the bargainee or releasee was tenant of the freehold, the subsequent cesser or determination of his estate does not impeach the recovery. For if the person against whom the præcipe is brought, be at the time when the præcipe is sued, or at any time before judgment, actual tenant of the freehold, it is immaterial what becomes of it afterwards. This doctrine has been carried so far, that where a tenant to the freehold was made by a fine, and the fine has been reversed, yet the recovery was held good. (See *Lloyd v. Evelyn*. 1 Salk. 368. and see 1. Shower's Rep. 347. Hob. 262. Noy 126. 1. Mod. 218.) The recovery therefore in this case is good; the freehold upon which it was suffered is determined; and the bargainor or grantor comes in of his original estate, and of course avoids all the leases, judgments, and other incumbrances of the tenant in tail. The reason why the conveyance is made to the bargainee or releasee during the joint lives of him and the grantor or bargainor, is to preserve his powers by leaving the reversion in him. — For sup-

posing

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*MES il est diversity perenter cest parol (si contingat, &c.) et les parols procheine avantdits. Car ceux parolx (si contingat, &c.) ne valent riens a tiel condition, sinon que il ad ceux parolx subsequents, que bien list al feoffor et a ses heires d'entrer, &c. Mes en les casés avantdits, il ne besoigne per la ley de mitter tiel clause, (scilicet) que le feoffor et ses heires poyent entrer, &c. pur ceo que ils poyent faire ceo per force des parols avantdits, pur ceo que ils impreignont * a eux mesmes en ley un condition, scilicet, que le feoffor et ses heires poyent entrer, &c. Uncore il est communement use en tous tiels casés avantdits de mitter † les clausés en les faits, scilicet, si le rent soit aderere, &c. que bien lirroit a le feoffor et a ses heires d'entrer, &c. Et ceo est bien fait, a cel intent, pur declarer et expresse a les lays gents, que ne sont apprises ‡ en la ley, ¶ de le manner et le condition de le feoffement, &c. Sicome home seisie de terre, § lessa mesme la terre a un auter per fait indent pur terme des ans, rendant a luy certain rent, il est use de mitter en le fait, que si le rent soit arere al jour de payment, ou per un semaine ou per un mois, &c. que adonque bien lirroit al lessor a distreyner, &c. ** uncore le lessor soit destreiner de common droit per le rent arere, &c. coment que tiels parols ne unque fueront misés en le fait, &c.*

BUT there is a diversitie between this word *si contingat*, &c. and the words next aforesaid, &c. for these words, *si contingat*, &c. are nought worth to such a condition, unlesse it hath these words following, That it shall be lawfull for the feoffor and his heires to enter, &c. But in the casés aforesaid, it is not necessarie by the law to put such clause, *scilicet*, that the feoffor and his heires may enter, &c. because they may doe this by force of the words aforesaid, for that they containe in themselves a condition, *scilicet*, that the feoffor and his heires may enter, &c. Yet it is commonly used in all such casés aforesaid, to put the clauses in the deeds, *scilicet*, if the rent be behind, &c. that it shall be lawfull to the feoffor and his heires to enter, &c. And this is well done, for this intent, to declare and expresse to the common people, who are not learned in the law, of the manner and condition of the feoffement, &c. As if a man seised of land letteth the same land to another by deede indented for terme of yeares, rendering to him a certaine rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a weeke or a moneth, &c. that then it shall be lawfull to the lessor to distreine, &c. yet the lessor may distreine of common right for the rent behind, &c. though such words were not put into the deed, &c.

Its

* *a—en* in L. and M. and Roh.

† *les tiels* in L. and M. and Roh.

‡ *en la — de* in L. and M. *de la* in Roh.

¶ *de la manner — le matere* in L. and M. and Roh.

§ *come de franktenement* added in L. and M. and Roh.

** *Et*

posing A. to be tenant for life, with the usual powers of leasing, jointuring, and charging; remainder to trustees to preserve contingent remainders; remainder to A.'s first and other sons in tail male; remainder to his daughters as tenants in common in tail, with cross remainders in tail between them if more than one, with remainders over; A. and his daughters may suffer a common recovery; and it will be good against A. and his daughters, and their issues in tail, and the remainders over. But the estates tail of the sons being prior to the estates of the daughters, and being supported by the estate of the trustees for preserving contingent remainders, are not, whether vested or contingent, at the time of the recovery affected by it. — But if A. granted his whole life estate to the tenant to the præcipe, it might be apprehended, that the powers relating to his estate, whether appendant or in gross, would be extinguished thereby (See *Edwards v. Slater and Hardress*, 410. *King v. Melling*, 1 Ventris 226.), and a limitation or grant of new powers would be void against the sons and the heirs male of their bodies. To prevent this question being made, A. the tenant for life, conveys an estate to the intended tenant to the præcipe, only during his (the tenant) and the grantor or bargainor's joint lives. This continues the old reversion in the grantor or bargainor, and preserves the powers relating to his original estate. — It is customary in these cases to declare, that the recovery shall enure in the first place for corroborating, strengthening, and confirming the estate for life of the grantor or bargainor, and all other estates precedent to the estate in tail meant to be destroyed, and all powers and privileges annexed to such estate for life, and other precedent estates. — The mode of suffering recoveries on a conditional estate of freehold, was in use so early as the end of the last century.

Ilz ne besoigne per la ley de mitter tiel clause, &c. Quæ dubitationis causâ tollendæ inferuntur, communem legem non lædunt. Et expressio eorum quæ tacite insunt, nihil operatur.

Per un moys, &c. Here albeit the clause of distress bee added, that if the rent be behind by the space of a weeke or a moneth, that the lessor may distraine, yet he may distraine within the weeke or moneth, because a distress is incident of common right to every rent service. And the words be in the affirmative, and therefore cannot restrain that which is incident of common right.

The other (&c.) in this section upon that which hath beene said are evident.

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*ITEM, si * feoffment soit fait + sur tiel condition, que si le feoffor paya al feoffee a certaine jour, &c. 40 li. d'argent, que adonque le feoffor soit reentrer, &c. en ceo cas le feoffee est appell tenant en morgage, que est autant a dire en Francois come mort-gage, & en Latin, mortuum vadum. Et il semble que le cause pur que il est appelle mort-gage, est, pur ceo que il estoit en averroust si le feoffor † voyt payer al jour limitee tiel somme ou non: & s'il ne paya pas, donque le terre que il mitter en gage sur condition de payment de le money, est ale de luy a tous jours, & issint mort || a luy sur condition, &c. Et s'il paya le money, donques est le gage mort quant a le tenant, &c.*

ITEM, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c. 40 pounds of money, that then the feoffor may reenter, &c. in this case the feoffee is called tenant in morgage, which is as much to say in French as mort-gage, and in Latine mortuum vadum (1.) And it seemeth that the cause why it is called mort-gage is, for that it is doubtful whether the feoffor will pay at the day limited such summe or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

Mortgage is derived [c] of two French words, *vis. mort*, that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latine *mortuum vadium*, or *morgagium*. Now it is called here *mortgage*, or *mortuum vadium*, both for the reason here expressed by Littleton, as also to distinguish it from that which is called *vadium vadium*. *Vadium autem dicitur vadium, quia nunquam moritur ex aliquâ parte quod ex suis proventibus acquiritur*. As if a man borrow a hundred pounds of another, and maketh an estate of lands unto him, untill he hath received the said summe of the issues and the profits of the land, so as in this case neither money nor land dieth, or is lost, (whereof Littleton hath spoken [d] before in this chapter) and therefore it is called *vadium vadium*. [c] Glanvil. lib. 10. cap. 68. & lib. 13. cap. 26. 27. [d] Vid. Sect. 317.

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* *asum* added in Roh. but not in L. and M. † *a sum bone* added in Roh. but not in L. and M. ‡ *2097*—
poet, in L. and M. and Roh. || *a lay sur condition, &c. Et s'il paya le money dont est le gage mort*, not in L. and M. nor Roh.

(1) Few parts of the law lead to the discussion of more extensive or useful learning than the law of mortgages. The nature of these notes neither requires nor admits more than some few general observations upon the origin of mortgages;—what constitutes a mortgage;—the different estates of the mortgagor and mortgagee, and the nature of an equity of redemption.—As to the origin of mortgages;—from what is said of them in this chapter, it appears, that they were introduced less upon the model of the Roman *pignus*, or *hypotheca*, than upon the common law doctrine of conditions. As to what constitutes a mortgage;—no particular words, or form of conveyance, are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that wherever a conveyance or assignment of an estate, is originally intended as a security for money, whether this intention appears from the deed itself, or by any other instrument, it is always considered in equity as a mortgage, and redeemable; even though there is an express agreement of the parties, that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons. See *Newcomb v. Bonham*, 1. Vern. 7. 214. 2. Ca. in Chan. 58. 159. *Howard v. Harris*, 1. Vern. 33. 190. 2. Ca. in Chan. 147. *Talbot v. Braddyl*, 1. Vern. 183. 394. *Barrel v. Sabine*, 1. Vern. 268. *Manlove v. Bell*, 2. Vern. 84. *Jennings v. Ward*, *ibid.* 520. *Price v. Perrie*, 2. Freeman 258. *Franchlyn v. Fern*, *Barnard. Cha.* 30. *Clinch v. Wetherby*, *Cal. temp. Finch*, 376. *Cooke v. Cooke*, 2. Atk. 67. *Mellor v. Lees*, 2. Atk. 494. *Cottrell v. Purchase*, *Cal. temp. Talbot*, 61. As to the nature of the estates of the mortgagor and mortgagee, it was not, till lately, accurately settled. It was formerly contended, that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back to his own possession, by payment of the money. It is now established, that the mortgagor has an actual estate in equity, which may be devised, granted, and entailed; that the entails of it may be barred by fine and recovery; but that he only holds the possession of the land, and receives the rents of it, by the will or permission of the mortgagee, who may by ejectment, without giving any notice, recover against him or his tenant. In this respect the estate of a mortgagee is inferior to that of a tenant at will. In equity, the mortgagee is considered as holding the lands only as a pledge or security for payment of his money. Hence a mortgage in fee is considered only as personal estate in equity, though the legal estate vests in the heir in point of law. Hence also a mortgagee, though in possession, will, in case of a living vacant, be compelled in equity to present the nominee of the mortgagor to it,—even though nothing but the advowson is mortgaged to him. On the same principle there is a *possessio fratris*; and tenancy by the curtesy, of an equity of redemption. *Casborne v. Scarfe*, 1. Atk. 603. *Keeche v. Narne*, *Doug.*

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*ITEM, sicome home poit faire feoffment en fee en mortgage, * issint home poit faire done en taile en mortgage, & un leas pur terme de vie, ou pur terme des ans en mortgage. † Et tous tiels tenants sont appels tenants en mortgage, solonque les estates que ils ont en la terre, &c.*

A L S O, as a man may make a feoffment in fee in mortgage, so a man may make a gift in taile in mortgage, and a lease for terme of life, or for terme of yeares in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c.

This section upon that which hath beene said needeth no further explication.

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27. H. 8. 19. b.

Lib. 8. fol. 91. Frances' case.
(1. Roll. 426.)

(Post. 219. b.)

QUE le feoffor payera a tiel jour, &c.

Albeit conditions bee not favoured, yet they are not alwayes taken literally, but in this case the law enableth the heire that was not named to performe the condition for foure causes. (1)

First, Because there is a day limited, so as the heire commeth within the time limited by the condition, for otherwise he could not doe it, as shall be said hereafter in this chapter.

Secondly, For that the condition descends unto the heire, and therefore the law that giveth him an interest in the condition, giveth him an abilitie to performe it.

Thirdly, For that the feoffee doth receive no damage or prejudice therby (all these reasons are expressely to be collected out of the words of Littleton). And these things being observed,

Fourthly, The intent and true meaning of the condition shall be performed. And where it is here said, that the heire may tender a *jour assesse*, &c. herein is implied, that

ITEM, si feoffment soit fait en mortgage sur condition, que le feoffor payera tiel somme a tiel jour, &c. come est ‡ enter eux per leur fait endent accorde & limit, coment que le feoffor morust devant le jour de payment, &c. uncore si le heire || le feoffor paya mesme le somme § de money a mesme le jour a le feoffee, ou tender a luy les deniers, et le feoffee ceo refusa de recevoir, donque poit l'heire entrer en le terre; et uncore le condition est, que si le feoffour payera tiel somme a tiel jour, &c. nient feasant mention en le condition

A L S O, if a feoffment be made in mortgage upon condition, that the feoffor shall pay such a summe at such a day, &c. as is betweene them by their deed indented agreed and limited, although the feoffor dyeth before the day of payment, &c. yet if the heire of the feoffor pay the same summe of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heire enter into the land; and yet the condition is, that if the feoffor shall pay such a summe at such a day, &c. not making men-
d'ascun

* *issint home poit faire done en taile en mortgage*, not in L. and M. or Roh.

† *enter—perenter*, L. and M. and Roh.
M. nor Roh.

‡ *de* added in L. and M. and Roh.

† *Et* not in L. and M. nor Roh.

§ *de money* not in L. and

Doug. 21. Mofs v. Gallimore, *ibid.* 266. Amherst v. Dawling, 2. Vern. 401. Gally v. Selby, Stran. 403. Gardner v. Griffith, 2. P. Will. 404. Mackenzie v. Robinson, 2. Atk. 559. — In this light the legislature has viewed the different estates of mortgagor and mortgagee in the statutes of the 7th of Will. and M. c. 25. and 9. Ann. c. 5. — As to the nature of an equity of redemption: — originally there was no right of redemption in the mortgagor. Lord Hale, in the case of Rose Carrick v. Barton, 1. Chan. Ca. 219. says, that in the 14th year of Richard II. the parliament would not admit of redemption. See the printed Rolls, vol. 3. p. 259. It was, however, admitted not long after. But after its admission, if the money was not paid at the time appointed, the estate became liable, in the hands of the mortgagee, to his legal charges, to the dower of his wife, and to escheat; and it was an opinion, that there was no redemption against those who came in by the post. This introduced mortgages for long terms of years. These are attended with this particular advantage, that on the death of the mortgagee, the term and the right in equity to receive the mortgage debt vest in the same person: whereas, in cases of mortgages in fee, the estate, on the death of the mortgagee, goes to his heir, or devisee, and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconvenience, both to the mortgagor and mortgagee. On the other hand, in case of mortgages for years, there is this defect, that if the estate is foreclosed, the mortgagee will be only intitled for his term. — To guard against which, it has been thought advisable to make the mortgagor covenant, that, on nonpayment of the money, he will not only confirm the term, but convey the freehold and inheritance to the mortgagee, or as he shall appoint, discharged of all equity of redemption. The difference between a trust and an equity of redemption, is observed by lord Hale in the case of Powlett and the Attorney-general, Hard. 465.

(1) *V. T. 15. Jac.* After covenant to stand seized to the use of B. and his heirs, with proviso of revocation on payment to B. and his assigns; B. dies; he may tender to the heir, and revoke. *Allen's case*, Ley. 55. b. Hal. MSS.

*d'ascun payment d'estre fait per son heire, mes pur ceo que le heire ad interesse de droit en le condition, &c. et l'entent fuit forsque que les deniers serront paies al jour assesse, &c. & le feoffee n'ad plus damage, si il soit pay per l'heire, que s'il fuit pay per le pier, &c. et pur cest cause, si le heire paya les deniers, ou tendra les deniers a le jour assesse, &c. et l'auter ceo refusa, il poet entrer, &c. Mes si un estranger de sa teste demesne, que n'ad ascun interesse, &c. voile tender les * avantdits deniers al feoffee a le jour assesse, le feoffee n'est † pas tenu de ceo recevoir.*

tion in the condition of any payment to be made by his heire, but for that the heire hath interest of right in the condition, &c. and the intent was but that the mony should be payed at the day assessed, &c. and the feoffee hath no more losse, if it be paid by the heir, then if it were paid by the father, &c. therefore if the heire pay the money or tender the money at the day limited, &c. and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c. will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

keth a feoffment in fee upon condition, that the feoffor shall within one yeare goe to the cite of Paris about the affaires of the feoffee, and presently after the feoffor dyeth, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a precedency before the re-entry, viz. the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by Littleton, that it must not be to the damage of the feoffee; and so it is if the feoffor shall appear in such a court the next tearme, and before the day the feoffor dyeth, the estate of the feoffee is absolute. [b] But if a man be bound by recognizance or bond with condition that he shall appear the next tearme in such a court, and before the day the conferee or obligor dyeth, the recognizance or obligation is saved; and the reason of the diversitie is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back againe but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken untill there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the time of the making of the condition, the obligation, &c. is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute; but if the condition precedent be impossible, no state

the executors or administrators of the mortgageor, or in default of them the ordinary may also tender, as shall be said [f] hereafter in this chapter. But what if the condition had beene, if the mortgageor or his heires did pay, &c. and hee dyed before the day without heire, so as the condition became impossible, here it is to be observed, that where the condition becometh impossible to be performed by the act of God, as by death, &c. the state of the feoffee shall not be avoyded, as shall be said hereafter in this chapter. And therefore the law here inablen the heire (of whom no mention was made in the condition) to performe the condition, least the inheritance should be lost, wherein divers diversities are worthy of observation. (1)

First, betweene a condition annexed to a state in lands or tenements upon a feoffment, gift in taile, &c. and a condition of an obligation, recognizance, or such like. [g] For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c. shall not be avoyded. As if a man ma-

[f] Vid. Sect. 337.

[g] Pl. Com. 456. Wrothe's case, 14 H. 7. 3. 15. H. 7. 1. 14. E. 4. 3. 38. H. 6. 2. 3]

[h] 15. H. 7. 18. 31. H. 6. barre 60. 18. E. 4. 17. 9. Eliz. 262. Dyer lib. 5. 23. Laughter's case, 38. H. 6. 2.

Fleta lib. 4. cap. 9. & Bracton & Britton ubi supra.

* avantdits not in L. and M. but in Roh.

† pas not in L. and M. but in Roh.

(1) Lord Coke here considers the effect of impossible conditions. 1st. Where they are possible at the time of their creation, but afterwards become impossible; and he distinguishes that impossibility which is produced by the act of God, and that which is produced by the act of the party. 2dly. When they are impossible at the time of their creation. 3dly. When they are against law, either as mala prohibita, or mala in se.—4thly. When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. It should be observed, that a condition is then only considered in the eye of the law as impossible at the time of the creation, if it cannot by any means take effect. Such is the case put by lord Coke, that the obligee shall go from the church of St. Peter at Westminster to the church of St. Peter at Rome, within three hours. But if it only be in an high degree improbable, and such as is beyond the power of the obligee to effect, it is not then considered as impossible. See the cases of this nature in 1. Roll. Abr. 419. 420.—It is said, that if the condition of a bond be to pay a certain sum, or to do any other act, out of his Majesty's dominions, the condition is void, and the bond is single, because the performance of it cannot be tried. See 21. Edw. 4. 10.—It was upon a similar principle, that if a man professed himself a monk in a religious house beyond seas, it was no disability, because the fact could not be tried. For the only method which the law had to know if a man was professed, was to issue a writ in the king's name to the bishop of the diocese, commanding him to certify if such a monk was professed in such a house in such a place within his diocese. But this method could not be used with respect to foreign professions, as the bishop was not bound to obey the king's writ, and might certify either true or false, without subjecting himself to punishment. For this reason no notice was taken in our law of foreign profession.—Thus L. Rolle, 2. Abr. 43. says, "If an Englishman goes into France, and there becomes a monk, he is, notwithstanding, capable of a grant in England; for that such profession is not triable; and also, for that all profession is taken away by the statute; and, by our religion, now received, such vows and profession are held void. I have heard," continues he, "that this was in 44. Eliz. in one Ley's case, resolved accordingly by all the justices in Chancery-lane."

(1. Leo. 229. 1. Roll. Abr. 420. Cro. El. 291. 864.)
 14. H. 8. 28. 10. H. 7. 22. 4. H. 7. 4. 8. E. 4. 1. 28. H. 8. 25. lib. 5. fo. 22. Laughter's case. & 75. 39. H. 3. 5. 17. H. 6. Obligation. 18. 5. El. Dier 222.

* Pl. Com. Fuller's case, 279.
 (1. Roll. Abr. 418. Poll. 217. b. 218.)

25. H. 6. tit. barre 262. 17. H. 6. barre 60. 2. E. 2. 9. 9. Eliz. Dyer 262. 28. H. 8. 30.
 (8th Rep. 83. a. 92. a. Hob. 24.)

[i] 4. H. 7. 4. 30. H. 8. Dyer 42. 11. H. 4. 57. in protection. 10. H. 7. 18.
 (Doc. Pla. 230.)

[k] Vid. Bracon, Britton, Fleta ubi supra.

Bracton lib. 3. fol. 100. 2. H. 4. 9. 8. E. 4. 12. b. 2. E. 4. 2. & 3. 4. H. 7. 4. b. 10. H. 7. 22. 14. H. 8. 28. 43. E. 3. 6. 13. (1. Roll. Abr. 418. Flo. 64. b.)
 2. H. 4. 9.
 (2. Ven. 109.)

(Pl. Com. Browning's case 133.)

Poll. Sect. 360. 10. Rep. 38. Hob. 170. 1. Roll. Abr. 419.)

7. H. 6. 43. b. 21. H. 6. 32. 21. H. 7. 11. 21. H. 7. 30. 20. E. 4. 8.
 (Moore 810. Poll. 225.)
 Pl. Com. in Browning's case 133. a. 27. H. 8.

Vide sect. 325.
 (5. Rep. 114.)

Vide sect. 401. Hill. 28. Eliz. in Banco Regis inter Watkins & Atwick pro tenetis in Com. Devon. 45. E. 3. tit. Release 28. 32. E. 1. tit. Annuity 51. 33. H. 6. 13.
 (1. Leo. 34. Moore 222. Poll. 225. b. 225. a.)

36. H. 6. tit. barre 166. 33. E. 1. tit. Annuity 51. 33. E. 3. judgement. 254.

state or interest shall grow thereupon. And to illustrate these by examples you shall understand. If a man be bound in an obligation, &c. with condition that if the obligor doe goe from the church of *St. Peter in Westminster* to the church of *St. Peter in Rome* within three hours, that then the obligation shall be voyd. The condition is voyde and impossible, and the obligation standeth good.

And so it is if a feoffment be made upon condition that the feoffee shall goe as is aforesaid, the state of the feoffee is absolute, and the condition impossible and voyde.

* If a man make a lease for life upon condition that if the lessee goe to Rome, as is aforesaid, that then he shall have a fee, the condition precedent is impossible and voyde, and therefore no fee simple can grow to the lessee.

If a man make a feoffment in fee upon condition that the feoffee shall re-entfeoff him before such a day, and before the day the feoffor disseite the feoffee and hold him out by force untill the day be past, the state of the feoffee is absolute, for "the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. [i]" And so it is if *A.* be bound to *B.* that *I. S.* shall marry *Jane G.* before such a day, and before the day *B.* marry with *Jane*, he shall never take advantage of the bond, for that he himselfe is the meane that the condition could not be performed. And this is regularly true in all cases.

But it is commonly holden [k] that if the condition of a bond, &c. be against law, that the bond itselfe is voyd.

But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law (that concerneth not any thing that is *malum in se*) but therefore is against law, because it is either repugnant to the state, or against some maxime or rule in law. And therefore the common opinion is to bee understood of conditions against law for the doing of some act that is *malum in se*, and yet therein alse the law distinguisheth. As if a man be bound upon condition that he shall kill *I. S.* the bond is voyde.

But if a man make a feoffment upon condition that the feoffee shall kill *I. S.* the estate is absolute, and the condition voyd.

If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute (whereof more shall bee said in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heires shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himselfe hath made.

So it is if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the state is absolute.

But a bond with a condition that the feoffee shall not take the profits is good. If a man be bound with a condition to entfeoff his wife, the condition is voyde and against law, because it is against the maxime in law, and yet the bond is good; but if he be bound to pay his wife money, that is good. *Et sic de similibus*, whereof there bee plentifull authorities in our bookes (1).

Tender les deniers al jour assesse, &c. Note, hereby is implied, that albeit a convenient time before sun set be the last time given to the feoffor to tender, yet if he tender it to the person of the mortgagee at any time of the day of payment, and hee refuseth it, the condition is saved for that time.

Il poet enter, &c. And so may his heire after his death.

Mes si estranger de sa teste demefne, que n'ad ascun interesse, &c. voile tender les avantdits deniers al feoffee al jour assesse, le feoffee n'est pas tenu de ceo receiver. Note, by this period and the (*&c.*) it is implied, that if the mortgager dye, his heire within age of 14 yeares (the land being holden in focage), the next of kinne to whom the land cannot descend being his gardian in focage may tender in the name of the heir, because he hath an interest as gardian in focage. Also if the heire be within age of 21 yeares, and the land is holden by knights service, the lord of whom the land is holden may make the tender for his interest which hee shall have when the condition is performed, for these in respect of their interest are not accounted estrangers.

But if the heire be an idiot, of what age soever, any mar may make the tender for him in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases.

Le feoffee n'est pas tenu de ceo receiver. And note that *Littleton* saith, that hee is not bound to receive it at a stranger's hand. But if any stranger in the name of

(1) It is observed in 1. P. W. 189, that "all instances of conditions against law, in a legal sense, are reducible under one of these three heads; either, to do *malum in se*, or *malum prohibitum*; 2dly, to omit the doing of something that is a duty; 3dly, to encourage such crimes and omissions. And such conditions as these, the law will always, and without any regard to circumstances, defeat." It is not within the plan of these notes to enumerate, or discuss, the various instances in which the conditions of bonds have been held unlawful at law, or in equity. Those which chiefly deserve consideration are such as relate to, 1st, Bonds given for procuring marriages, or what is usually called marriage brokerage. See *Hall v. Potten*, 3. Levinz. 411. *Shower's Par. Cas.* 76. *Brown's Par. Cas.* 60. *Scribblehill v. Brett*, *Brown's Par. Cas.* 57. *Heat v. Allen*, 2. Vern. 533. *Cole v. Gibson*, 1. Vez. 503. 2dly, Bonds restraining the obligor from a free exercise of a trade. Here, if the restraint be qualified, so as only to take in a particular place, and the breach of the condition tends apparently to the detriment of the obligee, and a consideration is given by the obligee to the obligor for executing the bond, the condition will not be impeached either at law or in equity. See 1. P. W. 190. 191. 10th Mod. 133. 3dly, Bonds of resignation. The validity of these bonds, and the propriety of their being supported, considered as a matter of policy, was most elaborately and ably discussed in the great cause of the bishop of London and Fytche, heard on appeal in the House of Lords in May 1783. A state of this case, and of the arguments and speeches of the lords, prelates, and judges who spoke when it was heard before the Lords, is to be found in Mr. Cunningham's Law of Simony. —It seems to be settled, that if a bond is given with a condition to do several things, and only some of them are against law, the bond shall be good as to the doing the things agreeable to law, and only void as to those which are against law. *Norton v. Sims*, Hob. 14. *Mosdell v. Middleton* 237. *Pearson v. Humes*, 229. *Chefman v. Nainby*, lord Raymond 145.

of the mortgageor or his heire (without his consent or privity) tender the money, and the mortgagee accepteth it, this is a good satisfaction, and the mortgageor or his heire agreeing thereunto may re-enter into the land. *omnis ratibabitio retrò trahitur & mandato æquiparatur.* But the mortgageor or his heire may disagree thereunto if he will. (Ant. 186. b. Post. 245. a. 258. a.)

Sect. 335.

ET memorandum que en tiel cas, l'ou tiel tender de le money est fait, &c. Et le feoffee de recevoir ceo refusa, per que le feoffor ou ses heires entront, &c. donque le feoffee n'ad aucun remedy d'aver le money per le common ley, pur ceo que il serra rette sa follie que il refusa le money quant un loyal tendre de ceo fuit fait a luy.

AND be it remembered that in such case, where such tender of the money is made, &c. and the feoffee refuse to receive it, by which the feoffor or his heires enter, &c. then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his owne folly that he refused the money, when a lawful tender of it was made unto him. (1)

TENDER de le money est fait, &c.

Here is implied at the due time and place according to the condition.

Entront, &c. viz.

into the lands or tenements.

Donque le feoffee n'ad aucun remedy d'aver le money per le common ley, &c.

And the reason is, because the money is collateral to the land, and the feoffee hath no remedy therefore.

If an obligation of an hundred pound be made with condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuse the same, yet in action of debt upon the obligation

8. E. 2. tit. Aff. 389. 31. Aff. 32.

(2. Roll. Abr. 523. 524. Sid. 13. 364. 365.)

22. H. 6. 39. 21. E. 4. 25.

22. E. 3. 5.

Lib. 9. fo. 79. H. Pevtoe's case. (2. Roll. Abr. 523. Dyer 24. b. 25. a. cont.)

8. E. 2. tit. Aff. 389.

(2. Saun. 48.)

7. H. 4. 18. 5. Mar. Dier. 150.

21. E. 4. 25. 22. E. 3. 5. 33. H. 6.

2. b. 17. Aff. pl. 2. 20. E. 4. 1.

b. 9. H. 6. 16. 36. H. 6. 26. 15.

E. 4. 1. 16. H. 7. 13. 18. E. 3. 53.

7. E. 4. 4. b. 19. H. 8. 12.

27. H. 8. 1. a.

22. H. 6. 39. tit. Abatement 11.

49. E. 3. 3. 19. H. 6. 12.

[e] Henry Pevtoe's case, ubi supra.

31. Aff. 25. 11. H. 4. 33. 1. H. 6.

8. 1. E. 4. 17. E. 4. 3. Pl. Com.

Fogasse's case, fo. 6.

(Moore 36. 37. Post. 236. b.)

if the defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money, and tender the same in court. But if the plaintiff will not then receive it, but take issue upon the tender, and the same be found against him, he hath lost the money for ever.

If a man be bound in 200 quarters of wheat for deliverie of a 100 quarters, if the obligor tender at the day the 100 quarters, &c. he shall not plead *uncore priff*, because albeit it be the parcell of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them. And the reason wherefore in the case of the obligation the summe mentioned in the condition is not lost by the tender and refusal, is not only for that it is a duty and parcel of the obligation, and therefore is not lost by the tender and refusal, but also for that the obligee hath remedy by law for the same. And in this case, *liberata pecunia non liberat offerentem*.

But if a man make a single bond, or knowledge a statute or recognizance, and afterwards made a defeasance for the payment of a lesser sum at a day, if the obligor or consor tender the lesser summe at the day, and the obligee or consor refuse it, he shall never have any remedy by law to recover it, because it is no parcell of the sum contained in the obligation, statute or recognizance, being contained in the defeasance made at the time or after the obligation, statute, or recognizance. And in this case in pleading of the tender and refusal the partie shall not be driven to plead, that he is yet ready to pay the same or to tender it in court: neither hath the obligee or consor any remedy by law to recover the summe contained in the defeasance. [e] And so it is if a man make an obligation of 100 pound with condition for the deliverie of corne or timber, &c. or for the performance of an arbitrement, or the doing of any act, &c. This is collateral to the obligation, that is to say, is not parcell of it, and therefore a tender and refusal is a perpetuall barre (2).

But if a man be bound to make a feoffment in fee to the obligee, and he make a lease and a release to him and his heires, albeit this be a collateral condition, yet is it well performed, because this amounts in law to a feoffment (3).

Money, moneta, legalis moneta Angliæ, lawfull money of England, either in gold or silver, is of two sorts, *viz.* the English money coyned by the king's authority,

Lib. 5. fo. 114. 115.

Wade's case, lib. 9. fo. 78.

(1) Here the performance of the condition is excused by the default of the feoffee or obligee, *viz.* by tender and refusal. It is also excused, 1. By his absence in those cases where his presence is necessary for the performance of the condition. 2. By his obstructing or preventing the performance. And 3. By his neglecting to do the first act, if it is incumbent on him to perform it. See the cases in 1. Roll. Abr. 457. 458. It is also excused, in some cases, by his not giving notice to the feoffee or obligee. See 1. Roll. Abr. 463. 467. 468.

(2) In the 10th, 11th, and 12th editions, there is in the margin a reference to 3. Cro. 755.; but there is no such page in that volume of Croke. Most probably it is misprinted for 1. Cro. 755. Cotton v. Clifton, where it was held, "that where an obligation is made, and afterwards a defeasance is made thereof, if he pays a less sum; there, if he pleads the defeasance and the tender of the lesser sum, he need not to say *tout temps priff*; for, by the tender, he was discharged of all: but otherwise it is of an obligation with a condition to pay a lesser sum."

(3) None of the authorities in the margin go to this point. In Plo. 156. it is laid down that a lease and release may be pleaded as a feoffment; and 1. Finch. 48. and 2. Finch. 68. it is said that a lease and release amounts to a feoffment. But this must be understood with some qualifications, as the operation of a feoffment is, in some instances, much more forcible, and of course may be much more beneficial to the person entitled to the benefit of the condition, than the operation of a lease and release. The nature of a feoffment will be fully considered in one of the notes to the chapter of Releases.

(5. Rep. 114. Wade's case 2 Inf. 379. 742. 3. Inf. 93.)

Aristotle, lib. 5. cap. 8.
(Cro. Car. 89. Trover and Conversion lies for money out of a bag.)
(*) 2. H. 5. stat. 2. cap. 7.
(Cro. El. 841.)

authority, or forraïne coyne by proclamation made currant within the realme. *Coyne, cuna dicitur à cudendo*, of coyning of money. In French, *coine* signifieth a corner, because in ancient time money was square with corners, as it is in some countries at this day. Some say that *coine dicitur à coire, id est communis, quod fit omnibus rebus communis. Moneta dicitur à monendo*, not only because he that hath it, is to be warned providently to use it, but also because *nota illa de auctore & valore admonet. Pecunia dicitur à pecu*, beasts, *omnes enim veterum divitiæ in animalibus consistebant*; and it appeareth that in Homer's time, there was no money but exchange of cattell, &c. (1)

Nummus, a quo nomen, quia lege fit non natura. Vide the statute of 9. H. 5. of the noble, halfe noble, and farthing of gold, which is the fourth part of a noble, and that is twenty pence.

Sect. 336.

12. E. 3. Condic. 8. 13. Ed. 3.
ibid. 10. 12. Aff. 5.
Flo. 461.

ET s'il faile de
pair les de-
niers, &c.

If a man make a feoffment of lands, to have and to hold to him and his heires, upon condition, that if the feoffee pay to the feoffor at such a day twenty pounds, that then the feoffee shall have the lands to him and his heires, if the condition had not proceeded further, it had been void, for that the feoffee had a fee simple by the first words, and therefore the words subsequent are materially added, (and if he faile to pay the money, &c.)

(5. Rep. 117.)

Li. 5. fo. 96. 97. Goodale's case.

**Le second feof-
fee voile tender
le summe des de-
niers, &c.**

Albeit the second feoffee bee not named in the condition, yet shall hee tender the summe because he is privie in estate, and in judgment of law hath an estate and interest in the condition, (as *Littleton* here saith) for the salvation of his tenancy. *Vid. Sect. 334.* And note, he that hath interest in the condition on the one side, or in the land on the other, may tender.

(8. Rep. 45. b.)

(a. Cro. 9. 245.)

Li. 5. fo. 114. 115. Wade's case

And it is to bee ob-

ITEM si feoffment
soit fait sur tiel
condition, que si le
feoffee paya al feof-
for a tiel jour inter eux
limit xxl.* adonques le
feoffee avera la terre
a luy et a ses beires; et
s'il faile de payer les de-
niers a le jour + assesse,
† que adonque bien list a
le feoffor ou a ses beires
d'entrer, &c. et puis
devant le jour assesse,
le feoffee verra la
terre a un auter, et
de ceo fait feoffment a
luy, en c'est case si le se-
cond feoffee voile ten-
der le summe de les de-
niers a le jour assesse a
le feoffor, et le feoffor
ceo refusa, &c. donque
le second feoffee ad
estate en la terre clere-
ment sans condition.
Et la cause est, pur ceo
que le second feoffee a-
voit interest en le condi-
tion pur salvation de ||
son tenancie. Et en
cest case il semble que si
le primer feoffee apres
tiel vender de la terre,
voile tender le money a

ALSO if a feoffment
be made on this con-
dition, that if the feof-
fee pay to the feoffor at
such a day between them
limited, twenty pounds,
then the feoffee shall have
the land to him and to
his heires; and if he faile
to pay the money at the
day appointed, that then
it shall be lawfull for the
feoffor or his heires to
enter, &c. and after-
wards before the day
appointed the feoffee sel
the land to another, and
of this maketh a feoffe-
ment to him, in this case
if the second feoffee wil
tender the sum of money
at the day appointed to
the feoffor, and the feof-
for refuseth the same, &c.
then the second feoffee
hath an estate in the land
cleerely without condi-
tion. And the reason is,
for that the second feof-
fee hath an interest in the
condition for the safeguard
of his tenancy. And in this
case it seemes that if the
first feoffee after such sale
of the land, will tender the

le

* que added in L. and M. and Roh. L. and M. and Roh.

† assesse—&c. L. and M.

‡ que added in Roh. but not in L. and M.

|| son—ie

(1) See the account given in *Bla. Com.* vol. I. ch. 7. of his majesty's prerogative respecting the coin of the kingdom; and see 5. Mod. 7. 2. Sal. 446. For the etymology of the word *Sterling*, see *Du Cange* and *Spelman's Glossaries*, under the word *Esterlingus*; and *Mr. Leake's Historical Account of English Money*, page 20. *Guineas* took their name from the gold brought from *Guinea* by the *African Company*, who, as an encouragement to bring over gold to be coined, were permitted, by their charter, to have their stamp of an elephant upon the coin made of the *African gold*.—By a proclamation of the 22d of December, 1717, the *guinea*, which till then had been current for 21 shillings and sixpence, was reduced to 20 shillings, and half-guineas, double-guineas, and five pound pieces in proportion.

(2) See note 1. fol. 216.

(3) And if at the time of the feoffment a purer or more weighty money were current, and before the day of payment coin of a baser alloy is established by proclamation, a tender of the sum in that coin is good. *Dav. Rep.* 18. Note to the 11th edition.

le jour assesse, &c. a le feoffor, ceo serra assets bone pur salvation d'estate de le second feoffee, pur ceo que le primer feoffee fuit privie a le condition, et issint le tender de ascun de eux deux est assets bone, &c.

or telling the same, for he doth that which he ought, viz. to bring the money in purses or bagges, which is the usuall manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it.

A primer feoffee. Here it appeareth, that the first feoffee may, notwithstanding his feoffment, pay the money to the feoffor, because he is partie and privie to the condition, and by his tender may save the estate of his feoffee, which in all good dealing he ought to doe.

money at the day appointed, &c. to the feoffor, this shall be good enough for the safeguard of the estate of the second feoffee, because the first feoffee was privie to the condition, and so the tender of either of them two is good enough, &c. (1)

served also, that the feoffee may tender any money that is currant within the realme, albeit it be forreine coine, so as it be currant by act of parliament, or by the king's proclamation, as hath beene said.

Tender le summe.

The feoffee may tender the money in purses or bagges, without shewing the money in purses or bagges, without shewing

Sect. 337.

ITEM si feoffement soit fait sur condition, Que si le feoffor paya certaine summe d'argent al feoffee, adonques bien virroit a feoffor et a ses heires d'entrer: en cest case si le feoffor devie devant le payment fait, et l'heire voile tender al feoffee les deniers, tiel tender est voyd, pur ceo que le temps deins quel ceo doit estre fait est passe. Car quaut le condition est, que si le feoffor paya les deniers al feoffee, &c. ceo est tant a dire, que si le feoffor durant sa vie paya les deniers al feoffee, &c. et quant le feoffor morust, don-*

ALSO if a feoffment be made upon condition, that if the feoffor pay a certaine summe of money to the feoffee, then it shal be lawfull to the feoffor and his heires to enter: in this case if the feoffor die before the payment made, and the heire wil tender to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c. and when the feof-

THIS diversitie is plaine and evident, and agreeth with our (a) books, and yet somewhat shal be observed hereupon: for here it appeareth, that seeing no time is limited, the law doth appoint the time, and that is, during the life of the feoffor. Wherein divers diversities are worthy the observation:

First, Betweene this case that *Littleton* here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a bond for the payment of a summe of money where no time is limited: for in such a condition of a bond the money is to be paid presently, that is, in convenient time. (b) And yet in case of a condition of a bond there is a diversitie betweene a condition of an obligation, which concernes the doing of a transitorie act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in convenient time; and when by the condition of the obligation the act that is to be done

(a) 14. H. 7. 31. 15. H. 7. 1. (Ant. 47. Post. 219. a. 2. Cro. 244.)

(2. Co. 70.)

44. E. 3. 9. 33. H. 6. 43. & 48. b. 4. E. 4. 29. 9. E. 4. 22. 15. E. 4. 30. 21. E. 4. 38. b. 9. H. 7. 17. b. 10. H. 7. 15. 14. H. 8. 21. a. & 23. b.

(b) Lib. 6. fol. 30. 31. Boothie's case. 33. H. 6. 47. 48.

(1. Roll. Abr. 436.)

* &c. added L. and M. and Roh.

(1) In the same manner equity permits all persons to redeem, who have any estate or interest in the equity of redemption of the mortgagor; as tenant for life, remainder-man or reversioner, jointress, tenant by the curtesy, by elegit, statute merchant, or staple, &c. All these may redeem; and volunteers are equally admitted to redeem, as purchasers for a valuable consideration. *Howard v. Harris*, 1 Vern. 193. 2. Eq. Cas. Abr. 594. The tenant for life and jointress contribute, in the proportion of one-third, towards the redemption of the mortgage debt; the remainder-man or reversioner in the first case, and the owner of the fee in the other, contribute the other two-thirds. But the remainder-man or owner of the inheritance must come in to redeem in the life of the tenant for life, or jointress; for he cannot after their decease compel a contribution from their assets. 1. P. Williams 650. *Cornish v. Mew*, 1. Cha. Ca. 271. *Prece. Cha. 62. Howel v. Price*, 424. —In what cases the doweress will be permitted to redeem, is a question which involves in it many points of great nicety. The law requires a legal seisin in the husband; and it is a settled point, that the wife cannot be endowed of a trust estate. Upon this principle, it was generally understood that the wife was not intitled to her dower out of an estate, which, at the time of her marriage, was subject to a mortgage in fee. But this, perhaps, was never formally determined, till the case of *Dixon v. Onslow*, decreed by lord Loughborough, and the other lords commissioners, on the 13th of November 1783, against the wife, without hearing the counsel for the heir. But the case is different with respect to mortgages for terms of years. It may be observed here, 1st. that at common law, if a lease be made for a term of years rendering rent, the wife is intitled to her dower of a third part of the reversion by metes and bounds, and to a third part of the rent; and execution will not cease during the term. 2dly. If the husband makes a gift in tail, as the rent is payable out of, or in respect of, an estate of inheritance, the wife will be endowed of a third part of the rent. 3dly. If the husband makes a lease for life, rendering rent, the wife is not intitled to her dower of the rent, because it is not payable, in this case, out of, or in respect of, an

(6. Rep. 31. Boothie's case.
Post. 210. b.)

3

(2. Roll. Abr. 436. 437.)

(*) Boothie's case, ubi supra.
(Doc. Pla. 269. 457.)

4

5

(Vide ant. sect. 324.)
Boothie's case. li. 6. fo. 31. lib. 2.
fo. 79. b. Seignior Cromwell's
case. 44. E. 2. 9. 21. E. 4. 41.
2. E. 4. 3. 4. 19. H. 6. 67. 73.
76. 4. E. 4. 4. b. 26. H. 8. 9. b.
(2. Rep. 59. 219. b.)

6

(Vide post. sect. 352. 353. 354.)

7

24. E. 3. Det. 138. li. 2. fo. 80.
Seignior Cromwell's case.

(*) Vid. Dyer. 14. El. 511.
(6 Rep. Boothie's case)

8

done to the obligee is of his owne nature locall, for there the obligor (no time being limited) hath time during his life, to performe it, as to make a feoffment, &c. if the obligee doth not hasten the same by request. In case where the condition of the obligation is locall, there is also a diversitie, when the concurrence of the obligor and the obligee is requisite, (as in the said case of the feoffment) and when the obligor may performe it in the absence of the obligee, as to knowledge satisfaction in the court of Kings Bench, (*) although the knowledge of satisfaction is locall, yet because he may doe it in the absence of the obligee, he must doe it in convenient time, and hath not time during his life.

Another diversitie is, where the condition concerneth a transitory or locall act, and is to be performed to the feoffee or obligee, and where it is to be performed to a stranger: as if A. be bound to B. to pay ten pounds to C. A. tender to C. and he refuseth, the bond is forfeited, as in this feoffment shall bee said more at large.

Another diversitie is betweene a condition of an obligation, and a condition upon a feoffment, where the act that is locall is to be done to a stranger, and where to the obligee or feoffor himselfe. As if one make a feoffment in fee, upon condition that the feoffee shall infeoffe a stranger, and no time limited, the feoffee shall not have time during his life to make the feoffment, for then he should take the profits in the meane time to his owne use, which the estranger ought to have, and therefore hee ought to make the feoffment as soone as conveniently he may, and so it is of the condition of an obligation. But if the condition be, that the feoffee shall re-infeoffe the feoffor, there the feoffee hath time during his life, for the privitie of the condition between them, unlesse he be hastened by request, as shall bee said hereafter.

Another diversitie is, when the obligor or feoffee is to infeoffe a stranger, as hath been said, and when a stranger is to infeoffe the feoffee or obligee: as if A. infeoffe B. of Black Acre, upon condition that if C. infeoffe B. of White Acre A. shall re-enter, C. hath time during his life, if B. doth not hasten it by request, and so of an obligation.

But in some cases albeit the condition be collateral, and is to be performed to the obligee, and no time limited, yet in respect of the nature of the thing, the obligor shall not have time during his life to performe it. As if the condition of an obligation bee, to grant an annuities or yeerely rent to the obligee during his life, payable yeerely at the feast of Easter, this annuity or yeerely rent must be granted before Easter, or else the obligee shall not have it at that feast during his life, & sic de similibus, and so was it resolved by the Judges (*) of the Common Pleas in the argument of Andrews case, which I my selfe heard.

Lastly, When the obligor, feoffor, or feoffee is to doe a sole act or labour, as to goe to Rome,

* que not in L. and M. nor Roh.

† donques added in L. and M. and Roh.

ques le temps de le tender est passé. Mes autrement est l'ou un jour de payment est limit, et le feoffor devie devant le jour, donque poet le beire tender les deniers come est avantdit, pur ceo que le temps de le tender ne fuyt passé per le mort del feoffor. Auxy il semble que en tiel case l'ou le feoffor devy devant le jour de payment, si les executors de le feoffor tendront les deniers al feoffee al jour de payment, cel tender est assés bone; et si le feoffee ceo refuse, † les beires de feoffor poient entrer, &c. Et le cause est, pur ceo que les executors representont le person leur testator, &c.

for dyeth, then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heire tender the money as is aforesaid, for that the time of the tender was not past by the death of the feoffor. Also it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heires of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c. (1)

an estate of inheritance. 4thly. If the husband makes a lease for years, reserving no rent, then judgment will be given for the wife, with a *cesset executio* during the term. This, if the term be of long duration, deprives her, virtually, of her dower. 5thly. If a person purchases an estate of inheritance which is in mortgage for a term of years, whether he only purchases the equity of redemption, or discharges the mortgage, the wife of the vendor will not be entitled to her dower in equity. 6thly. If a person dies seised in fee, subject to a term of years, if the term be a term in gross, for securing the payment of a sum of money, the widow by discharging the money secured by it, or paying one third of the interest, will be intitled to dower. 7thly. If the term be an outstanding satisfied term, she will also be intitled to her dower against the heir. Ante. 22. a. Bro. Abr. Dower 44. 60. 89. 1. Roll. Abr. 678. Bodmin and Vandebendy, Shower's Cases in Parliament, 69. Brown v. Gibbs, Precedents in Chancery, 97. Wray v. Williams, ibid. 151. Dudley v. Dudley, ibid. 201. Banks v. Sutton, 2. P. Williams 700. Hill v. Adams, 2. Atkins, 208.—But there is a manuscript report of this last case, under the names of Swannock v. Lifford, where the argument of lord Hardwicke is stated much more at large than it is in Mr. Atkins's Report of it.—The editor begs to observe, that there are manuscript reports of many cases of the highest importance which either are not reported at all, or the printed reports of which are very short or inaccurate; and that it would be rendering a most essential service to the profession to collect and publish the manuscript reports of them.

(1) It has long been settled in equity, that mortgage money is to be paid, not to the heir but to the executor. And this holds tho' the mortgage be in fee; tho' the condition be for payment to the mortgagee, his heirs or executors; tho' there is no want of assets; and tho' there be no bond given, or covenant entered into by the mortgagor for payment of the money; and whether the mortgage be forfeited or not, at the death of the mortgagee; for equity considers a mortgage as part of the mortgagee's personality. See the argument of lord keeper Finch in Thornbrough v. Baker, 1. Cha. Ca. 285. and see 2. Cha. Ca. 50. 51. 187. 224. 2. Vent. 348. 351.—This follows from the principle, that in equity the lands are

Rome, Jerusalem, &c. in such and the like cases, the obligor, feoffor, or feoffee, hath time during his life, and cannot be hastened by request. And so it is if a stranger to the obligation or feoffment were to doe such an act, he hath time to doe it at any time during his life.

Si les executors del feoffor tendront, &c. So as now it appeareth that either the heire of the feoffor, or his executors, may (when a day is limited) pay the money; and so also may the administrator of the feoffor doe, if the feoffor dye intestate [f]; and this may the ordinarie doe if there bee neither executor nor administrator, as hath bene said. (Ant. 206. a.) Lib. 5. fol. 96. 97. Goodale's case. [f] Vid. Sect. 334. (See Henflor's case 9. Rep. 36. b.)

Et le feoffee refuse, les heires del feoffor poient entrer, &c. Nota, a tender by the executors or administrators, and a refusall, doth give the heire of the feoffor a title of entrie. And here by this (&c.) is a diversitie implied, when a tender and refusall shall give a third person title of entrie.

If a man be bound to A. in an obligation with condition to enfeoffe B. (who is a mere stranger) before a day, the obligor doth offer to enfeoffe B. and he refuseth, the obligation is forfeit, for the obligor hath taken upon him to infeoff him, and his refusall cannot satisfie the condition, because no feoffment is made; but if the feoffment had bene by the condition to be made to the obligee, or to any other for his benefit or behoofe, a tender and refusall shall save the bond, because he himselfe upon the matter is the cause wherefore the condition could not be performed, and therefore shall not give himselfe cause of action. But if A. be bound to B. with condition that C. shall enfeoffe D. in this case if C. tender, and D. refuse, the obligation is saved, for the obligor himselfe undertaketh to doe no act, but that a stranger shall infeoffe a stranger. And it is holden in bookes, [h] that in this case it shall be intended, that the feoffment should be made for the benefit of the obligee. Some to reconcile the bookes seeme to make a difference between an expresse refusall of the stranger, and a readinesse of the obligor at the day and place to make performance, and the absence of the stranger: but that can make no difference. I take it rather to be the error of the reporter, and the records themselves are necessary to be seene, for the law herein is, as it hath bene before declared.

If I enfeoffe one in fee upon condition to enfeoffe I. S. and his heires, the feoffee tenders the feoffment to I. S. and he refuseth it, the feoffor may re-enter, for by the expresse intent of the condition, the feoffee should not have and retaine any benefit or estate in the land, but as it were an instrument to convey over the land. 10. H. 6. 34. (2. Rep. 59. 1. Roll. Abr. 452. 1. Rep. 133. b.)

But in that case if the condition were to make a gift in taylor to I. S. and he refuseth it, and a tender and refusall is made, there the feoffor shall not re-enter, for that it was intended that the feoffee should have an estate in the land. And so it is if a feoffment bee made upon condition that the feoffee shall grant a rent charge to a stranger, if the feoffee tender the grant and he refuseth, the feoffor shall not re-enter, because the feoffee was to retaine the land, which points are worthy of due observation.

Here in the case of *Littleton*, when the executors make the tender, and the feoffee refuseth, albeit the heire be a third person, yet is he no stranger, but he and the executors also are privies in law.

Le person del testator, &c. This is to bee understood concerning goods and chattels either in possession or in action, and the executor doth more actually represent the person of the testator, than the heire doth the person of the ancestor. For if a man bindeth himselfe, his executors are bound though they bee not named, but so it is not of the heire: furthermore, here the administrators and the ordinarie also are implied, as before hath bene said. (Post. 209. b.) (2. Saun. 136.)

Sect. 338.

ET nota, que en tous cas de condition de payment de certaine somme en grosse touchant terres ou tenements, si loyall tender soit un

AND note, that in all cases of condition for payment of a certaine somme in grosse touching lands or tenements, if lawfull tender be once re-

THIS is to be understood, that he that ought to tender the money is of this discharged forever to make any other tender; but if it were a dutie before, though the feoffor enter by force of the condition, yet the debt or dutie remaineth. As if A. borroweth a hundred

Vide Sect. sequen.

are only considered as a pledge or security for the money lent, and the money is the principal, if not the sole object. Still however the mortgage is considered as forfeited in law, and the mortgagor can only recover the mortgaged lands back, by the aid of equity.—Now, as it is among the maxims of equity, that whoever claims equity must do equity; and that in payment of debts, equality is the highest equity; it has been settled, that if the equity of redemption of lands of a mortgagor in fee descends upon the heir, it is equitable assets in his hands; and debts by specialty and simple contract are paid in equal proportion. But if the equity of redemption of lands of a mortgagor for years descends upon the heir, it is legal assets, and the debts are then paid according to their legal priority: yet, in this latter case, if the creditor is obliged to pray the aid of equity, the court will direct simple contract and specialty creditors, notwithstanding the assets are legal, to come in proportionably; and if there is not sufficient to pay all, the loss to fall equally on all.—See 29. C. 2. §. 10. and 11. 3. & 4. W. & M. c. 14. *Bennet v. Box*, 1. Cha. Cases, 12. *Wollenshott v. Croft and Long*, ib. 32. *Trevor v. Perryor*, ib. 148. *Hexon v. Wythan*, ib. 248. *Anonymous*, 2. Cha. Ca. 54. *Girling v. Lee*, 1. Vern. 63. *Child v. Stephens*, ib. 101. *Morgan v. lord Sherrard*, ib. 293. *Cole v. Warden*, ib. 410. *Plunkett v. Kirk*, ib. 411. *Sawley v. Gower*, 2. Vern. 61. *Anonymous*, ib. 405. *Willson v. Fielding*, ib. 763. *Car v. countess of Burlington*, 1. P. W. 228. The creditors of sir Charles Cox, 3. P. W. 341. and see 1. Roll. Abr. 920. *Hob. 265*. It also follows from the above circumstance of the mortgaged lands being considered in equity as a security or pledge for the mortgage debt, that after the legal forfeiture it continues as much a debt as before: Hence, in general, the personal estate of the mortgagor is, upon his decease, to be applied in discharge of the mortgage: and this holds equally in favour of the heir; of a general devisee, or *heires fallus*; and of a devisee of particular lands; and whether there

Lib. 3.

(9. Rep. 79. a.)

Cap. 5.

Of Estates

Seet. 339.

hundred pound of *B.* and after morgageth land to *B.* upon condition for payment thereof; if *A.* tender the money to *B.* and hee refuseth it, *A.* may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may bee recovered by action of debt. But if *A.* without any loane, debt, or dutie preceding infeoffe *B.* of land upon condition for the payment of a hundred pounds to *B.* in nature of a gratuite or gift; in that case if he tender the hundred pound to him according to the condition and he refuseth it, *B.* hath no remedie therefore; and so is our author in this and his other cases of like nature to be understood.

foits refuse, celuy que fufed, he which ought
duiffoit tender le mo- to tender the money
ney est de ceo affouth, is of this quite and
Et pleinment discharge fully discharged for
per tous temps a- ever afterwards.
pres.

Seet. 339.

PAIERA tiel
summe a tiel

ITEM si le feoffee en
mortgage devant le

ALSO if the feoffee in
mortgage before the

18. E. 4. fol. 18. lib. 5. fol. 98.
Goodale's case.
19. H. 6. 54. 20. E. 3. Account
Pl. 70.
(5. Rep. 117.)

jour, &c. Here is implied, that this payment ought to bee reall, and not in shew or appearance. For if it be agreed betweene the feoffor and the executors of the feoffee that the feoffor shall pay to the executors but part of the money, and that yet in appearance the whole summe shall be paid, and that the residue shall bee repaid, and accordingly at the day and place the whole summe is paid, and after the residue is repaid, this is no performance of the condition, for the state shall not be devesed out of the heire, which is a third person, without a true and effectuall payment, and not by a shadow or colour of payment, and the agreement precedent doth guide the payment subsequent.

jour de payment que day of payment which
ferroit fait a luy, face should be made to him,
ses executors et devie, makes his executors and
et son heire enter en le die, and his heire entreth
terre come il devoit, &c. into the land as he ought,
il semble en cest cas que &c. it seemeth in this
le feoffor doit payer le case that the feoffour
money al jour assesse al ought to pay the money
executors, et nemy al at the day appointed to
beire le feoffee, pur ceo the executors, and not to
que le money al com- the heire of the feoffee,
mencement trenchast al because the money at the
feoffee en maner come beginning trenched to
un dutie, et serra en- the feoffee in manner as
tendue que l'estate fuit a dutie, and shall be inten-
fait per cause de le ded that the estate was
prompter de le money made by reason of the
per le feoffee, ou pur lending of the money by
cause d'auter dutie; et the feoffee, or for some
pur ceo le payment ne other dutie; and therefore
serra fait al beire, come* the payment shall not be
il semble, mes les pa- made to the heire, as it
rols del condition soy- seemeth, but the words
ent estre tiels, que le of the condition may be
payment serra fait al such, as the payment shall
beire. Come si le condi- be made to the heire. As
tion fuit, que si le feof- if the condition were,
for paya al feoffee, ou a that if the feoffor pay to
ses beires, tiel summe the feoffee or to his
a tiell jour, &c. la apres heires such a summe at
la

la

(5. Rep. 96.)

(Ant. 209. a. 9. Rep. 39.)

* *come il semble, mes les parols del condition poyent estre tiels, que le payment serra fait al beire,* not in L. and M. nor Roh.

is, or is not, a bond or covenant for payment of the money. Cope v. Cope, 1. Salk. 450. Howell v. Price, in Cha. 433. Pockley v. Pockley, 1. Vern. 36. Lord Winchelsea v. Norcliffe, 1. Vern. 485. Bartholomew v. May, 1. Atk. 489. Galton v. Hancock, 2. Atk. 530. This doctrine has been frequently extended to the case of a devise of lands in trust, to pay off debts; where (particularly if the personalty is bequeathed to the executor) the courts, notwithstanding an express devise of a real estate for the payment of debts, have directed the personalty to be first applied in payment of them. See Gower v. Mead, Prec. in Cha. 2. Dolman v. Smith, ibid. 256. 2. Vern. 117. Hall v. Brooker, Gilb. Rep. 70. See also Bamfield v. Wyndham, Prec. in Cha. 101. Wainwright v. Bendloe, Gilb. Rep. 12. Stapleton v. Colville, Ca. temp. Talbot, 202.—It does not appear, that the courts of equity have fixed any determinate period of time to be such a length of possession as to bar the mortgagor's right of redemption: but as, in the courts of law, twenty years is a bar to an entry or ejectment; the courts of equity (consistently with their general system, that the rules and practice of their courts should bear an analogy to the rules and practice of the courts of law) have inclined to allow the same period of time to be a bar to a redemption.—See Cook v. Arnham, 3. P. W. 283, and the note of the editor at the end of that case.

la mort le feoffee such a day, &c. there
s'il morust devant after the death of the
le jour limit, le* feoffee, if he dieth be-
payment doit estre fore the day limited,
fait al heir al jour the payment ought to
asseffe, &c. be made to the heir at
 the day appointed, &c.

law appoints him to receive
 the money, but so doth not the
 law appoint the heir to re-
 ceive the money unless he be
 named.

Doit estre fait al
heire al jour asseffe, &c.
 And here it also appeareth, that
 if the condition upon the mor-
 gage be to pay to the mortgagee

or his heirs the money, &c. and before the day of payment the mortgagee dieth, the feoffor cannot pay the money to the executors of the mortgagee: for *Littleton* saith that in this case the payment ought to be made to the heir. *Et in hoc casu designatio unius persone est exclusio alterius, & expressum facit cessare tacitum*; and the law shall never seeke out a person, when the parties themselves have appointed one. But if the condition be to pay the money to the feoffee his heirs or executors, then the feoffor hath election to pay it either [m] to the heir or executors.

Vid. lib. 5. fo. 96. *Goodale's case*
 Dier. 2. Eliz. 181. 44. E. 3. 1. b.
 (Ant. 47. 2.)

[m] 12. E. 3. Condition 8. & 10.
 (8. Rep. 73.)

If a man make a feoffment in fee upon condition that the feoffee shall pay to the feoffor his heirs or assigns 20 pound at such a day, and before the day the feoffor make his executors and dieth, the feoffee may pay the same either to the heir or to the executors, for they are his assigns in law to this intent. But if a man make a feoffment in fee upon condition that if the feoffor pay to the feoffee his heirs or assigns 20 pound before such a feast, and before the feast the feoffee maketh his executors and dyeth, the feoffor ought to pay the money to the heir, and not to the executors, for the executors in this case are no assigns in law; and the reason of this diversitie is this, for that in the first case the law must of necessity finde out assigns, because there cannot be any assigns in deed, for the feoffor hath but a bare condition and no estate in the land which he can assigne over. But in the other case the feoffee hath an estate in the land which he may assigne over, and where there may bee assigns in deed, the law shall never seeke out or appoint any assigns in law. And albeit the feoffee made no assignment of the estate, yet the executors cannot be assigns, because assigns were only intended by the condition to be assigns of the estate; and so was it resolved (*) *Micb. 23. & 24. Eliz.* by the two chiefe justices in the court of wards betwene *Raxdall and Browne*, which I observed.

(1. Roll. Abr. 421.)

(Hob. 9.)

27. H. 8. 2. 3. & 4. Ph. & Mar.
 140. a.

(*) *Micb. 23. & 24. Eliz.* in curia
 Wardorum. Inter *Randel &*
Browne. Vid. 2. Eliz. Dier. 181.
 Pl. Com. *Chapman's case* 186.
 288. Vid. *Goodale's case* lib. 5.
 fo. 96. 97. 17. Ad. pl. 2. *Good-*
ale's case ubi supra.
 (Mo. 243. Ant. 268. a.)

But if the condition be to pay the money to the feoffee his heirs or assigns, and the feoffee make a feoffment over, it is in the election of the feoffor to pay the money to the first feoffee or to the second feoffee; and so if the first feoffee dyeth, the feoffor may either pay the money to the heir of the first feoffee or to the second feoffee, for the law will not enforce the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectually or not, but at his pleasure, and the first feoffee and his heirs are expressly named in the condition (1).

Sect. 340.

ITEM † *sur tiel case* ALSO upon such case
de feoffment en mort- of feoffment in
gage, question ad este mortgage, a question
demaunde en quel lieu hath been demanded in
le feoffour est tenu what place the feoffor
 ‡ *de tender les deniers* is bound to tender the
a le feoffee al jour as- money to the feoffee at
seffe, &c. Et ascuns the day appointed, &c.
ont dit, que sur la terre And some have said,
issint § tenu en mor- upon the land so holden
gage, pur ceo que le con- in mortgage, because the
dition est dependant sur condition is depending
le terre. Et ont dit || que upon the land. And they

Item *sur tiel case*
de feoffment en
morgage, question ad
este demande, &c.

Here and in other places,
 that I may say once for
 all, where *Littleton* ma-
 keth a doubt, and setteth
 downe severall opinions
 and the reasons, he ever
 setteth downe (*) the
 better opinion and his
 owne last, and so he doth
 here. [n] For at this day
 this doubt is settled, ha-
 ving bene oftentimes
 resolved, that seeing the
 money

(*) Vid. Sect. 170. 302. 375.

[n] 8. E. 4. 4. & 14. 11. H. 4.
 62. 17. Aff. p. 2. 17. E. 3. 2.
 21. H. 7. *Keylway* 74. 16. Eliz.
 Dier. 327. lib. 4. fo. 71. in
Borough's case 21. E. 4. 6.

* *donques* added in L. and M. and Roh.
 § *tenu*, not in L. and M.

† *sur—en*, L. and M. and Roh.
 || *que* not in L. and M. but in Roh.

‡ *de—a*, L. and M. and Roh.

(1) Hob. 9. *Pease and Styleman*.—A man was bound to pay 20l. to such a person as he (the obligee) should by his will appoint. The obligee made J. S. his executor, but made no other appointment. It was resolved, upon demurrer, that the executor should not have the 20l. for he is only an assignee in law, who takes to the use of the testator: but here the condition is in favour of an actual assignee, who takes to his own use. The devise of a fine leases to the devisee for 99 years, with condition, if the lessee pays to the lessor, his heirs and assigns, that the uses limited to the devisee and his heirs, by an indenture, should cease: the lessor dies. Lord Nottingham was of opinion, that the uses should not cease by payment to the administrator of the lessor, because he may be an assignee in deed, as here. 11. May, 1659, Sir Andrew Young.—Lord Nott. MSS. notes.—*Howe v. Whitebank*. Upon a fine, the use of land was limited to A. for 80 years, with a power to A. and his assigns to make leases for three lives, to commence after the determination of that term. A. assigned over to B. B. died, having made his will, and appointed C. his executor. C. assigned over to D.: D. in pursuance of the power, made a lease for life. The question was, whether D. was such an assignee of A. as to have a power to make this lease; or whether it should extend only to the immediate assignees of A.? The doubt in this case was the greater, as there had been a descent upon an executor. The case of *Pease and Styleman* was cited, where it was said, that an executor or administrator should not in some cases be said to be a special assignee. But all the court seemed to incline to the contrary, and that D. should be called an assignee, well enough for the purpose of making the leases in question, and that so should any person that came to the estate under the first lessee, though there should be twenty mesne assignments. And afterwards, in the Michaelmas term following, judgment was given accordingly.—1. Freem. 476.

(5. Rep. 95. 2. Cro. 423. 3. Cro. 689)

B. E. 4. 2. 19. R. 2. Det. 178.

(Ant. 206. b. 207. a.)

(1. Roll. 453.)

(Ant. 208.)

(1) 2. E. 4. 3.

money is a summe in grosse and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the latter opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat or twenty load of timber or such like, the obligor or feoffor is not bound to carry the same about and seeke the feoffee, but the obligor or feoffor before the day must goe to the feoffee, and know where he will appoint to receive it, and there it must bee delivered. And so note a diversitie betweene money, and things ponderous, or of great waight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient [b] for him to tender it upon the land, because the state must passe by live-ric.

Deins le roialm d'Engleterre (1). For if he be out of the realme of England, hee is not bound to seeke him, or to goe out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land, as if he had duly tendered it according to the condition.

Un especiall corporall service al feoffee. This is a diversitie betweene a rent issuing out of land, and a corporall service issuing out of land, for it sufficeth (as hath beene

*si le feoffor soit * sur le terre la prest a paier la money al feoffee a le jour assesse, & le feoffee adonque ne soit pas la, + adonque le feoffor est assouth & excuse de payment de le mony, pur ceo que nul default est en luy. Mes il semble a ascuns que la ley est contrary, & que default est en luy; car il est tenu de querer le feoffee s'il soit adonque en ‡ ascun autre lieu deins le roialme de Engleterre. Come si home soit obligé en un obligation de 20 li. sur condition endorce sur mesme l'obligation, que s'il paya a celuy a que l'obligation est fait a tiel jour 10 li. § adonque l'obligation de 20 li. perdra sa force, & serra tenu pur nul; cest en cas il covient a celuy que fist obligation de querer celuy a que l'obligation est fait, s'il soit deins Engleterre, & al jour assesse de tender a luy les dits 10 li. autrement il forfeitera la summe de 20 li. comprise deins l'obligation, || &c. Et issint il semble en l'auter cas, &c. Et coment que ascuns ont dit, que le condition est dependant sur la terre, uncore ceo ne prove que*

have said that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee bee not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seeke the feoffee if hee bee then in any other place within the realm of England. As if a man be bound in an obligation of 20 pound upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day 10 pound, then the obligation of 20 pound shall lose his force, and bee holden for nothing. In this case it behooveth him that made the obligation to seek him to whom the obligation is made if he be in England, & at the day set to tender unto him the said 10 pound, otherwise he shall forfeit the summe of 20 pound comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have

* *sur le terre la*, not in L. and M. nor Roh. and Roh.

§ *que added L. and M. and Roh.*

+ *que added in L. and M. and Roh.*

|| *&c. not in L. and M. but in Roh.*

‡ *ascun—um*, L. and M.

(1) If A. recites by his deed, that whereas he is indebted to B. in 100l. and he covenants with B. that the 100l. shall be paid and delivered to B. or his assigns, at Rotterdam, in Holland, by C. without any suit at law, upon the first requisition which shall be made of it; in this case, the demand may be in any other place besides Rotterdam: for though payment is to be made at Rotterdam, yet the demand may be made in any place; and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, it is good, for he ought to have reasonable time to pay it after the demand, having respect to the distance of the place. But if the demand should be limited to Rotterdam, perhaps he would never come there, and so the covenant would be of no effect.—Mich. 1650. between Halsted and Vanieyden, adjudged upon a special verdict.—1 Roll. Abr.

*le feafans de le condition d'estre performe, convient estre fait sur la terre, &c. nient plus que si le condition fuit que le feoffor ferra a tiel jour, &c. un especial corporall service al feoffee, nient nosmant le lieu ou tiel corporall service ferra fait. En tiel cas le feoffor doit faire tiel corporall service al jour limite al feoffee, en quecunque lieu d'Engleterre que le feoffee est, s'il voile aver advantage de le condition, &c. Isint il semble en l'auter cas. Et il semble a eux que il serroit plus proprement dit, que l'estate de la terre est dependant sur la condition, * que † a dire, que le condition est dependant sur la terre, &c. Sed quære, &c.*

tion, then to say that the condition is depending upon the land, &c. *Sed quære, &c.*

give notice to the feoffee when he will pay it, for without such notice as is aforesaid, the tender will not be sufficient. But in both these cases if at any time the obligor or feoffor meete the obligee or feoffee at the place, he may tender the money.

If *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* on such a day, *C.* must give notice to *D.* thereof, and request him to be on the land at the day to receive the feoffment, and in that case he is bound to seeke *D.* and to give him notice.

De tender, or *tendre,* is a word common both to the English and French, in Latine *offerre*, and in that sense, and with that Latyn word it is alwayes used in the common law. *Vide* sect. 514. the tender of the halfe marke. And before, *sect.* 333. 334. 337.

* &c. added L. and M. and Roh.

† *est a tant*, added L. and M. and Roh.

(1) Oth advise when thy lease is void; for there no acceptance of rent afterwards can make it have continuance. Post. 215. 2. Lord Not. MS.

saïd that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said, that the estate of the land is depending upon the condi-

tion, then to say that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said, that the estate of the land is depending upon the condi-

tion, then to say that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said, that the estate of the land is depending upon the condi-

tion, then to say that the condition is depending upon the land, yet this proves not that the making of the condition to bee performed, ought to be made upon the land, &c. no more then if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee bee, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seemes to them that it shall bee more properly said, that the estate of the land is depending upon the condi-

21. E. 3. 10. 20. H. 6. 31. 27. E. 3. 34. 21. Aff. 13. 7. E. 4. 4. 21. E. 4. 17. 20. E. Avowrie 113. 45. E. 5. 9. 46. E. 3. Barre. 216.

Mich. 22. & 23. Eliz. in Banke le Roy, which I myselfe heard and observed. 19. Eliz. Dier. 354. Lib. 8. fol. 92. in France's case. (Cro. Jac. 9.)

(1. Roll. Abr. 453. Ant. 206. 210.)

18. Eliz. Dyer 354.

(2. Rep. 59. 3. Rep. 64.)

(8. Rep. 92. Post. sect. 353. 2. Cro. 9. 10.)

(Hob. 51. 1. Roll. Abr. 463. 2. Cro. 9.)

(2. E. 4. 3. & 4.)

Sect. 341.

HERE the diversitie appeareth betwene a summe in grosse, and a rent issuing out of the land, as hath beene touched before.

Uncore il poet eslier, scilicet, derelinquisher son entry, ou de aver un assise.

Here it appeareth, that if the condition be broken for non payment of the rent, yet if the feoffor bringeth an assise for the rent due at that time, he shal never enter for the condition broken, because hee affirmeth the rent to have a continuance, and thereby wayveth the condition. And so it is if the rent had had a clause of distresse annexed unto it, if the feoffor had distrained for the rent, for non payment whereof the condition was broken, he should never enter for the condition broken, but he may receive that rent and acquite the same, and yet enter for the condition broken. But if he accept a rent due at a day after, hee shall not enter for the condition broken, because he thereby affirmeth the lease to have a continuance.

*MES si feoffment en fee soit fait, reservant al feoffor un anual rent, et pur default de payment unre-entrie, &c. en cest case il ne besoigne * le tenant a tender le rent, quant il est arere, forsque sur le terre, pur ceo que ceo est rent issuant hors de la terre, que † est rent secke. Car si le feoffor soit seise un foits de cest rent, et puis il vient sur la terre, &c. et le rent luy soit denie, il poet aver assise de Novel Disseisin. Car coment que il poet entrer per cause de le condition enfreint, &c. uncore il poet eslier, scilicet, de relinquisher son entrie, ou d'aver un assise, &c. Et issint est diversitie, quant al tender de le rent que est issuant hors de la terre, et del tender d'auter summe en grosse, que ne passe issuant hors d'ascun terre.*

BUT if a feoffment in fee bee made, reserving to the feoffor a yearly rent, & for default of payment a re-entrie, &c. in this case the tenant needeth not to tender the rent, when it is behind, but upon the land, because this is a rent issuing out of the land, which is a rent secke. For if the feoffor bee seised once of this rent, and after hee commeth upon the land, &c. and the rent is denied him, he may have an assise of Novel Disseisin. For albeit he may enter by reason of the condition broken, &c. yet hee may choose either to relinquishe his entrie, or to have an assise, &c. And so there is a diversitie as to the tender of a rent which is issuing out of the land, & of the tender of another summe in grosse, which is not issuing out of any land.

Sect. 342.

ET pur ceo il serra bone et sure chose pur celuy que voet faire tiel feoffment en mortgage, de mitter un especial lieu l'ou les deniers seront payes, et le plus especiall que est mis,

AND therefore it wil be a good & sure thing for him that will make such feoffment in mortgage, to appoint an especial place (1) where the money shall be payd, and the more speciall that it bee put, the

* a added L. and M. and Roh.

† ceo added L. and M. and Roh.

(1). Upon the marriage of lord Anglesea with a daughter of lady Dorchester, a term of years was limited in his lordship's Irish estates, for raising 12000l. for the portions of the daughters. There was but one daughter of the marriage. It was made a question, whether the portion was to be paid in England, without any deduction or allowance for the exchange from Ireland to England? It was determined in Chancery, that the portion ought to be paid in England, where the contract was made and the parties resided, and not in Ireland; because it was a sum in gross, and not a rent issuing out of land. Vin. Abr. vol. 5. 209.

*le melior est pur le feoffor. Si come A. infeoffe B. a aver a luy et a ses heires, sur tiel condition, que si A. paya a B. en le Feast de Saint Michael L'Archangell procheine a vener, en esglise cathedrall de Paules en Londres, deins quater heures procheine devant le heure de noone de mesme le Feast, a le Rood loft de * le Rood de le North doore deins mesme le esglise, ou le tombe de S. Erkenwald, ou al huis de tiel chappell, ou a tiel piller, deins mesme l'esglise, que adonque bien list al avantdit A. et a ses heires d'entrer, &c. en tiel case il ne besoigne de querer le feoffee en auter lieu, ne d'estre en auter lieu, forsque en le lieu comprise en l'indenture, ne d'estre la plus longe temps que le temps specife en mesme l'indenture, pur tender ou payer le money a le feoffee, &c.*

better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon such condition, that if A. pay to B. on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of Saint Paul's in London, within foure houres next before the heure of noone of the same Feast, at the Rood loft of the Rood of the North doore within the same church, or at the tombe of Saint Erkenwald, or at the doore of such a chappell, or at such a pillar, within the same church, that then it shal be lawfull to the aforesaid A. and his heires to enter, &c. in this case he needeth not to seek the feoffee in an other place, nor to bee in any other place, but in the place comprised in the indenture, nor to bee there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.

(1. Roll. Abr. 445. 446.)

(2. Cro. 13. 14.)

HERE is good counsell and advice given, to set downe in conveyances every thing in certaintie and particularitie, for certaintie is the mother of quietnesse and repose, and incertaintie the cause of variance and contentions: and for obtaining of the one, and avoyding of the other, the best meane is, in all assurances, to take counsell of learned and well-experienced men, and not to trust onely without advice to a president. For as the rule is concerning the state of a man's bodie, *Nullum medicamentum est idem omnibus*, so in the state and assurance of a man's lands, *Nullum exemplum est idem omnibus*.

Al tombe de Saint Erkenwald, &c. This *Erkenwald* was a younger sonne of *Anna*, king of the East Saxons, and was first abbot of Chersey in Surrey which he had founded, and after bishop of London, a holy and devout man, and lieth buried in the fourth isle, above the quire in Saint Paul's church, where the tombe yet remaineth, that *Littleton* speaketh of in this place: he flourished about the yeare of our Lord 680.

The residue of this section and the (&c.) are evident.

Sect. 343.

ITEM en tiel case ou le lieu † de payment est limitte, le feoffee n'est † obligé de recevoir le payment en nul auter lieu forsque en mesme le lieu issint

ALSO in such case, where the place of payment is limited, the feoffee is not bound to receive the payment in any other place but in the same place so limited.

HEREBY it appeareth that the place is but a circumstance; and therefore if the obligee receiveth it at any other place, it is sufficient, though he be not bound to receive it at any other place. And

(6. Rep. 46. b. 47. Plo. 69. b. 5. Rep. 117.)

* le rood de le, not in L. and M. nor Roh. L. and M. and Roh.

† de payment, not in L. and M. nor Roh.

‡ pas added in

And so it is if the money be to be paid on such a feast, yet if the money be tendred and received at any time before the day, it is sufficient. (1)

limit. Mes uncore si il receivst le payment en auter lieu, ceo est assés bone, et auxy fort pur le feoffor sicome le receipt ust este en mesme le lieu issint limit, &c.

But yet if he doe receive the payment in another place, this is good enough & as strong for the feoffor as if the receipt had beene in the same place so limited, &c.

Sect. 344.

(Dyer 1.)

3. H. 4. b. 9. H. 7. 16. 11. H. 7. 20. 21. 19. E. 4. 1. b. 47. E. 3. 24. 22. E. 4. 37. H. 6. 26. Li. 9. to. 78. Peytoe's case.

(1. Roll. Rep. 296.)

22. H. 4. 22.

* Peytoe's case ubi supra.

(Ant. 207.)

4. H. 7. 4. Dy. 35. H. 8. 56. 27. H. 8. 1. (Ant. 208. b.)

Lib. 5. fo. 117. Pinnel's case.

26. H. 6. tit. Barre 37. (Sid. 44. Post. 373. a. Mo. 47.)

30. E. 3. 23. (Hob. 68. 69.)

11. R. 2. tit. Barre 3. 43. (1. Roll. Abr. 470. 604.)

HEREUPON are many diversities worthie of observation.

First, there is a diversitie, when the condition is for payment of money: and when for the deliverie of a horse, a robe, a ring, or the like: for where it is for payment of money, there if the feoffee or obligee accept an horse, &c. in satisfaction, this is good: but if the condition were for the deliverie of a horse, or robe, there albeit the obligee or feoffee accept money or any other thing for the horse, &c. it is no performance of the condition. The like law is, if the condition bee to acknowledge a recognizance of twentie pounds, &c. if the obligee or feoffee accept twenty pounds in satisfaction of the condition, it is not sufficient in law, * but notwithstanding such acceptance, the condition is broken. And so it is of all other collateral conditions, though the obligee or feoffee himselfe accept it.

Secondly, in case when the condition is for payment of money, there is a diversitie when the money is to be paid to the partie, and when to an estranger: for when it is to bee paid to an estranger, there if the stranger accept an horse or any collateral thing in satisfaction of the money, it is no performance of the condition, because the condition in that case is strictly to be performed. But if the condition be, that a stranger shal pay to the obligee or feoffee a sum of money, there the obligee or feoffee may receive a horse, &c. in satisfaction.

Thirdly, where the condition is for payment of twentie pounds, the obligor or feoffor cannot at the time appointed pay a lesser summe in satisfaction of the whole, because it is apparant that a lesser summe of money cannot be a satisfaction of a greater. But if the obligee or feoffee doe at the day receive part, and thereof make an acquittance under his seale in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser summe either before the day, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction.

Fourthly, not onely things in possession may be given in satisfaction, (whereof *Littleton* putteth his case,) but also if the obligee or feoffee accept a statute or a bond in satisfaction of the money, it is a good satisfaction.

If the obligor or feoffor be bound by condition to pay an hundred markes at a certaine day.

† &c. added in L. and M. and Roh.

(1) It hath been formerly doubted, Whether the defendant, in such a case, ought not to plead specially? See 1. Cro. 242. S. C. 1. Ander. 198. S. C. Mo. 267. S. C. Ow. 45. Savil 96. 1. Leon. 311. But now this point is settled; for, per 4. Annæ, cap. 16. sect. 12. if the obligor, his heirs, executors, and administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the condition of the bond, though such payment was not strictly made according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition, and had been so pleaded. Note to the 11th edition.

day, and at the day the parties doe account together, and for that the feoffee or obligee did (Noy. 110. 5. Rep. 117.) owe twentie pound to the obligor or feoffor, that summe is allowed, and the residue of the hundred markes paid, this is a good satisfaction, and yet the twenty pound was a chose in action, 37. H. 6. 26. 46. E. 3. 39. and no payment was made thereof, but by way of retainer or discharge (1). 34. H. 6. 17. 12. H. 8. 1. b.

En pleine satisfaction. Nota, in satisfaction and in full satisfaction is all one.

Sect. 345.

ITEM si home enfeoffa un autre* sur condition, que il et ses heires rendront a un estrange home & a ses heires un annuel rent de 20s. &c. et si il ou ses heires failont de payment de ceo, que adonques bien lirroit al feoffor et a ses heires de entrer, ceo est bon condition: et uncore en cest cas, coment que tiel annuall payment est appelle en l'indenture un annuall rent, ceo n'est pas properment rent. Car s'il serroit rent, il covient estre rent service, ou rent charge, ou rent secke, et † il n'est ascun de eux. Car si l'estrange fuit seise de ceo, et puis il fuit a luy denie, il n'avera unque assise de ceo, pur ceo que il n'est ‡ pas issuant || hors d'ascun tenements; et if sint l'estrange n'ad ascun remedie, si tiel annuall rent soit aderere en cest cas, mes que le feoffor ou ses heires poient entrer, &c. Et uncore si le feoffor ou ses

ALSO if a man infeoffe an other upon condition, that hee and his heires shall render to a stranger and to his heires a yearely rent of 20 shillings, &c. and if hee or his heires faile of payment thereof, that then it shall bee lawfull to the feoffor and his heires to enter, this is a good condition: and yet in this case, albeit such annuall payment be called in the indenture a yearely rent, this is not properly a rent. For if it should bee a rent, it must bee rent service, rent charge, or a rent secke, and it is not any of these. For if the stranger were seised of this, and after it were denied him, hee shall never have an assise of this, because that it is not issuing out of any tenements; and so the stranger hath not any remedy, if such yearely rent be behind in this case, but that the feoffor or his heires may enter, &c. And yet if the feoffor or his heires enter for default of pay-

REndront a un estrange home un annuel rent, &c. (Dr. and Stud. cap. 20.)

This reservation is meere void [a] for the reasons hereafter in this section alleadged by Littleton, and also for that no estate moveth from the stranger, and that he is not partie to the deed.

And albeit it bee a voyde reservation, and can be no rent, and the words of the condition be, that if the feoffee or his heires faile of payment of it, (that is, of the annuall rent) that then, &c. yet it appeareth that the condition is good, and annuall rent shall bee taken for an annuall summe of money in grosse, and not in the proper signification thereof, viz. to bee a rent issuing out of land, which is to bee observed, that words in a condition shall bee taken out of their proper sense, *ut res magis valeat quam pereat*, and so in like cases it is holden [b] in our bookes.

But if A. bee seised of certaine lands, and A. and B. joyne in a feoffment in fee reserving a rent to them both and their heires, and the feoffee grant that it shall be lawfull for them and their heires to distreine for the

[a] Lib. 8. fol. 70. 71. (Flo. 243. sera bon in case le Roy. Aut. 47. a. Cro. Car. 288. Aut. 143. b.)

[b] 6. E. 2. entr. cong. 55. recit per.

8. Aff. 34. revertere. (1. Rep. 76. Godbolt 448.)

* en fee added L. and M. and Roh. not in L. and M.

† que added L. and M. and Roh.

‡ pas not in L. and M.

§ hors

(1) In Roll. Rep. 296. it is said, that the reason why a collateral thing cannot be satisfied with money, or other collateral thing, is, because the collateral thing is not due, and so no contract can be made of it till the day of payment; and that the reason why money may be satisfied by a collateral thing is, because it is of certain value.

(Ant. 148. a. Sect. 221.)

[c] 18. E. 2. Aff. 381. 26. H. 8.
2. 13. E. 2. feoffments & lites
108. 31. Aff. pl. 31.

the rent, this is a good grant of a rent to them both, because hee is partie to the deed, and the clause of distress is a grant of the rent to A. and B. as it appeareth before in the chapter of rents. But if B. had beene a stranger to the deed, then B. had taken nothing. And upon this diversitie are all the bookes [c], which *prima facie* seeme to vary, reconciled.

Car s'il serra rent, il covient estre rent service, rent charge, ou rent secke, et il n'est nul de eux.

This is a good logical argument à divisione, & argumentum à divisione est fortissimum in lege. [d] Littleton useth this argument elsewhere, where see more of this matter.

[d] Vide Sect. 381.

*beires entrent pur default de payment, adonque tiel rent est ale a tous jours. Et issint tiel rent * n'est forsque un peine assesse a le tenant et ses beires, que s'ils ne voient payer ceo selonque la forme del indenture, ils perdront leur terre per l'entrie del feoffor ou ses beires pur default de paiement. Et en cest cas il semble que le feoffee et ses beires doient querer le estranger et beires s'ils sont deins Engleterre, † pur ceo que nul lieu est limit l'ou le payment serra fait, et pur ceo que tiel rent n'est pas issuant ‡ hors d'ascun terre, &c.*

ment, then such rent is taken away for ever. And so such a rent is but as a paine set upon the tenant and his heires, that if they will not pay this according to the forme of the indenture, they shall lose their land by the entrie of the feoffor or his heires for default of payment. And in this case it seemeth that the feoffee and his heires ought to seeke the stranger and his heires if they bee within England, because there is no place limited where the payment shall bee made, and for that such rent is not issuing out of any land, &c.

Pur default de payment. Note here, seeing it is but a summe in grosse, there need no demand of the rent; for Littleton here saith, that the feoffee ought to seeke the person of the stranger to pay him the summe of money, because it is a summe in grosse and not issuing out of the land.

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(Hob. 130. 2. Roll. Abr. 447.
Poll. 386. 8. Rep. 71. Ant. 39. b.)

A Le feoffor, donor, &c. ou a leur beires. Hereby it may seem that if a man make a feoffment, gift, or lease, that (omitting himselfe) he may reserve a rent to his heires (1). But Littleton is not so to be understood; his meaning is, that either the feoffor, &c. may reserve the rent to himselfe only, or to himselfe and his heires. And yet it is holden [e] in our bookes, that a man may make a feoffment in fee reserving a rent of forty shillings to the feoffor for tearme of his life, and

[e] 5. E. 3. 27. 28.

(Ant. 164. a.)

ET hic nota duas cosas: un est, que nul rent (que properment est dit rent) poit estre reserve sur ascun feoffment, done, ou leas, forsque tantselement al feoffor, ou al donor, ou al lessor, ou a leur beires, & en nul || maner § il poit estre reserve a ascun estrange

AND here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but onely to the feoffor, or to the donor, or to the lessor, or to their heires, and in no manner it may bee reserved to any strange person. But if

* n'est—est, L. and M. and Roh.
‡ hors not in L. and M. nor Roh.

† pur ceo que nul lieu est limit l'ou le payment serra fait, et, not in L. and M. nor Roh.
|| auter added in L. and M. and Roh.
§ il not in L. and M. nor Roh.

(1) Plo. 107. If a man leases, rendering rent to the heir, it is void; for the heir takes as purchaser, and is quasi a stranger. Hob. 130. Oats v. Frith. Father seized in fee and son join in a lease to commence after the death of the father, rendering rent to the son, and dies, the reservation was adjudged void; for tho' the son proves heir by the event, that does not mend the case: but if the reservation had been to the heir of the lessor, omitting the lessor, it would have been good; for tho' the rent never was in the father to demand, yet the son would take it; not as a purchaser, but as a rent inherent in the root of the reversion, which he has by descent from his father; and in this sense the rent itself was in the father, viz. to release (by the word rent, but not action) tho' not to ask. So note the difference, (says Hobart) when in such a lease the rent is reserved to the heir first, omitting the ancestor, which is good, and where an annuity or warranty is granted against the heir, omitting the ancestor, which is not good. It appears in the case of Littleton, that tho' the reservation to a stranger be had to carry any rent to the stranger, yet it will be good to the lessor, and that not only during his life, but generally during all the term; for when it is said, rendering to I. S. the words I. S. shall be void, in the same manner as if he had said, rendering rent generally: because, 1st. If a man leases, rendering rent to him and a stranger, it is good to him clearly, and void to the stranger. 31. Aff. 30. 2dly, When a man leases, rendering rent to him and his heirs general, yet the law will direct it to an issue who is not his heir general, merely for congruity's sake. Dyer 115. b. Sir Thomas Wyatt's case, and before 12. b. Difference between a lease reserving rent to I. S. and a lease upon condition, that I. S. shall re-enter if the rent be in arrear, for there neither shall enter; not I. S. because he cannot by law; not the lessor, because there are no words to give re-entry to any beside I. S. But in the case of Doctor and Student, feoffment upon condition, that he shall pay 2cl. to I. S. and that otherwise I. S. shall re-enter; there, tho' I. S. cannot re-enter, the feoffor can, for there the condition was created by the first words: and tho' he intends the advantage of this to I. S. it does not signify. 28. H. 8. Dyer 33. Devise to the prior of St. B. so that he pays to the Dean and Chapter of St. Paul's, and that if he does not so, the Dean and Chapter shall have it, that is a void condition to make it a remainder, but it is good for the deviser to re-enter. Difference between a rent upon a lease and a rent upon a feoffment: in the last case rent would be void to a stranger, and yet not good to the feoffor, because the law does not create it, and it is not so reserved; but the case of a feoffment is like to a grant of rent to I. S. and that if it be in arrear that I. D. shall distrain, there

person. Mes si deux joyntenants font un leas per fait endent, reservant a un de eux un certaine annuall rent, ceo est assés bon a luy a que le rent est reserve, pur ceoque il est privy a le lease & nemy estrange a le leas, &c.

two jointenants make a lease by deed indented, reserving to one of them a certain yearely rent, this is good enough to him to whom the rent is reserved, for that hee is privie to the lease and not a stranger to the lease, &c. (1)

after his decease, a pound of (10. Rep. 106. Hob. 230.) comyne to his heires, that this is good.

If a man make a feoffment in fee, reserving a rent to him or his heires, it is good [f] to him for tearme of his life, and void to his heire. (Ant. 47. a.)

[f] Lib. 5. fol. 111. Mallorie's case.

Mes si 2. joyntenants font un lease per fait indent, &c.

This case being by deed indented, is evident, and it hath been touched before; but

5. E. 4. 4. a. 27. H. 8. 16. Vide Sect. 58. (Post. 318. a. Ant. 47. a.)

if that two joyntenants without a deed indented make a lease for life, reserving a rent to one of them, it shall enure to them both in respect of the joynt reversion. And so it is of a surrender to one of them, it shall enure to them both.

If two joyntenants, the one for life, and the other in fee, joyne in a lease for life, or a gift in taile, reserving a rent, the rent shall enure to them both; for if the particular estate determine, they shall be jointenants againe in possession. But if tenant for life, and he in the reversion joyne in a lease for life, or a gift in taile by deed, reserving a rent, this shall enure to the tenant for life onely, during his life, and after to him in the reversion, for every one grants that which he may lawfully grant; and if at the common law they had made a feoffment in fee generally, the feoffee should have holden of the tenant for life during his life, and after of him in reversion, and so it was holden [g] in the King's Bench.

(Ant. 192. a. 6. Rep. 15. a. Ant. 42. a. 45. a. 53. b. 193. a.)

Vide Sect. 58.

[g] Mich. 36. & 37. Eliz.

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*LE second chose * est, que nul entrie ou re-entrie (que est tout un)† poit estre reserve ne done a aucun person, forsque tantselement al feoffor, ou al donor, ou al lessor, ou a lour heires: & tiel ‡ reenter ne poyt estre grant a un auter person. Car si home lessa || terre a un auter pur terme de vie per indenture, rendant al lessor et a ses heires certaine rent, & pur default de payment un reentry, &c. si apres le lessor per un fait granta le reversion de la terre a un auter en fee, et le tenant a terme de vie atturna, &c. si le rent a-*

THE second thing is, that no entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heires: and such reentry cannot be given to any other person. For if a man letteth land to another for tearme of life by indenture, rendring to the lessor and to his heires a certaine rent, and for default of payment a reentry, &c. if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for terme of life

QUE nul entrie, &c.

(1. Roll. Abr. 473.)

Here Littleton reciteth one of the maxims of the common law; and the reason hereof is, for avoyding of maintenance, suppression of right, and stirring up of suites: and therefore nothing in action, entrie, or reentry, can bee granted over; for so under colour thereof pretended titles might bee granted to great men, wherby right might bee trodden downe, and the weake oppressed, which the common law forbidde, as men to grant before they be in possession.

Pur default de payment un reentry,

* est not in Roh. but in L. and M. and Roh.

† ne added in L. and M. and Roh.

‡ reenter—rent in L. and M.

|| certaine added in L. and M. and Roh.

(1) The principle which gave rise to this rule is, that rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land.—It is to be observed, that remainder-men in a settlement, being, at first view, neither feoffors, donors, lessors, nor the heirs of feoffors, donors, or lessors, there seems to have been, for some time after the statute of Uses, a doubt, whether the rents of leases made by virtue of powers contained in settlements, could be reserved to them. In Chudleigh's case, 1. Rep. 139. it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with several remainders over, with a power to the tenant for life to make leases, reserving the rent to the reversioners, and the tenant for life accordingly makes leases, neither his heirs nor any of the remainder-men shall have the rent. But in Harcourt v. Pole, 1. Anders. 273. it was adjudged, that the remainder-men might distrain in these cases. And in Sir Thomas Jones, 35. the dictum in Chudleigh's case is denied to be law. The determination in Harcourt v. Pole will appear incontrovertibly right, if we consider that both the lessees and remainder-men derive their estate out of the reversion, or original inheritance of the settlor; and therefore the law, to use Sir Edward Coke's expression in Whitlocke's case, 8. Rep. 71. will distribute the rent to every one to whom any limitation of the use is made.

the distress is of no value. 40. Aff. 26. But here the words are sufficient to create a rent, and in an entire clause, part may be void. 4. E. 4. Obligation to I. S. payable to I. D. it is good to I. S. Difference where the repugnancy of words appears, as here, and where it does not: as a release of all actions which I have as executor, and I have none as executor; this is void, because it does not appear. 22. H. 7. Kel. 88. b. Cestuy que use leases, rendering rent to himself, and dies; the heir shall have the rent. Yet in 5. H. 7. 5. b. the rent, with the reversion, goes to the feoffees, tho' reserved to the cestuy que use; yet in law the feoffees are donors; so it is, in effect, the feoffees lease, rendering rent to the cestuy que use, it is good for themselves, which is stronger. Sir Geo. makes a feoffment to the use of himself for life; remainder to William Huntley his son and heir apparent and his heirs: Sir Geo. and William join in a lease for years, rendering rent to Sir Geo. his heirs and assigns: Sir Geo. dies. Resolved, that the reservation and the rent are determined; for William is not in as heir, and therefore he cannot have the rent. Huntley's case, Palm. 485. Lord Nott. MSS.

Lib. 3.

(10. Rep. 42.)

Cap. 5.

Of Estates

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(Flo. 242. 2. 1. Roll. Abr. 411.
PoR. 379. a.)

Register 246. Pl. Com. 27. 34.
B. 3. Formedon 68. F. N. B.
201. Lib. 10. fo. 36. Mary Por-
ington's case.

(Flo. 242. 2.)
Brooke tit. Condition in Abr.
11. H. 7. L'opinion de Broun-
ley. 10. E. 52. 10. Aff. Pl. 24. Pl.
Com. 36. 11. H. 7. 17. 19. R. 2.
Done 10.
(1. Roll. Abr. 475. Nov 7.
3. Rep. 64. b. 65. 8. Rep. 95.
Poll. 215. b.)

Pl. Com. 313. 314. in Scolasti-
cae's cas.
(Hob. 130.)
15. E. 4. 14. a.

21. H. 7. 18. 2.
(Aut. 46. b.)

reentrie, &c. Hereupon is to bee collected divers diversities. First, betweene a condition that requireth a re-entrie, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger, as *Littleton* saith, shall take any advantage, as hath beene said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, untill *I. S.* come from *Rome*, the lessor grant the reversion over to a stranger, *I. S.* comes from *Rome*, the grantee shall take advantage of it and enter, because the estate by the expresse limitation was determined.

So it is if a man make a lease to a woman *quamdiu castavixerit*, or if a man make a lease for life to a widow, *si tamdiu in purâ viduitate viveret*. So it is if a man make a lease for a 100 yeares if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causâ quâ suprà*.

2. Another diversitie is betweene a condition annexed to a freehold, and a condition annexed to a lease for yeares.

For if a man make a gift in taile or a lease for life upon condition, that if the donee or lessee goeth not to *Rome* before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entrie; but if the lease had beene but for yeares, there the grantee should have taken advantage of the like condition, because the lease for yeares *ipso facto* by the breach of the condition without any entry was void; for a lease for yeares may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a void thing an estranger may take benefit, but not of a voidable estate by entry.

Alfeoffor, ou al donor, &c. ou a lour heires, &c. Here is to be observed a diversitie betweene a reservation of a rent and a re-entry; for (as it hath beene said) a rent cannot be reserved to the heire of the feoffor, but the heire may take advantage of a condition, which the feoffor could never doe. As if I infeoffee another of an acre of ground upon condition that if mine heire pay to the feoffee, &c. 20 shillings, that he and his heires shall re-enter, this condition is good; and if after my decease my heire pay the 20 shillings, hee shall re-enter, for he is privy in blood, and enjoy the land as heire to me.

Porsque tantselement al feoffor, &c. ou a lour heires. Our author speaketh here of naturall persons for an example, for if a bishop, archdeacon, parson, prebend, or any other body politique or corporate, ecclesiastical or temporal, make a lease, &c. upon condition, his successor may enter for the condition broken, for they are privy in right.

And so if a man have a lease for yeares and demise or grant the same upon condition, &c. and die, his executors or administrators shall enter for the condition broken, for they are privy in right, and represent the person of the dead.

*pres soit aderere, le grantee de le reversi- on poit distreiner pur le rent, pur ceo que le rent est incident a le reversion; mes il ne poit entrer en la terre, & ouste le tenant, si come le lessor puissoit ou ses heires, si le reversion ust este continue en eux, &c. Et en cest case l'entrie est tolle a tous temps; car le grantee de le reversion ne poit entrer, causâ quâ suprà. Et le lessor ne ses heires ne poyent enter; car si le lessor puissoit entrer, donques il covient que il serroit * en son premier estate, &c. et ceo ne poit estre, pur ceo que il ad alien de luy le reversion.*

after behind, the grantee of a reversion may distreine for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and ouste the tenant, as the lessor might have done or his heires, if the reversion had beene continued in them, &c. And in this case the entrie is taken away for ever; for the grantee of the reversion cannot enter, *causâ quâ suprà*. And the lessor nor his heires cannot enter; for if the lessor might enter, then hee ought to be in his former state, &c. and this may not bee, because hee hath aliened from him the reversion.

[J] If

* *en-a* in L. and M. and Rob.

(y) If *cessuy que use* had made a lease for yeares, &c. upon condition, the feoffees should not enter for the condition broken, for they are privie in estate, but not privie in blood. (y) 27. H. 8. 1.

Another diversitie is in case of a lease for yeares, where the condition is that the lease shall cease, or be void, as is aforesaid, and where the condition is, that the lessor shall re-enter, for there the grantee, as *Littleton* saith, shall never take benefit of the condition. (4. Rep. 52. Ant. 211. b. 1. Roll. Abr. 475. 3. Rep. 64.)

And it is to be observed, that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwise it is of an estate or lease voidable by entrie. (1) Pl. Com. Browning's case. 136.

Another diversitie is betweene conditions in deed, whereof sufficient hath beene said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c. that then the lessor may enter. Of this and the like conditions in law, which doe give an entrie to the lessor, the lessor himselfe and his heires shall not onely take benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in their owne time. Another diversitie there is betweene the judgement of the common law, whereof *Littleton* wrote, and the law at this day by force of the statute (*) of 32. H. 8. cap. 34. (a) For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entrie by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c. and if the rent be behind a re-entrie, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32. H. 8. the grantee may take advantage thereof, and upon demand of the rent, and non-payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c. of any lands, &c. which pertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heires, executors, successors, and assignees shall have like advantage against the lessees, &c. by entrie for non-payment of the rent, or for doing of waste or other forfeiture, &c. as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgements have beene given, which are necessary to be knowne.

1. That the said statute is generall, *viz.* (b) that the grantee of the reversion of every common person as well as of the king shall take advantage of conditions. (b) Pl. Com. Hill and Garge's case 175. 176. M. 10. & 11. Eliz. 180. Dier. ibid.

2. That the statute doth extend to grants made by the successors of the king, albeit the king be only named in the act. 14. Eliz. Dyer 309. Wynter's case.

3. That where the statute speaketh of lessees, that the same doth not extend to gifts in taile. (d) Pl. Com. Kidwellye's case 69. Vid. Dyer Mich. 14. & 15. Eliz. 309.

4. That where the statute speakes of grantees and assignees of the reversion, (d) that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c. and the reversion is granted for life, &c. So if lessee for yeares, &c. be, and the reversion is granted for yeares, the grantee for yeares shall take benefit of the condition in respect of this word (*executors*) in the act. (1. Roll. Abr. 472. Post. 385. 2. Ante 148. a. 1. Roll. Abr. 471. Mo. 93.)

5. That a grantee of part of the reversion shall not (c) take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right. Vide 7. E. 3. 54. Simile adjudged in *Communi Banco* in the Lord Dyer's time. P. 17. Eliz. Mich. 14. & 15. Eliz. Dyer 309. adjudge Winter's case.

6. That in the king's case, the condition in that case is not destroyed, but remaines still in the king. (c) Lib. 5. fo. 54. Knight's case. Winter's case ubi supra. Knight's case ubi supra.

7. By act in law a condition may be apportioned in the case of a common person; as if a lease for yeares be made of two acres, one of the nature of Burrough English, the other at the common law, and the lessor having issue two sonnes, dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents. Lib. 4. fo. 120. Dumper's case. (4. Leo. 27. 28. 29. 30. Mo. 202. 203.)

8. If a lease for life be made, reserving a rent upon condition, &c. the lessor levies a fine of the reversion, he is grantee or assignee of the reversion; but without attornment hee shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee. (2) Resolved in Duke's case. Pasch. 20. Eliz. in *Communi Banco*. Mallorie's case lib. 5. 112. b.

9. There is a diversitie betweene a condition that is compulsory, and a power of revocation that is voluntary: for a man that hath a power of revocation, may by his owne act extinguish his power of revocation in part, as by levying of a fine of part; and yet the power shall remaine for the residue, because it is in nature of a limitation, and not of a condition; and so it was resolved (b) in the case of Shrewsburie's case in the court of wards, Pasch. 39. Eliz. and Mich. 40 & 41. Eliz. (1. Roll. 472. Hob. 213. Post. 237. 265. b. 1. Rep. 112. 113.)

10. If the lessor bargain and sell the reversion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and yet hee is an assignee within the statute. (b) 14. Eliz. Dyer 39. (1. Rep. 173. b. 4. Rep. 115. b. 1. Roll. Abr. 429.)

So

(1) Because the acceptance of rent cannot make a new lease, and the old one was determined; but the acceptance of the rent is a sufficient declaration, that it is the lessor's will to continue the lease, for he is not entitled to the rent but by the lease. Note to the 11th edition. And see Symfon v. Butcher, Doug. Rep. 51; and the case of Wynn v. Humphreys; and Carter v. Butcher, reported in the notes of that case.

(2) Attornment being taken away per 4. & 5. Ann. c. 16, the law seems to be otherwise now. Note to the 11th edit.

(3. Rep. 62. b.)

Lib 5. fo. 113. Mallorie's case.
Lib. 8. fol. 92. France's case.
(Cro. Jac. 9. 1. Roll. 46.)

And so was it resolved in Wyn-
ter's case, Mich. 14. & 15. Eliz.
in Communi Banco, and often-
times since. Vide Dyer 309.
(Flo. 242. 1. Saun. 240. 1. Leo.
62.)

So if the lessor grant the reversion in fee to the use of *A.* and his heirs, *A.* is a sufficient assignee within the statute, because he comes in by the act and limitation of the parties, albeit he is in the *possession*, and the words of the statute be, *to or by*, and they be assignees to him, although they be not by him: but such as come in merely by act in law, as the lord of the villeine, the lord by escheat, the lord that entreth or claimeth for mortmaine, or the like, shall not take benefit of this statute.

11. If the lessor in the case before bargain and sell the reversion by deed indented and inrolled, or if the lessor make a feoffment in fee, and the lessee re-enter, the grantee or feoffee shall not take any advantage of any condition, without making notice to the lessee.

12. Albeit the whole words of the statute be, for non-payment of the rent, or for doing of waste or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture, by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the state, as for not doing of waste, for keeping the houses in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like, and not for the payment of any summe in grosse, delivery of corne, wood, or the like, so as other forfeiture shall be taken for other forfeitures like to those examples which were there put, (*videlicet*) of payment of rent, and not doing of waste, which are for the benefit of the reversion. (1)

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(F. N. B. 144. b.)

39. E. 3. Resceit 14.

(Ant. 1. b. 47. a.)

*AL seignior per voy
de escheat, &c.*

Note, here it appeareth, that the lord by escheat shall distrein for the rent, and yet the rent was reserved to the lessor and his heirs; but both assignees in deed and assignees in law shall have the rent, because the rent being reserved of inheritance to him and his heirs, is incident to the reversion, and goeth with the same. But if the rent were reserved to him and his assigns, and the lessor assigned over the reversion, and dyeth, the assignee shall not have the rent after his decease, because the rent determined by his death, for that it was not reserved to him, his heirs, and assigns.

Mes il ne poet entrer en la terre per force del condition, &c.

Hereby it appeareth, that at the common law neither assigns in deed nor assignees in law could have taken the benefit of either entrie or re-entrie, by force of a condition.

Pur ceo que il n'est pas beire al lessor, &c.

(f) 21. H. 7. 18. 17. Aff. 20.
39. E. 3. Gard. 113. 114. 18.
Aff. pl. 18. lib. 7. fol. 7. The
earl of Bedford's case.

The guardian in chivalrie (f) or in socage shall in the right of the heir take benefit of a condition by entrie or re-entrie, by the common law, and so it is here implied.

*ITEM si soyt seig-
nior et tenant, et*

*le tenant fait un tiel
lease pur terme de vie,
rendant a lessor et a
ses beires tiel annual
rent, et pur default
de payment un re-en-
trie, &c. si apres le
lessor morust sans beire
durant la vie le te-
naunt a terme de
vie, per que le re-
version devient al
seignior per voy d'es-
cheat, et puis le rent
de le tenaunt a terme
de vie soit aderere, le
seignior poet destrein-
er le tenant pur le
rent arere; mes il
ne poet entrer en la
terre per force del
condition, &c. pur ceo
que il n'est pas beire
al * lessor, &c.*

ALSO if lord and

*tenant bee, and
the tenant make a
lease for terme of
life, rendering to the
lessor and his heyres
such an annuall rent,
and for default of pay-
ment a re-entrie, &c.
if after the lessor dy-
eth without heir du-
ring the life of the te-
nant for life, whereby
the reversion com-
meth to the lord by
way of escheat, and
after the rent of the te-
nant for life is behind,
the lord may distrein
the tenant for the rent
behind; but he may not
enter into the land by
force of the condition
&c. because that hee
is not heir to the lessor, &c.*

Sect.

* lessor—feoffor, L. and M. and Roh.

(1) It has also been held upon this statute, that if a man makes a lease for years upon condition that if the rent should be in arrear, it should be lawful to the lessor and his assigns to re-enter, and then the lessor assigns the reversion over, and the lessee attorns, and the lessor dies, the grantee shall not take advantage of the condition for want of these words, his heirs, in the reservation of the condition; the condition being that he and his assigns shall enter. By Brown, serj. who moved the case in C. B. ex relatione T. Hu. It appears therefore, that this reservation of condition is to be resembled to such a reservation of rent as is mentioned before, in page 47. a. which determined by the death of the lessor; but that nevertheless the grantee shall have advantage of the condition, during the life of the grantor, by the 32. H. 8. Infra 215. b. So note, the grantee of part of the reversion in the whole shall take advantage of a condition; for to this purpose the grantee of a reversion for life or years is an assignee within the 32. Henry 8, who may enter; which nevertheless is very different in the case of a warranty; for a lessee for life, who has but part of the estate in the whole, is not assignee for voucher. Infra 385. b. On the other hand, the grantee of the whole estate in reversion in part is not an assignee within the 32. Henry 8.; as if the reversioner in fee of 4 acres grants 2 acres in fee, the grantee cannot enter; which also is very different in the case of warranty, for the feoffee of 2 acres is an assignee for voucher. Infra 315. a.—Lord Nott. MS.

Sect. 349.

*ITEM si terre soit graunt a un * home pur terme de deux ans sur tiel condition, que s'il payeroit al grantor deins les dits deux ans 40 markes, † adonques il averoit la terre a luy et a ses heires, &c. en cest case si le grantee enter per force de le grant, sans ascun liverie de seisin fait a luy per le grantor, et puis il paya al grantor les 40 markes deins les deux ans, uncore il n'ad riens en la terre forsque pur terme de deux ans, pur ceo que nul liverie de seisin a luy fuit fait al commencement. Car s'il averoit franktenement et fee en cest case, pur ceo que il ad performe le condition, donque il averoit franktenement per force del prime graunt, l'ou nul liverie de seisin de ceo fuit fait, que serroit ‡ inconvenient, &c. Mes si le grantor ust fait liverie de seisin al grantee per force de la grant, donque averoit le grantee le franktenement et le fee sur mesme le condition.*

A L S O if land be granted to a man for terme of two yeares upon such condition, that if hee shall pay to the grantor within the said two yeares fortie marks, then he shal have the land to him and to his heyres, &c. in this case if the grantee enter by force of the grant, without any liverie of seisin made unto him by the grantor, and after he payeth the grantor the forty markes within the two yeares, yet he hath nothing in the land but for terme of two yeares, because no liverie of seisin was made unto him at the beginning. For if he should have a freehold and fee in this case, because he hath performed the condition, then he should have a freehold by force of the first grant, where no liverie of seisin was made of this, which would be inconvenient, &c. But if the grantor had made liverie of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.

H E R E fixe things are to be observed. First, *Littleton* here putteth an example of a condition precedent (1). Secondly, that such a condition which createth an estate may be made by paroll without deed. Thirdly, that liverie of seisin in this case must bee made before the lessee enter, (as *Littleton* here saith at the beginning) for after his entrie livery made to him that is in possession is void, as hath been said. Fourthly, that if no liverie of seisin be made, that no fee simple doth passe, although the money be paid. Fifthly, that it is inconvenient that the fee simple should passe in this case without livery of seisin. Sixthly, that *argumentum ab inconvenienti*, is forcible in law, as often hath beene and shall be observed. See more of this kind of condition in the section next following (2).

Et a ses heires, &c. Here (&c.) implyeth an estate in taile, or a lease for life.

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* home not in L. and M. nor Roh.
reason in L. and M. and Roh.

† que added in L. and M. and Roh.

‡ inconvenient, &c.—encontre

(1) See some observations on conditions precedent, and conditions subsequent, in the last note upon this chapter.

(2) The necessity which there was in the old law, that there should always be some person to do the feudal duties, to fill the possession, and to answer the actions which might be brought for the sief, introduced the maxim, that the freehold could never be in abeyance. See 2. Wilson, Bond v. West, 165. But it was admitted, that there were some cases in which the inheritance, when separated from the freehold, might be so. The question agitated in the commentary upon this and the following section, arises from the difficulty of ascertaining where the freehold, in the case mentioned by *Littleton*, is to be. By the livery, it is taken out of the grantor; it must therefore vest in the feoffee. Yet it seems difficult to conceive how it could be in the grantee, consistently with the term of years. The opinion adopted by *Littleton* and Sir Edward Coke is conformable to what is said in Lord Strafford's case, 8. Rep. 73. b.—It is to be observed, that tho' by conveyances at common law the freehold necessarily passes out of the grantor; and that if there is not some person in being in whom it can immediately vest, the conveyance is void; that

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(5. Rep. 9^o.)

ORE il ad
fee simple
conditionall, &c.

The like is of an estate in taile, or for life. Many are of opinion against *Littleton* in this case, and their reason is, because the fee simple is to commence upon a condition precedent, and therefore cannot passe until the condition be performed; and that here *Littleton* of a condition precedent doth (before the performance thereof) make it subsequent: and for proove of their opinion they avouch many successions of authorities that no fee simple should passe before the condition performed.

31. E. 1. tit. feoffments & faits
119.

31. E. 1. tit. feoffments & faits 119. A. letteth a mannor to B. for term of twenty years, and the deed would, that after the terme of twenty yeares that B. and his heirs should hold the said mannor for ever by twelve pounds rent, A. taketh a wife and dyeth before the term be past, the wife of A. demands dower. And there *Wayland* chiefe justice saith, that the fee and the franktenement doth repose in the person of the lessor untill the terme be past, for before that the condition is not performed; for if the lessor had aliened the land before the end of the terme, B. should not recover by a writ of assise, and by the death of the lessor the chiefe lord should have had the wardship

ITEM si terre soyt
grant a un home
pur terme de 5 ans,

sur condition, que s'il pay
al grantor deins les
deux primer ans 40
markes, que adonque il
averoit fee, ou autrement
forsque pur terme
de les 5 ans, et liverie
de seisin est fait a luy
per force de le graunt,
ore il ad fee simple con-
ditionell, &c. Et si en
ceo case le grauntee ne
paia my al grantor les
40 markes deins les
primers deux ans, don-
ques immediate apres
mesmes les deux ans
passés, le fee et le frank-
tenement est et serra
adjudge en le grantor,
pur ceo que le grantor
ne poet apres les dits
deux ans maintenant
enter sur le grauntee,
pur ceo que le grauntee
ad uncore title per trois
ans d'aver et occuper la
terre per force de mesme
le grant. Et issint pur
ceo que le condition del
part le grauntee est en-
freint, et le grauntor ne
poet entrer, la ley mitte-
ra le fee et le franktene-
ment en le grantor. Car si
le grauntee en cest case fait
waist, donques apres le
enfrenider de le condi-
tion, &c. et apres les

ALSO if land be grant-
ed to a man for term
of five yeares, upon con-
dition, that if he pay to
the grantor within the
two first yeares forty
markes, that then he shal
have fee, or otherwise
but for terme of the five
yeares, and livery of sei-
sin is made to him by
force of the grant, now
he hath a fee simple con-
ditionall, &c. And if in
this case the grauntee
doe not pay to the gran-
tor the fortie markes
within the first two yeares,
then immediately after
the said two yeares past,
the fee & the freehold is
and shall be adjudged in
the grantor, because
that the grantor cannot
after the said two yeares
presently enter upon the
grauntee, for that the
grauntee hath yet title
by three yeares to have
and occupie the land by
force of the same grant.
And so because that the
condition of the part of
the grauntee is broken,
and the grantor cannot
enter, the law will put
the fee and the freehold
in the grantor. For if
the grauntee in this case
makes waist, then after
the breach of the condi-
tion, &c. and after the two
deux

is not the case with respect to wills, conveyances under the statute of uses, trusts in equity, or grants of rents *de novo*. For as to wills;—there is no immediate transfer of the freehold, as upon the death of the testator it vests in the heir to answer the lord's services and the stranger's writs. As to conveyances under the statute of uses;—till there is some person in being in whom the use can vest, the possession is not altered, but continues in the feoffor and his heirs. See 1. Inst. 23. As to executory trusts, the legal estate immediately vests and continues in the trustee: and as to rents *de novo*, the tenant continues in possession of the land out of which they issue. However, it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the estates *expressly* declared, that the freehold should remain with the party (as if he has a term of years *expressly* given him), the law will not give him, by *implication*, an estate of freehold. See *Pybus v. Mitford*, 1. Vent. 352. *Adams v. Savage*, 2. Salk. 679. *Penhay v. Hurrell*, 2. Vern. 370. *Speed v. Davis*, 2. Salk. 675. In the same manner, if a person limits his estate to such uses as he shall appoint; and in the mean time, and until he makes an appointment, to the use of himself and his heirs; or if he limits it to the use of himself for life, and after
his

deux ans, le grantor yeares, the grantor
avera son brieve de shall have his writ of
wast. Et ceo est bone waste. And this is a
prosse adonque, que good proffe then, that
le reversion est en luy, the reversion is in him,
&c. &c.

of the heire of the lessor, and by judgement the wife recovered dower, for the termor could not have fee, all which be the words of that booke.

12. E. 2. tit. voucher 265. 12. E. 2. tit. voucher 265. 9
 I. letteth lands to B. for eight (8. Rep. 73. Plow. 481)

lessee at the end of the tearme, that then he shall have fee: by the non-payment of the mony, the fee and franktenement accrueth to him, and before, the lessee cannot be impleaded in a *præcipe*, neither shall he vouch.

[x] 7. E. 3. 10. I. letteth certaine lands to N. for the tearme of ten yeares, rendring a hundred shillings by the yeare to him and his heires, and granted by deed, that if he held the lands over to him and his heires, that he should render by the yeare twenty pounds: the lessor during the tearme brought an action of debt for the rent. And there *Herle* chiefe justice of the Common Pleas giveth the rule, that during the tearme the lessee had but for yeares, and therefore the action of debt maintainable.

[x] 7. E. 3. 10. Pl. Com. Saye's case 272.

[y] 44. E. 3. tit. attain. 22. and 43. Aff. p. 41. D. and A. infeoffe the two plaintifes in the assise, they let those lands to S. for tearme of nine yeares upon condition, that if the plaintife in the assise pay a hundred shillings to S. during the tearme, that S. shall have it but for nine yeares, and if they pay it not, that S. shall have fee. S. continueth his estate by one yeare, and after granteth his estate to one H. which H. continueth his estate by two yeares, and granted the residue of the tearme to R. and within the tearme of nine yeares the plaintifes in the assise pay the hundred shillings to S. R. continueth his possession after the tearme, and infeoffeth D. which infeoffeth the lord *Furnivall*, against whom and others without any claim or entry made by the plaintifes, after the nine yeares ended he brought his assise, and after adjournment recovered.

[y] 44. E. 3. tit. attain. 22. 43. Aff. p. 41.

[z] 10. E. 3. 39. & 40. R. doth let certaine lands to I. for tearme of twelve yeares, and in suretie of his tearme he maketh a charter of the fee upon condition, that if he be disturbed within the tearme, that he cannot hold the lands untill the end of the tearme, that then he shall hold the lands to him and his heires for ever, and seisin was delivered upon the one charter and the other. R. within the tearme plowed and sowed the land, and tooke the profits against the will of I. and I. upon this disturbance had fee and recovered in assise.

[z] 10. E. 3. 39. 40. 10. Aff. 15. tit. Aff. 161. Pl. Com. Brown- ing's case 135.

6. R. 2. tit. *Quid juris clamat* 20. If a lease be made for a tearme upon condition, if the lessee pay a certain summe within the tearme, that then he shall have fee, if he pay the money he shall have the fee, but if before the day of payment the lessor levieth a fine to another, the lessee ought to attorn by protestation, and if he pay the money, the conusee shall have it, and the conusee shall have the rent reserved untill the day of payment; and if land be letten for tearme of yeares upon condition, that if the lessee be ousted within the tearme by the lessor, that he shall have fee, if he be ousted, he shall have fee by the condition, and notwithstanding he shall not have any assise, but he must hap possession after the ouster, and of this he shall have an assise.

6. R. 2. tit. quid juris clamat. 20.

And generally the bookes (*) are cited that make a diversitie between a condition precedent and a condition subsequent.

(*) 15. H. 7. 1. a. 14. H. 8. 18. 20. 3. H. 6. 6. b.

And lastly, they cite *Dier*, [a] 10. *Eliz.* 281. and in *Say* and *Fuller's* case, *Pl. Com.* 272. the opinions of *Dyer* and *Brown*.

[a] *Dyer* 10. *Eliz.* 281. *Pl. Com.* 272.

Notwithstanding al this there are those that defend the opinion of *Littleton*, both by reason and authority. By reason, for that by the rule of law a liverie of seisin must passe a present freehold to some person, and cannot give a freehold *in futuro*, as it must doe in this case, if after liverie of seisin made the freehold and inheritance should not passe presently, but expect untill the condition be performed; and therefore if a lease for yeares be made to begin at *Michaelmas*, the remainder over to another in fee, if the lessor make liverie of seisin before *Michaelmas*, the liverie is void, because if it should worke at all it must take effect presently, and cannot expect.

Vide Litt. in the chapter of tenants for yeares.

Secondly, they say that when the lessor makes liverie to the lessee, it cannot stand with any reason that against his owne liverie of seisin, a freehold should remaine in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for yeares the remainder to the right heires of I. S. and the lessor make liverie to the lessee *secundum formam chartæ*, this liverie is voyd, because during the life of I. S. his right heire cannot take (for *nemo est hæres viventis*), and in that case the freehold shall not remaine in the lessor, and expect the death of I. S. during the tearme; for albeit I. S. die during the tearme, yet the remainder is void, because a liverie of seisin cannot expect.

(1. Rep. 139. 2. Rep. 67. a. Post. 378. a.)

And

his decease, to such uses as he shall appoint, and for want of appointment, to the use of his right heires;—in both of these cases, the settlor and his heires have a qualified and determinable fee, until by an exercise of the power of appointment, an use vests in the person to whom it is appointed; or till by the death of the settlor, without exercising his power, the exercise of it becomes impossible. To this fee dower is clearly incident. If the settlor makes an appointment, a new use springs up and vests in the appointee; and the fee originally limited to the settlor ceases; and with it the right of the wife to her dower out of it: and from that time, the use appointed under the power takes effect, in the same manner as if it had been inserted in the original deed, in the place of the power. But if no appointment is made, the fee, from being qualified and determinable, becomes simple and absolute. It may be objected, that in the second of these cases, an estate for life is expressly limited to the settlor, and that the fee is therefore put in abeyance. But in the case of *Leonard Lovie*, 8. Rep. 78. where the estate was devised to *Leonard Lovie* expressly for his life, without impeachment of waste, and afterwards to such uses as he should appoint, and after several intermediate remainders to the use of his right heires, it was resolved, that the fee vested in him till the appoint-
 ment

(2. Rep. 55.)

And they say further, that seeing all the bookes afore said prove that such a condition is good, and that the livery made to the lessee is effectually, by consequence the freehold and inheritance must passe presently or not at all.

[*b*] Hill & Grange's Pl. Com. 171.

And it is not rare, say they, in our bookes that words shall be transposed and marshalled so as the feoffment or grant may take effect. [*b*] As if a man in the moneth of *February* make a lease for yeares reserving a yearly rent payable at the feasts of Saint *Michael* the Archangel, and the Annuntiation of our Lady, during the tearme, the law (in this case of reservation) shall make transposition of the feasts, viz. at the feasts of the Annuntiation, and of Saint *Michael* the Archangel, that the rent may be paid yearly during the tearme. And so it is [*c*] in case of a grant of an annuitie. And further they take a divoritie in this case betwene a lease for life and a lease for yeares. For in case of a lease for life with such a condition to have fee, they agree that the fee simple passeth not before the performance of the condition, for that the livery may presently worke upon the freehold; but otherwise it is in the case of a lease for years. Also they take a divoritie between inheritances that lie in grant and inheritances that lie in livery. For they agree that if a man grant an advowson for yeares upon condition, that if the grantee pay twenty shillings, &c. within the tearme, that then he shall have fee, the grantee shall not have fee untill the condition be performed, *Et sic de similibus*. But otherwise it is where livery of seisin is requisite, and therefore if the king make such a lease for yeares upon such a condition, the fee simple shall not passe presently, because in that case no livery is made.

[*c*] 10. E. 3. Seignior Stafford's case, lib. 8. fol. 74. Pl. Com. Nichol's case 487.

They also make severall answers to the authorities before cited. For as to the case in 31. E. 1. they say that either the case is misreported, or else the law is against the judgement. For the case is but this, that a man make a lease of a manor to *B.* for twenty yeares, and that after the twentie yeares *B.* shall hold the manor to him and his heires by 12 pound rent and (as it must be intended) maketh livery of seisin, in this case it is cleere (say they) that *B.* hath a fee simple *maintenant*, for there is no condition precedent in the case.

Seignior Stafford's case ubi supra.

As for the case in 12. E. 2. the case (as it is put in the booke) is, that *John de Marre* made a charter to *John de Burford* of fee simple, and the same day it was covenanted betwene them that *John de Burford* should hold the same tenements for eight years, and if he did not pay a hundred markes at the end of the tearme that the land shall remaine to *John de Burford* and his heires. In which case, say they, there is direct repugnancy; for, first, the charter of the fee simple was absolute, and after the same day it was covenanted between them, &c. this covenant being made after the charter, could neither alter the absolute charter, nor upon a condition precedent give him a fee simple that had a fee simple before.

To all the other bookes, viz. 7. E. 3. 10. E. 3. 10. Aff. 44. E. 3. 43. Aff. and 6. R. 2. they say, that being rightly understood they are good law; for in some of these bookes, as namely in 10. E. 3. 10. Aff. &c. it appeareth that there was a charter made in surety of the tearme, which, say they, must be intended thus, viz. a man maketh a lease for yeares, the lessee enters and the lessor makes a charter to the lessee, and thereby doth grant unto him, that if he pay unto the lessor a hundred markes during the tearme, that then he shall have and hold the lands to him and to his heires.

Pl. Com. in Nichol's case 487.

In this case, say they, there need no livery of seisin, but doth enure as an executory grant by increasing of the state, and in that case, without question, the fee simple passeth not before the condition performed.

And therefore *Littleton* warily putteth his case of an estate made all at one time by one conveyance, and a livery made thereupon.

For *Littleton* himselfe in the *Section* before saith, that in that case without a livery nothing passeth of the freehold and inheritance.

[*d*] 10. E. 3. 54.

And this diversity (say they) is proved by books; and thereupon they cite [*d*] 10. E. 3. 54. In a writ of dower, the tenant vouched to warranty; the vouchee as to part pleaded that the husband was never seised of any estate whereof she might be endowed; as to the residue the tenant pleaded that he lesseed to the husband in gage upon condition that if the lessor paid ten markes at a certaine day, that he should re-enter, and if he failed of payment, that the land should remaine to the husband and his heires, which must be intended to be done by one entire act, and pleaded that he paid the money at the day, which is allowed to be a good plea: *Ergo*, the fee simple passed by the livery, otherwise the plea had amounted that the husband was never seised, &c. And say they, that it cannot be intended that the judges should be of one opinion in *Trinitie* tearme, and of another opinion in *Michaelmasse* tearme in the same yeare, and therefore (they hold) their severall opinions are in respect of the said diversity of the cases.

[*e*] 32. E. 3. tit. garr. 30.

[*e*] 32. E. 3. tit. garr. 30. a tenant by the curtesie made a lease for yeares, and in surety of the tearme, &c. made a charter in fee simple, and made livery according to the charter (note a speciall mention made of livery in this case); and issue being taken in an assise, whether the

tenant

ment was made. See also Sir Edward Cleere's case, 6. Rep. 18. It may also be objected, that a limitation to such uses as a person shall appoint, is incompatible with, or rendered void by, the subsequent limitation of the fee to him, as the ownership of the fee carries with it every power of appointment. But it is to be observed, that the owner of the fee cannot convey the inheritance, but by deed sealed and delivered. Now he may limit a fee, under a power, by a mere instrument in writing, and without any of these forms or ceremonies which the law requires for passing real property; which, clearly, is a power not included in the ownership of the fee. It must, however, be noticed, that as a power of appointment is liable to be suspended and destroyed, and as the existence of the power is the only circumstance which precludes the wife from her dower, in the case I have mentioned there always must be a possibility of danger in taking a title which depends upon it. Yet in some cases the possibility is so small as not to deserve attention. Some remarks on the mode generally used for barring the wife's dower will be offered in the course of these annotations.

tenant by the courtſie demifed in fee, upon the ſpeciall matter found, it was adjudged that a fee ſimple paſſed, and that the heire might enter for a forfeiture, which, ſay they, in caſe of livery is an expreſſe judgement in the point agreeing with the opinion of *Littleton*.

(f) 43. E. 3. 35. In an action of waſt againſt one in lands which hee held for tearme of yeares, *Belknap* pleaded thus for the defendant: that the defendant was ſeiſed in fee, and infeoffed the plaintife, &c. and after the plaintife demifed the land back againe to the defendant for yeares upon condition, that if the defendant paid certaine money, &c. that then the defendant might retaine the land to him and to his heires, and if not, the plaintife might enter, &c. and pleaded that the tearme endured, and that the day of payment was not come, and demanded judgement, if the plaintife may maintaine an action of waſte, inasmuch as the defendant had now a fee ſimple, and ſhewed forth the indenture of leaſe with the condition (which agreeth with *Littleton's* caſe) all being done at one time, and by one deed, and a livery intended, and with *Littleton's* opinion alſo. It is true, ſay they, that *Cavendiſh* accouſſell with the plaintife offered to demurre, but never proceeded. (g) *Vide* 20. Aff. pl. 20. (f) 43. E. 3. 36.

Other authorities they cite, but theſe (as I take it) are the principall, and therefore for avoyding of tediousneſſe, having I feare bene too long upon this point, the others I omit. Only this they adde, that *Littleton* had ſeene and conſidered of the ſaid bookes, and have ſet downe his opinion where livery of ſeiſin is made upon a conveyance made at one time, as hath bene ſaid, that he hath fee ſimple conditional.

Benigne leſſor, utere tuo iudicio, nihil enim impedit. Conditio beneficiæ quæ ſtatim conſtruitur benigne ſecundum verborum intentionem eſt interpretanda, odioſa autem quæ ſtatim deſtruit ſtrictè ſecundum verborum proprietatem eſt accipienda. Lib. 8. fo. 90. France's caſe. (Dyer 45. Plow. 7. a.)

A leaſe is made to a man and a woman for their lives upon condition, that which of them two ſhall firſt marry, that one ſhall have fee, they entermarry, neither of them ſhall have fee, for the incertainty.

Note, If the condition be to increaſe an eſtate (that is to ſay) to have fee upon payment of money to the leſſor or his heires at a certaine day, before the day the leſſor is attainted of treaſon or felony, and alſo before the day is executed, now is the condition become impoſſible by the act and offence of the leſſor, and yet the leſſee ſhall not have fee, becauſe a precedent condition to increaſe an eſtate muſt be performed, and if it become impoſſible, no eſtate ſhall riſe. (Flo. 48t. a. Ant. 206. a. b.)

Pur ceo que le grantor ne poeſt entrer, &c. Regularly when any man will take advantage of a condition, if hee may enter hee muſt enter, and when he cannot enter he muſt make a claime, and the reaſon is, for that a free-hold and inheritance ſhall not ceaſe without entry or clayme, and alſo the feoffor or grantor may waive the condition at his pleaſure.

Pl. Com. Browning & Beſton's caſe 133. b. (2. Rep. 53. b.)

As if a man grant an advowſon to a man and to his heires upon condition, that if the grantor, &c. pay 20 pound on ſuch a day, &c. the ſtate of the grantee ſhall ceaſe or be utterly void, (1) the grantor payeth the money, yet the ſtate is not reſtored in the grantor before a claime, and that claime muſt be made at the church. (d) And ſo it is of a reversion or remainder of a rent, or common, or the like, there muſt be a claime before the ſtate be reſtored in the grantor by force of the condition, and that claime muſt be made upon the land.

Vi. *Littleton* cap. Villein.

(d) Pl. Com. Browning's caſe 133. b.

A fortiori, in caſe of a feoffment which paſſeth by livery of ſeiſin, there muſt be a re-entry by force of the condition before the ſtate be voyd.

42. E. 3. 1.

If a man bargaineth and ſelleth land by deed indented and inrolled with a *proviſo*, that if the bargainer pay, &c. that then the ſtate ſhall ceaſe and be void, he payeth the money, the ſtate is not reſtored in the bargainer before a re-entry, (2) and ſo it is if a bargain and ſale be made of a reversion, remainder, advowſon, rent, common, &c. And ſo it is if lands be deviſed to a man and to his heirs upon condition, that if the deviſee pay not 20 pound at ſuch a day, that his eſtate ſhall ceaſe and be void, the money is not paid, the ſtate ſhall not be veſted in the heir before an entry. And ſo it is of the reversion or remainder, an advowſon, rent, common, or the like. (3)

Lib. 2. fo. 30. Sir Hugh Cholmeley's caſe.

(5. Rep. 34. a. b. Flo. 242. a.)

But the ſaid rule hath divers exceptions. Firſt, in this preſent caſe of *Littleton*, for that he can make no entry, he ſhall not be driven to make any claime to the reversion: for ſeeing by conſtruction of law the freehold and inheritance paſſeth *maintenant* out of the leſſor; by the like conſtruction, the freehold and inheritance by the default of the leſſee ſhall be reſtored in the leſſor without entrie or claime.

Vid. lib. 1. fo. 174. Dig's caſe. 20. E. 4. 18. 19.

2. If I grant a rent charge in fee out of my land upon condition, there if the condition be broken, the rent ſhall be extinct in my land, becauſe I (that am in poſſeſſion of the land) need make no claime upon the land, and therefore the law ſhall adjudge the rent voide without any claime.

Pl. Com. Browning's caſe 133. b. 20. E. 4. 19.

3. If a man make a feoffment unto me in fee upon condition that I ſhall pay unto him 20 pound at a day, &c. before the day I let unto him the land for yeares reſerving a rent, and after

20. E. 4. 19. 20. H. 7. 4. b. (4. Rep. 53.)

(1) Acc. 2. And. 8.

(2) Acc. 1. Rep. 174. a. as to the general principle; but the particular caſe there was, that *A.* covenanted to ſtand ſeiſed to the uſe of himſelf for life, with ſeveral remainders over; with a power of revocation.—By an exerciſe of this power, he revoked the uſes; and it was held, that the antient uſes were determined, without entry or claim, becauſe he himſelf was tenant for life of the land, and he could not enter upon himſelf; and no claim was neceſſary, as an expreſs revocation was as ſtrong as any claim could be.—See the following page.

(3) The entry, or claim, may be made either by the party himſelf, or by a ſtranger, by his order. 2. Cro. 57.

Lib. 3.

(1. Rep. 97.)

Lib. 1. 174. Digge's case.
(Parl. Rot. 227. a. 265. b. Ant.
215. a.)

Pl. Com. in Fulmerstone's case.
207. b.
(2. Roll. Abr. 494. 495. 497.
498. 499.)
(5. Rep. 11. a. 1. Roll. Abr.
412.)

7. E. 4. 29. 14. E. 4. 6. 45. E. 3.

8. E. 2. Aff. 395.

50. E. 3. 27.

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after faile of payment, the feoffee shall retaine the land to him and to his heirs, and the rent is determined and extinct, for that the feoffor could not enter, nor need not claime upon the land, for that he himselfe was in possession, and the condition being collateral is not suspended by the lease, otherwise it is of rent reserved.

4. If a man by his deed in consideration of fatherly love, &c. covenant to stand seised to the use of himselfe for life, and after his decease to the use of his eldest sonne in taile, the remainder to his second sonne in taile, the remainder to his third sonne in fee with a *proviso* of revocation, &c. the father doth make a revocation according to the *proviso*, the whole estate is *maintenant* revested in him without entry or claime for the cause aforesaid.

Le grantee ad uncore title pur 3 ans. By this it appeareth that albeit the lessee had *pro tempore* a fee simple, yet after that fee simple is devested out of him, and vested in the lessor, he shall hold the lands for three yeares by the expresse limitation of the parties.

If a man make a lease for 40 yeares, the lessee afterwards taketh a lease for 20 yeares upon condition that if he doth such an act, that then the lease for 20 yeares shall be void, and after the lessee breake the condition, by force whereof the second lease is void, notwithstanding the lease for 40 yeares is surrendered, for the condition was annexed to the lease for 20 yeares, but the surrender was absolute. So it is if a man make a lease for 40 yeares, and the lessor grant the reversion to the lessee upon condition, and after the condition is broken, the tearme was absolutely surrendered. And the diversitie is when the lessor grants the reversion to the lessee upon condition, and when the lessee grants or surrenders his estate to the lessor; for a condition annexed to a surrender may revert the particular estate, because the surrender is conditionall. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion and the surrender absolute. (1)

A gardian in chivalrie took a feoffment of the infant within age that was in his ward, and the infant brought an assise, and the gardian shall be adjudged a disseisor, which proveth that the feoffment as against the infant was voyd, and yet by acceptance thereof the interest of the gardian was surrendered.

A man maketh a lease for tearme of life by deed, reserving the first seven yeares a rose, and if the lessee will hold the land after the seven yeares, to pay a rent in money; the lessee will not hold over, but surrender his tearme: in this case in judgement of law he had but a tearme for seven yeares. And so it is if a man make a lease for life, and if the lessee within one yeare pay not 20 shillings, that he shall have but a tearme for two yeares, if hee pay not the money the estate for life is determined, and he shall have the land but for two yeares.

Ceo est bone proosse adonques, que le reversion est in luy, &c. Here is implied that no man can have an action of waste, unlesse the reversion be in him, and by the authoritie of our author the reason of a case, and well applyed, is a good proosse in law. (2)

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*MES en tiels cafes de feoffment sur condition, l'ou le feoffor poit loyamment entrer pur le condition enfreint, &c. * la le feoffor n'ad le franktenement devant son entrie, &c.* BUT in such cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c. there the feoffor hath not the freehold before his entrie, &c. (3)

This upon that which hath beene said is evident, and needeth no further explanation.

Sect. 352.

2. Mar. 134. Dyer 14. Eliz. Dyer.
311. b. 2. H. 4. 5. 44. E. 3. 9.
Lib. 2. fo. 79. 83. 81. in Seignior Cromwel's case.
(Ant. 208. b. 1. Roll. Abr.
429. 1. Roll. Abr. 614. 615. a.)

QUE le feoffee donera, &c.

Here is no time limited, therefore the feoffee by the law hath time du-

ITEM si feoffment soit fait sur tiel condition, que le feoffee donera le terre al feoff-

ALSO if a feoffment be made upon such condition, that the feoffee shall give the land to
for,

* la—lon in L. and M. and Roh.

(1) See also Dyer 143. 2. Roll. Abr. 495.

(2) No person is entitled to an action of waste against a tenant for life, but he who has the *immediate* estate of inheritance in remainder or reversion, expectant upon the estate for life. If between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there is interposed an estate of freehold, to any person *in esse*, then during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever. But though, while there is an estate for life interposed between the estate of the person committing waste, and that of the reversioner or remainder-man in fee; the remainder-man cannot bring his action of waste: yet, if the waste be done by cutting down trees, &c. such remainder-man in fee may seize them; and if they are taken away, or made use of, before he seizes them, he may bring an action of trover. For, in the eye of the law, a remainder-man for life has not the property of the thing wasted; and even a tenant for life in possession has not the absolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance, of which it is considered a part, and therefore it belongs to the owner of the fee. See Ant. 53. b. 5th Rep. Pagett's case. Udal v. Udal, Alleyne 81. 3. P. W. 267. Bewick v. Whitehead, 22. Vin. Abr. 523. 2. Eq. Ca. Abr. 727. Rolt v. Somerville, 3. Atk. 757.

(3) For till entry it doth not appear; the feoffor having power at his election to void or continue the estate of the feoffee, which he will do. Note to the 11th edit.

for, et a la feme del feoffor, a aver et tener a eux, et a les heires de lour deux corps engendres, et pur default de tiel issue, le remainder al droit heires le feoffor. En ceo cas si le baron devy, vivant la feme, devant aucun estate en le taile fait a eux, * &c. donques doit le feoffee per la ley faire estate a la feme cy pres le condition, et auxy cy pres l'entent de le condition que il poit faire, cest a savoir, de leffer la terre a femme pur terme de vie sans impeachment de waste, le remainder apres son decease a les heires de + corps sa baron de luy engendres, et pur default de tiel issue, le remainder as droit heires le baron. Et la cause pur que le lease serra en cest cas a la feme sole sans impeachment de waste, est pur ceo que le condition est, que l'estate serra fait al baron et a sa feme en ‡ taile. Et si tiel estate ust este fait en le vie le baron, donques apres le mort le baron el || ust ewe estate ent en le taile; quel estate est sans impeachment de waste. Et issint il est reason, que cy pres que

the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heires of their two bodies engendred, and for default of such issue, the remainder to the right heires of the feoffor. In this case if the husband dyeth, living the wife, before any estate in taile made unto them, &c. then ought the feoffee by the law to make an estate to the wife as near the condition, and also as neere to the entent of the condition as he may make it, (1) that is to say, to let the land to the wife for terme of life without impeachment of waste, (2) the remainder after his decease to the heires of the body of her husband on her begotten, (3) and for default of such issue, the remainder to the right heires of the husband. And the cause why the lease shall bee in this case to the wife alone without impeachment of waste is, for that the condition is, that the estate shal be made to the husband and to his wife in taile. And if such estate had been made in the life of the husband, then after the death of the husband shee should have

ring his life, unlesse he be harrassed by the request (a. Rep. 59.) of the feoffor or the heires of his body, as Littleton saith in the next section.

Si le baron devie,
 &c. But in this case, (Sect. 337.) if the feoffee dyeth before any feoffment made, then is the condition broken, because he made not the estates, &c. within the time prescribed by the law. But if the feoffment bee made upon condition that the feoffee before the feast of St. Michael the Archangel next following give the land to the feoffor and to his wife in taile, *ut supra*, and before the day the feoffee dieth, the state of the heire of the feoffee shall be absolute, because a certaine time is limited by the mutual agreement of the parties, within which time the condition becommeth impossible by the act of God, as hath been said before, and therefore it is necessary when a day is limited, to adde to the condition, that the feoffee or his heires doe performe the condition; but when no time is limited, then the feoffee at his perill must performe the condition during his life (although there be no request made) or else the feoffor or his heires may re-enter.

15. H. 7. 13. 21. H. 6. 26. 27.
 9. Eliz. Dyer 262. Pl. Com. 456.
 Lib. 2. fo. 79. Signior Cromwell's case.
 (Sect. 334.)

(1. Roll. Abr. 449. Ant. 206. a.)

(2. Rep. 79. a. 6. Rep. 30. b.)

Fait a eux, &c.

Here the (&c.) implyeth according to the condition with the remainder over.

Al feoffor & a la feme, &c.

Here it appeareth that albeit the feme bee a stranger, yet the feoffee is not bound to make it within convenient time, because the feoffor who is privy to the condition is to take joyntly

27. E. 3. Dower 125.
 Signior Cromwell's case ubi supra.

* &c. not in L. and M. nor Roh.

‡ le added in L. and M. and Roh.

+ les corps de son baron et de luy engendres, in L. and M. and Roh.

|| ust ewe—ad ewe, in L. and M. and Roh.

(1) So where a feoffment was made on condition that the feoffees re-into the feoffor and his wife in tail, the remainder to the right heirs of the husband; the husband died; the wife married a second husband; the feoffees enfeoffed the second husband and his wife, for her life;—the remainder to the right heirs of the first husband; it was held that the condition was well performed. Br. Abr. tit. Cond. pl. 33. And see ibid. 70. Pl. 291.

(2) Note, if land be given to the wife, and the heirs of the husband of his body begotten, the wife shall have the estate for life, subject to waste.—Sup. 26. b.; therefore such conveyance is not by force. Lord Nott. MS.

(3) It is with great pleasure we present the reader with the following observations on this passage. Lord Chief-justice Wilmore, in his argument in the giving judgment in the case of Frogmorton, on demise of Robinson v. Wharrey. 2. Blackst. 728. remarks: "When an estate is limited to a husband and wife, and the heirs of their two bodies; the word Heirs is a word of limitation, because an estate is given to both the persons, from whose bodies the heirs are to issue. But when it is given to one only, and the heirs of two, (as to the wife and the heirs of her and A. B.) there the word Heirs is a word of purchase; for no estate tail can be made to one only, and the heirs of the body of that person and another. This appears from Litt. sect. 352. according to the true reading collected from the original editions. The common editions make the estate cy pres, therein mentioned, to be, to the widow and les heirs d. corps sa baron de luy engendres; which is not as near as might be to the original estate intended, if the husband had lived; viz. to the husband and wife, and the heirs of their

6. Rep. 30. b.)

(1. Roll. Abr. 452.)

(1. Roll. Abr. 428.)

Seignior Cromwel's case ubi supra.
(2. Rep. 79. Ant. 208. b.)

(Ant. 21. b.)

(1. Roll. Abr. 436. Plow. 7. a.
Dyer 45. 4.)30. H. 8. tit. Condit. Br. 190.
V. 33. H. 8. tit. Joint. Br. 62.Lib. 2. fo. 79. 80. 81. Seignior
Cromwel's case. 2. H. 4. 5.2. H. 4. 5. Seignior Cromwel's
case ubi supra.
(1. Sid. 268. 303. 304. 442. Ant.
207. a. Cro. El. 45.

joynedly with her. And so it is if the condition be to enfeoffe the feoffor and an estranger, the feoffee hath time during his life unlesse he be halted by request. Otherwise it is (as hath beene said) where the condition is to enfeoffe a stranger or strangers onely.

If a man make a feoffment in fee, upon condition that the feoffee shall make a gift in taile to the feoffor, the remainder to a stranger in fee, there the feoffee hath time during his life, as is afore said, because the feoffor who is

*home poit faire estate a l'entent de condition, &c. que il serroit * fait, &c. comment que † et ne poit aver estate en ‡ taile sicome el § puissoit aver si le done en le taile ust eslre fait a § sa baron et ¶ a luy en le vie † sa baron.*

the gift in taile had been made to her husband and to her in the life of her husband, &c.

partie, and privy to the condition, is to take the first estate. But if the condition were to make a gift in taile to a stranger, the remainder to the feoffor in fee, there the feoffee ought to doe it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently, as before hath beene said.

De faire estate al feme cy pres le condition, et auxy cy pres l'entent del condition que il poit faire, &c.

A. infeoffe B. upon condition that B. shall make an estate in frankmarriage to C. with one such as is the daughter of the feoffor; in this case he cannot make an estate in frankmarriage, because the estate must move from the feoffee, and the daughter is not of his blood, but yet he must make an estate to them for their lives, for this is as neer the condition as he can. And so it is if the condition be, to make to A. (which is a meer layman) an estate in frankalmoigne, yet must he make an estate to him for his life, for the reason here yeccied by Littleton.

A diversitie is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate: for here it appeareth, that a condition that is to create an estate, is to be performed by construction of law, as neere the condition as may be, and according to the entent and meaning of the condition, albeit the letter and words of the condition cannot be performed: but otherwise it is of a condition that destroyeth an estate, for that is to be taken strictly, unlesse it be in certaine speciall cases: and of this somewhat hath beene said before in this chapter.

As if a man mortgage his land to W. upon condition, that if the mortgagee and I. S. pay twenty shillings at such a day to the mortgagee, that then he shall re-enter, the mortgagee dieth before the day, I. S. payes the money to the mortgagee, this is a good performance of the condition, and yet the letter of the condition is not performed. But if the mortgagee had been alive at the day, and he would not pay the money, but refused to pay the same, and I. S. alone had tendred the money, the mortgagee might have refused it. But if a man make a lease to two for yeares, with a *proviso*, if the lessees dye during the term, the lessor shall re-enter, one lessee alien his part and dye, the other lessee cannot re-enter, but the assignee shall enjoy the term so long as the survivor liveth, and the reason is, because the lease by the *proviso* is not to cease til both be dead. But in the former case, albeit the mortgagee be dead, yet the act of God shall not disable I. S. to pay the money, for thereby the mortgagee receives no prejudice. And so it is that case, if I. S. had died before the day, the mortgagee might have paid it.

And here is to be observed a diversitie when the feoffee dyeth, for then (as hath been said) the condition is broken, and when the feoffor dyeth, for then the estate is to be made as neer the intent of the condition as may be.

Al feme pur terme de sa vie sans impeachment de wast.

Here it appeareth, that this estate for life ought to be without impeachment of wast, and yet if the wife doth accept of any estate for life without this clause, without impeachment of wast, it is good, because the state for life is the substance of the grant, and the privilege to be without impeachment of wast is collateral, and onely for the benefit of the wife, and the omission of it onely for the benefit of the heire. (1)

Also if the wife take husband before request made, and then they make request, and the state

is

* *fait* not in L. and M. nor Roh.
‡ *el—il* in L. and M. and Roh.
† *sa—su* in L. and M. and Roh.

† *el—il* in L. and M. and Roh.
§ *sa—su* in L. and M. and Roh.

† *le* added in L. and M. and Roh.
¶ *a* not in L. and M. and Roh.

(1) Mr. Serj. Hawkins observes here, that the omission of the privilege of being without impeachment of waste, shall not give the heir of the feoffor, for whose benefit it was omitted, a re-entry, which would defeat the estate of the wife. P. 307. 2. Rep. 82. a.

“ their two bodies. But the original edition by Letton and Macklinia, in Littleton's life-time, and the Rohan edition, which is the next (both which my brother Blackstone has) read it thus: *les heirs de les corps de son baron et luy engendres*: which is quite consonant to the original estate; and this estate, to the widow for life, and the heirs of the body of her husband and herself begotten, Littleton, in the same section, declares not to be an estate tail. The same is held in Dyer 99.—in Lane and Pannel, 1. Roll. Rep. 438. and in Goffage and Taylor, Style, 325. which, from a manuscript of lord Hale, in possession of my brother Bathurst, appears to have been first determined in Hil. 1651; which accounts for some expressions of chief-justice Rolle, in Style's case, which was in T. Pasch. 1652.”

is made to the husband and wife, during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where *Littleton* saith it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife.

Sauns impeachment de wast, *Absque impetitione wasti*, (that is) without any challenge or impeachment of waste, and by force hereof the lessee may cut downe the trees and convert them to his owne use. Otherwise it is if the words were *sauns impeachment per usum action de wast*, for then the discharge extends but to the action, and not to the trees themselves, and in that case the lessor shall have them (1).

And it is to be observed, that after the decease of the husband the state is not to be made to the wife and the heires of her body by her late husband ingendred, and so to have an estate of inheritance as she should have had by survivor, if the estate had bin made according to the condition, but only an estate for life without impeachment of wast, &c. for that by the authority of *Littleton* is not so neere the intent of the condition as the case that *Littleton* putteth. But I will search no further into this case, but leave it to the learned and judicious reader.

Et apres son decease a les heires del corps le baron de luy engendres.

Note here, admit that there were two issues in taile, the remainder shal presently vest only in the eldest, and yet if he dieth without issue, it shall *per formam doni* vest in the youngest, as hath beene said in the chapter of Estate taile: (2) and so it is *tacite* proved here, for otherwise the condition (if there were two issues) could not be performed.

(Cro. Car. 242.)
(Cro. Jac. 216.)
See in my Reports lib. 11. fo. 83.
lib. 9. fo. 9. li. 2. 23.

(4. Rep. 63. a.)

(Ant. 20. b. 26. b. 27. a.)

Sect. 353.

ITEM en cest case si le baron et la feme ont issue, et devont devant le done en le taile fait a eux, &c. donques le feoffee doit faire estate al issue et a les heires de corps son pere et son mere engendres, et pur default de tiel issue, le remainder a les droit heires le baron, &c. Et mesme la ley est en auters cases semblables. Et si tiel feoffee ne voet faire tiel estate, &c. quant il est raisonnablement requise per eux que devoyent aver estate per force de le condition, &c. donque poet le feoffor ou ses heires entrer.*

ALSO in this case if the husband and wife have issue, and die before the gift in taile made to them, &c. then the feoffee ought to make an estate to the issue, and to the heires of the body of his father and his mother begotten, and for default of such issue, &c. the remainder to the right heires of the husband, &c. And the same law is in other like cases: and if such a feoffee will not take such estate, &c. when he is reasonably required by them which ought to have the state by force of the condition, &c. then may the feoffor or his heires enter.

QUANT il est raisonnablement requise per eux queux devoyent aver estate per force de le condition.

Note here it appeareth, that the feoffee hath time during his life to make the estate, unless he be reasonably required by them that are to take the estate. This is to be intended of parties or privies, and not of meere strangers, for there (as hath beene said) the state must be made in convenient time.

And concerning the request it is to be knowne, that when the request is made, the party or privy must request the feoffee at a time certain to be upon the land, and to make the state according to the condition, for seeing no time certain is prescribed for the making of the state, and it is incertain when the request shall be made, such request and notice must be made as hath bin said before in this chapter. And of this section, with the (&c.) there needeth not, upon that which hath beene said, any farther explication.

(2. Rep. 78. b. 79.)

(Ant. 222. b. 214. b. 268. b.)

(8. Rep. 89. b.)

Sect.

* &c. added in L. and M. and Roh.

(1) The privilege given by the words without impeachment of waste, is annexed to the privy of estate;—so that if the person to whom that privilege is given, changes his estate, he loses the privilege. 11. Rep. 83. b. Latch. 270.—It has been held that the intent of this clause is only to enable the tenant to cut down timber and open new mines, and that it does not extend to allow destructive or malicious waste; such as cutting down timber which serves for the shelter or ornament of the estate. See *Vane v. Lord Bernard*, 2. Vern. 738. *Packington v. Packington*, 5. Bac. Abr. 491. *Roit v. Lord Sommerville*, 2. Ab. Eq. 759. *Alton v. Alton*, 1. Vin. 264. *Peers v. Peers*, 1. Vin. 521. 2. Atk. 283.

(2) See 1. Rep. 95. 3. Rep. 61. 11. Rep. 80. and the note page 488. in Mr. Douglas's Reports.

Sect. 354.

(2. Rep. 70.)

QUE le feoffee re-infeoffera plusieurs homes. By the re-feoffment it is implied to be made to the feoffors, for a feoffment over to strangers cannot be said a re-feoffment, and if the feoffment should be made over to strangers only, then, as hath been often said, it must be made in convenient time.

Al heire celuy que survesquist, a aver & tener a luy & a les

heires celuy que survesquist. Hereupon questions have been made, wherefore the *habendum* is not to the heires of the heire, and for what reason it is by *Littleton* limited to the heires of the survivor. And the cause is, for that if it were made to the heires of the heire, then some persons by possibility should be inheritable to the land, which should not have inherited if the estate had been made to the survivor and his heires, and consequently the condition broken.

(Ant. 12. a.)

Vide Sect. 49

For example, if the survivor took to wife *Alice Fairfield*, in this case if the limitation were to the sonne and his heires, then if the sonne should dye without heires of his father, the blood of the *Fairfields* (being the blood of his mother) should inherit. But if the limitation be to the right heires of the father, then should not the blood of the *Fairfields* by any possibility inherit, for then it is as much as if the state had been made to the survivor and his heires: and therefore these words (*et a les heires celuy que survesquist*), which many have thought superfluous, are verie materiall. Note well this kind of fee simple, for it is worthy the observation: but sufficient hath been said to open the meaning of *Littleton*, and therefore I will dive no deeper into this point, but leave it to the further consideration of the learned reader. (1)

Sect. 355.

LITTLETON having spoken of defaults of performance, or expresse breaches of conditions, speaketh now in what cases the feoffee in judgement of law doth disable himselfe to perform the condition: and of disabilities some be by act of the party, and some by act in law.

Ou a doner en taile a un auter, &c. Here is implied an estate for life, or for yeares, &c.

ITEM si feoffment soit fait sur condition d'enseoffier un auter, ou ‡ de doner en || taile a un auter, &c. si le feoffee devant le performance del condition enseoffia un e-stranger, ou fait un lease pur terme de vie, donques poct le feof-

ALSO if a feoffment be made upon condition to enseoffe another, or to make a gift in taile to another, &c. if the feoffee before the performance of the condition enseoffe a stranger, or make a lease for life, then

for

* re-infeoffera—infeoffera, L. and M. and Rob. nor Rob. || le added in L. and M. and Rob.

† &c. added in L. and M. and Rob.

‡ de not in L. and M.

(1) See whether there is a difference between an obligation and feoffment with condition to re-enseoff.—Obligation on condition to give to the baron and feme and the heirs of the body of the feme before a certain day; and before the day the feme dies. The court was divided whether he ought to make it cy pres, in 8. Jac. B. R. Rot. 303. Roger and Scudamore, T. 37—P. 4. E. 6. Bendt. n. 56. Obligation on condition to enseoff B. and C. and their heirs before such a day, and before the day B. dies, the obligation is discharged. Sir Ant. Brown's case. But this case was denied by the whole court. T. 40. E. C. B. C. n. 16. Obligation with condition that the obligor or his heirs should enseoff the obligee and his heirs before a certain day;—before the day the obligee dies: it was ruled that he should enseoff the heir. T. 40. El. C. B. Hone v. May, C. n. 16.—Ld. Hale's MSS.

(2) See the note 2. on page 12. b.

for & ses heires enter, &c. pur ceo que il ad luy mesme disable de performer le condition, entant que il ad fait estate a un autre, &c.

may the feoffor and his heirs enter, &c. because he hath disabled (1) himselfe to performe the condition, inasmuch as he hath made an estate to another, &c.

Enfeoffe un estranger ou fait un lease pur terme de vie. This is

a disability by the act of the partie, for herein the feoffee hath disabled himself to make the feoffment or other estate according to the condition.

And to speake once for all, the feoffee is disabled when he cannot convey the land over according to the condition in the same plight, qualitie and freedome as the land was conveyed to him, for so the law requireth the same, as shall manifestly appeare hereafter. And here where our Author speaketh of a feoffment, he includeth an estate taile as well as the fee simple.

(2. Rep. 59. 1. Roll. Abr. 447.)

Sect. 356.

EN mesme le manner est, si le feoffee, devant le condition performe, lessa mesme la terre a un estranger pur terme des ans; en cest case le feoffor et ses heires poyent entrer, &c. pur ceo que le feoffee ad luy disable de faire estate de les tenements accordant a ceo que estoit en les tenements, quant estate ent fait a luy. Car s'il voile faire estate de les tenements accordant a le condition, &c. donques poit le lessée pur terme d'ans enter & ouste mesme celuy a que l'estate est fait, &c. et occuper ceo durant sont terme †.

IN the same manner it is, if the feoffee, before the condition performed, letteth the same land to a stranger for tearme of yeares; in this case the feoffor and his heires may enter, &c. because the feoffee hath disabled him to make an estate of the tenements according to that which was in the tenements, when the state thereof was made unto him. For if hee will make an estate of the tenements according to the condition, &c. then may the lessée for yeares enter and oust him to whom the estate is made, &c. and occupy this during his tearme.

(4. Rep. 52.)

(5. Rep. 95.)

SI le feoffee devant le condition performe lessa mesme la terre a un estranger pur terme des ans, &c. Here the &c. implyeth a lease to take effect in futuro as well as in presenti, also a lease for one yeare or halfe a yeare, &c.

The reason of this is evidently set downe before. And againe, of disabilities some be by act in presenti, whereof Littleton hath put two examples, and some in futuro, whereof now hee will speake in the next section.

Sect. 357.

ET plusors ont dit, que si tiel feoffment soit fait a un home sole sur mesme condition, & devant que il ad per-

AND many have said, that if such feoffment be made to a single man upon the same condition, and before hee hath per-

FIRST, here is an example of a disability both by act in law, and in futuro, for by marriage the wife is entitled by law to dower, after the death of her husband.

Secondly, it [a] appeareth that albeit the wife by the marriage is but intituled to have dower,

[a] 13. H. 7. 23. b. 34. E. 3. dower. 127. M. 27. E. 3. tit. dower. 135. 28. Alf. Pl. 4. 11. H. 7. 7. 6. lib. 2. fol. 59. b.

* de les tenements, not in L. and M. nor Roh.

† &c. added in L. and M. and Roh.

(1) Upon the doctrine of this and the three following sections, see Vin. Abr. vol. 5. p. 221. 225.

(5. Rep. 20. b. 21. a.)
Julius Winnington's case, lib. 2.
fol. 59. 60.

dower, and the estate which she is to have *in futuro*, viz. after the decease of her husband, yet it is a present cause of entrie. As a lease for yeares to begin at a day to come is a present disability and cause of re-entrie, for that the land is not in that freedom and plight as it was conveyed to the feoffee, and after the state made over according to the condition the land shall be charged therewith.

En un auter plight.

Plight is an old English word, and here signifieth not onely the estate but the habit and qualitie of the land, and extendeth to rent charges, and to a possibility of dower. *Vide Sect. 289.* where plight is taken for an estate or interest of and in the land it selfe, and extendeth not to a rent charge out of the land.

A un home sole.

For if the feoffee were married at the time of the feoffment, then the dower can bee no disability, because the land shall remaine in such plight as it was at the time of the feoffment made unto him.

Donques le feoffor & ses heires maintenant poient entrer.

Here it appeareth, that seeing that for this title or possibility the feoffor may presently enter, that albeit the wife happen to dye before the husband, so as this title or possibility tooke no effect, yet the feoffor may re-enter, for the feoffee being disabled at any time though the same continue not, yet the feoffor may re-enter, for in that case he that is once disabled is ever disabled. And herein a diversitie is to be observed betweene a disability for a time on the part of the feoffee, and a disability for a time of the part of the feoffor. For if a man maketh a feoffment in fee upon condition that the feoffee before such a day shall re-entfeoff the feoffor, the feoffee taketh wife, and the wife dyeth before the day, yet may the feoffor re-enter.

So it is if the feoffee before the day entreth into religion, and is professed, and before the day is deraigned, yet the feoffor may re-enter.

So it is if the feoffee before the day make a feoffment in fee, and before the day take back an estate to him and his heires, yet the feoffor may re-enter.

Albeit in these cases a certaine day be limited, yet the feoffee being once disabled is ever disabled. And so it is when no time is limited by the parties, but the time is appointed by the law.

But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certaine sum of money before such a day, the feoffor commit treason, is attainted and executed, now is there a disability on the part of the feoffor, for he hath no heir; but if the heir be restored before the day he may performe the condition, as it was resolved * *Trin. 18. Eliz. in Communi Banco* in Sir Thomas Wiat's case, which I heard and observed. Otherwise it is if such a disability had growne on the part of the feoffee; and the reason of the diversitie is, for that, as Littleton saith, *maintenant* by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heires, for if they performe the condition within the time, it is sufficient, for that they may at any time performe the condition before the day. And so it is if the feoffor enter into religion, and before

*forme mesme la condition il prent feme, * donques le feoffor et ses heires maintenant poient entrer, pur ceo que s'il fesoit estate accordant a la condition, et puis morust, donques † la feme serra endowe, et poit recover sa dower per brieve de dower, &c. et issint per le prisel del feme les tenements sont mis en un auter plite que ne fueront al temps de feoffment sur condition, pur ceo que adonques nul tiel ‡ feme fuit dowable, ne serroit dowe per la ley, &c. &c.*

formed the same condition he taketh wife, then the feoffor and his heires maintenant may enter, because, if he hath made an estate according to the condition, and after dieth, then the wife shall be endowed, and may recover her dower by a writ of dower, &c. and so by the taking of a wife, the tenements bee put in another plight then they were at the time of the feoffment upon condition, for that then no such wife was dowable, nor should bee endowed by the law, &c.

(1. Roll. Abr. 447.)

(5. Rep. 21. a.)

21. E. 4. 55.

(2. Rep. 79. a.)
* *Trin. 18. Eliz. in Communi Banco* in Sir Thomas Wiat's case.

(Plow. 553. a. 554. Cro. Cax. 427. Hob. 334.)

* *donques—que* in L. and M. and Roh.

† *la—sa* in L. and M. and Rob.

‡ *feme* not in L. and M. nor Roh.

the day is deraigned, he may performe the condition for the cause aforesaid, *et sic de similibus*. The (Señ.) in this section are sufficiently explained.

Señ. 358.

*EN mesme le man-
ner est, si le fe-
offee charge la terre
per son fait d'un rent
charge devant le per-
formance del condi-
tion, ou soit oblige en
un estatute de le staple,
ou statute merchant,
en tielx casés le fe-
offor et ses heires poy-
ent entrer, &c. causâ
quâ suprâ. Car que-
cunque que venust a
les tenements per le
feoffment de le feoffee,
* eux covient estre li-
ables, et estre mis en
execution per force
de l'estatute mer-
chant, ou de statute
del staple. † Quere.
Mes quant le feoffor
ou ses heires, pur les
causes avant dits,
averont entrer, come
ils devoient, come
il semble, &c. don-
ques tous tiels choses
que devant tiel en-
trie puissent trou-
bler ou encumber
les tenements issint
dones sur condition,
&c. quant a mes-
mes les tenements sont
ousterment defeats.*

The Lord Clifford did hold his barony and the sherswick of *Wissmerland* of the king by grand serjanty in capite, and the king gave him licence that he might infeoffe thereof divers chaplains in fee, so that they should give the same to the Lord Clifford and the heires males

IN the same man-
ner it is, if the fe-
offee charge the land
by his deed with a
rent charge before
the performance of
the condition, or be
bound in a statute
staple, or statute mer-
chant, in these cases
the feoffor and his
heires may enter, &c.
causâ quâ suprâ. For
whosoever commeth
to the lands by the
feoffment of the feof-
fee, they ought to be
lyable, and put in exe-
cution by force of the
statute merchant, or
of the statute staple.
Quere. But when the
feoffor or his heires,
for the causes afore-
said, shal have entred,
as it seemes they
ought, &c. then all
such things which be-
fore such entry might
trouble or incumber
the land so given
upon condition, &c.
as to the same land,
are altogether defeat-
ed.

Poyent entrer, &c.

And here it is to be un-
derstood, that the grant of
the rent charge is a present
disability of the feoffee, and
therefore albeit the grantee
doth bring a writ of an-
nuitie, and discharge the land
of it, *ab initio*, yet the cause
of entrie being once given
by the act of the feoffee,
the feoffor may re-enter.
And so it is if the grant of the
rent charge were made for
life, and the grantee died be-
fore any day of payment, yet
the feoffor may re-enter.

The like law is of any
judgement given against the
feoffee wherein debt or dam-
ages are recovered.

*Ou soit oblige in
un statute de la staple,*

&c. If the feoffee be dis-
seised, and after bind himself
in a statute staple, or mer-
chant, or in a recognizance,
or take wife, this is no dis-
ability in him, for that dur-
ing the disseisin the land is
not charged therewith, nei-
ther is the land in the hands
of the disseisor liable there-
unto. And in that case if the
wife die or the conusee re-
lease the statute or recogni-
zance, and after the disseisee
doth enter, there is no dis-
ability at all, because the
land was never charged there-
with, and therefore in that
case the feoffee may enter
and performe the condition
in the same plight and free-
dome as it was conveyed un-
to him.

And it is to be observed, that
Littleton putteth these cases as
examples, for there are some
other disabilities implied, that
are not here exprest.

13. H. 7. 23. b. 44. E. 3. 9. b. 20.
E. 3. 73. 20. H. 6. 34. *Julius*
Wynnington's case ubi supra.
(1. Roll. Abr. 447.)

(5. Rep. 20. b.)

Lib. 2. fol. 59. 60. *Julius Wyn-*
nington's case.

(2. Rep. 79. a. 10. Rep. 49. b.)

18. Aff. Pl. ultimo. 19. E. 3.
39. Lib. 2. fol. 80. b. *Sir Crom-*
wel's case.
(4. Rep. 119.)

* *Eux*—donques les tenements, L. and M. and Roh.

† *Quere*—&c. L. and M. and Roh.

(Ant. sect. 354. 1. Roll. Abr. 454.)

males of his body, the remainder over, &c. the Lord Clifford according to the licence infeoffed the chaplains, and before they made the reconveyance the Lord Clifford dyed, and it was adjudged that the heir might enter for the condition broken. For in this case the feoffees were bound by law to have made the gift in taile to the Lord Clifford himselfe, albeit hee never made any request, for otherwise they pursued not the licence, and if they should make the state to the issue of the Lord Clifford, then might the king seise the barony, &c. for default of a licence, and that in default of the feoffees. And then the same should not be in the same plight and freedome as it was at the time of the feoffment made upon condition, which is worthy of observation.

(1. Rep. 79. 1. Leo. 167.)

If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in taile; in this case, if the church become void before the regrant or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight as it was at the time of the grant upon condition. And so was it resolved, (*) Pasch. 14. Eliz. in Communi Banco, betweene Andreeves and Blunt, which I heard and observed, and which my Lord Dier hath omitted out of his report of that case, and therefore the grantee in that case at his perill must regrant it before the church become voide, or else he is disabled, otherwise he hath time during his life if he be not hastened by request.

44. E. 3. 9.

If the feoffee suffer a recovery by default upon a fained title, before execution sued the feoffor may re-enter for this disability, *et sic de similibus*.

Sect. 359.

ET en le fait est nul condition, &c.

either in deed or in law.

(4. Rep. 25. 2.)

Et le feoffment est en tiel force sicome nul tiel fait ust este fait.

18. E. 3. 19. 36. 17. Ass. p. 20.
8. H. 6. 8. 27. H. 6.

And the reason hereof is, for that the estate passeth by the livery of seisin (1). And in this case the feoffor upon the deliverie of seisin must expresse the state to him and his heirs, or to the heirs of his body, &c.

34. Ass. pl. 1.

If an agreement bee made betweene two, that the one shall enfeoffe the other upon condition in surety of the payment of certaine money, and after the livery is made to him and his heirs generally, the state is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery.

ITEM, si un home fait un fait de feoffment a un autre,

*& en le fait est nul condition, &c. et quant le feoffor a luy voyle faire livery de seisin per force de mesme le fait, il fait a luy le livery de seisin sur certaine condition *;*

en cest cas rien de les tenements passa per le fait, pur ceo que le condition n'est comprise deins le fait,

& le feoffment est en tiel force sicome nul tiel fait ust este fait.

*certaine condition *;*

en cest cas rien de les tenements passa per le fait, pur ceo que le condition n'est comprise deins le fait,

& le feoffment est en tiel force sicome nul tiel fait ust este fait.

ALSO, if a man make a deed of feoffment to another, and in the deed there is no condition, &c. and when the feoffor will make livery of seisin unto him by force of the same deed, hee makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had beene made.

ment to another, and in the deed there is no condition, &c. and when the feoffor will make livery of seisin unto him by force of the same deed, hee makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had beene made.

the feoffor will make livery of seisin unto him by force of the same deed, hee makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had beene made.

livery of seisin unto him by force of the same deed, hee makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had beene made.

nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had beene made.

the deed, and the feoffment is in like force as if no such deed had beene made.

if no such deed had beene made.

43. E. 3. tit. Estoppel 177.
19. E. 3. ibid. 184.

If a man make a charter of feoffment in fee, and the feoffor deliver seisin for life, the feoffee shall hold it but for life; but if the livery be expressely for life, and also according to the deed, the whole fee simple shall passe, because it hath a reference to the deed.

Sect. 360.

ITEM si feoffment soit fait, &c. And

ITEM si feoffment soit fait sur tiel

ALSO if a feoffment be made
con-

* &c. added in L. and M. and Roh.

(1) Vid. ant. 48.

condition, que le feoffee ne alienera la terre a nulluy, cest condition est voide, pur ceo que quant home est enseoffe * de terres ou tenements, il ad power de eux aliener a ascun person per la ley. Car si tiel condition serroit bone, dunque la condition luy ousteroit de tout le power que la ley luy dona, le quel serroit enconter reason, & pur ceo tiel condition est voyde.

upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements, he hath power to alien them to any person by the law. For if such a condition should bee good, then the condition should oust him of all the power which the law gives him, which should bee against reason, and therefore such a condition is voide.

the like law is of a devise in fee upon condition that the devisee shall not alien (1), the condition is voide, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth passe. For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man bee possessed of a lease for yeares, or of a horse, or of any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shal not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibility of a reverter, and it is against trade and traffique, and bargaining and contract-

(Ant. 206. 1. Rep. 85.
21. H. 6. 34. a. 8. H. 7. 10. b.
33. Aff. 11. 24. Doct. and Stud.
39. 124. 13. H. 7. 23.
(5. Rep. 56. a.)

Argumentum ex absurdo.
Vid. Sect. 722.

ing betweene man and man: and it is within the reason of our author that it should ouster him of all power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem*; and *rerum suarum quilibet est moderator, & arbiter*. And againe, *regulariter non valet pactum de re mea non alienanda*. But these are to be understood of conditions annexed to the grant or sale it selfe in respect of the repugnancy, and not to any other collateral thing, as hereafter shall appeare. Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seised of a seigniorie, or a rent, or an advowson, or common, or any other inheritance that lyeth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, this condition is voide. But some have said that a man may grant a rent charge newly created out of lands to a man and to his heirs upon condition that he shall not alien that, that is good, because the rent is of his owne creation; but this is against the reason and opinion of our author, and against the height and purtie of a fee simple.

(10. Rep. 39. Hob. 170.)

A man before the statute of *quia emptores terrarum* might have made a feoffment in fee, and added further, that if he or his heirs did alien without licence, that he should pay a fine, then this had been good. And so it is said, that when the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter; and so it is in the king's case at this day, because he may reserve a tenure to himselfe.

14. H. 4. 13. H. 7. 23.

If *A.* be seised of Black Acre in fee, and *B.* infeoffeth him of White Acre upon condition that *A.* shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnancy to the state passed by the feoffment; and so it is of gifts, or sales of chattels reals or personals.

21. H. 7. 8. lib. 5. 56. Knight's case.

Sect. 361.

MES si le condition soit tiel, que le feoffee ne alienera a un tiel, noshant son noshme, ou

BUT if the condition be such, that the feoffee shal not alien to such a one, naming his name, or to any of his

IF a feoffment in fee bee made upon condition that the feoffee shall not infeoffe *I. S.* or any of his heirs or issues, &c. this is good, for he doth not restraine the feoffee of all his power: the reason here yeilded by our author

Pl. Com. 77. a. 8. H. 7. 10. b.
21. E. 4. 47. a.

* de—en, L. and M.

(1) A devise in fee, on condition not to alien but to *I. S.* whether void? See *Muschamp's case*, Bridg. 132.—Lord Nott. MSS.

(Dyer 45. 2. 11. Rep. 74. a.)

30. H. 7. 11. Doct. and Stud. 124.
13. H. 7. 23.

Brafton lib. 1. fol. 13. a.

author is worthy of observation. And in this case if the feoffee enfeoffe *I. N.* of entent and purpose that hee shall enfeoffe *I. S.* some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur & per obliquum.*

If a feoffment bee made upon condition that the feoffee shall not alien in mortmaine, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*. In ancient deeds of feoffment in fee there was most commonly a clause, *quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis & Judæis.*

*a ascun de * ses heires, ou de issues d'un tiel, &c. ou hujusmodi, les queux conditions ne tollent tout la power d'alienation del feoffee, &c. doncque tiel condition est bone.*

heires, or of the issues of such a one, &c. or the like, which conditions doe not take away all power of alienation from the feoffee, &c. then such condition is good.

Sect. 362.

33. Aff. 11. 24. lib. 6. 40. 41.
Mildmay's case. 21. H. 6. 33.
13. H. 7. 23. 21. H. 7. 11.
Vid. Sect. 220. acc.(Cro. Car. 555. Hob. 191. Cro.
Jac. 307. Ant. 146. b. 10. Rep.
230. 4. Rep. 14.)

(6. Rep. 43. a. contra.)

21. H. 6. 33. 13. H. 7. 23. 24.
27. H. 8. 17. 19. 31. H. 8.
Dyer 45.
(3. Rep. 64.)(*) Dier 33. H. 8. fo. 48. 49.
(10. Rep. 38. 39. 1. Roll. Abr.
418.)Vid. lib. 6. 40. 41. Sir Anth.
Mildmaic's case.
(1. Rep. 84. 1. Roll. Abr. 418.)

NOTE here, the double negative in legall construction shall not hinder the negative, viz. *sub conditione quod ipse nec heredes sui non alienarent.* And therefore the grammaticall construction is not alwayes in judgment of law to be followed.

Forsque pur lour vies demesne, &c. And yet if a man make a gift in taile upon condition that he shall not make a lease for his owne life, albeit the state be lawfull, yet the condition is good, because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should bee lawfull. (*) If a man make a gift in taile upon condition that he shall not make a lease for three lives or 21 years according to the statute of 32. H. 8. the condition is good, for the statute doth give him power to make such leases, which may be restrained by condition, and by his owne agreement; for this power is not incident to the estate, but given to him collaterally by the act, according to that rule of law, *quilibet potest renunciare juri pro se introducto.*

Quant il fist tiel alienation & discontinuance del state taile. And therefore if a gift in taile be made upon condition, that the donee, &c. shall not alien, this condition is good to some intents, and void to some; for, as to all those alienations which amount to any discontinuance of the state taile (as *Littleton* here speaketh,) or is against the statute of *Westminster 2.* the condition is good without question. But as to a common recovery the condition is voyd, because this is no discontinuance, but a barre, and this common recovery

ITEM, *si tenements soient donnees en le taile sur tiel condition, que le tenant en le taile ne ses heires + ne alieneront en fee, ‡ ne en le taile, ne pur terme d'auter vie, lorsque pur lour vies demesne, &c. tiel condition est bone. Et la cause est, pur ceo que quant il fist tiel alienation et discontinuance de le taile, il fait le contraire a l'entent le donor, pur que l'estatute de W. 2. || cap. 1. fuit fait, per que l'estatute les estates en le taile sont ordeines.*

ALSO, if lands bee given in taile upon condition, that the tenant in taile nor his heires shall not alien in fee, nor in taile, nor for terme of another's life, but only for their owne lives, &c. such condition is good. And the reason is, for that when hee maketh such alienation and discontinuance of the entaile, hee doth contrary to the intent of the donor, for which the statute of *W. 2. cap. 1.* was made, by which statute the estates in taile are ordained (1).

* ses not in L. and M.

† &c. added in L. and M.

‡ ne—on in L. and M.

|| cap. 1. added in L. and M.

(1) A power of suffering a common recovery, and of levying a fine within the statutes of 4. Hen. 7. and 32. Hen. 8. is so inseparably inherent to the estate of a tenant in tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But it does not vitiate the grant of the estate tail to which it is annexed; because (to use an expression of lord Hobart) a condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding it, neither in any thing expressed, nor in any thing implied, which is, of its nature, incident to and inseparable from the thing granted. Hob. 170. But this doctrine does not extend to a feoffment, a fine at common law, or any other alienation which works a discontinuance, and is therefore considered in the law as tortious. A proviso restrictive of an alienation of this nature may be annexed to an estate in tail, either as a condition to determine the estate, and give the donor and his heirs a right of re-entry, or by way of limitation, to make the estate of the tenant in tail cease, and the lands remain over to a third person. But in these cases the estate in tail must be made to cease absolutely; for a proviso to make it void only during the life of the tenant in tail is void. See Litt. Sect. 720, 721, 722, 723. Scholastica's case, Plow. 403. Corbett's case, 1. Rep. 83. b. Jermyn v. Arscot, cited in 1. Rep. 85. Mildmay's case, 6. Rep. 40. Mary Portington's case, 10. Rep. 37. b.

recovery is not restrained by the said statute of *W. 2.* And therefore such a condition is repugnant to the estate taile; for it is to be observed, that to this estate taile there be divers incidents. First, to be disinherited of waite. Secondly, that the wife of the donee in taile shall be endowed. Thirdly, that the husband of a feme donee after issue shall be tenant by the curtesie. Fourthly, that tenant in taile may suffer a common recoverie (1): and therefore if a man make a gift in taile, upon condition to restraîne him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, (*) that a collateral warranty or a lineal with assets in respect of the recompence, is not restrained by the statute of *Donis conditionalibus*, no more is the common recovery in respect of the intended recompence. And *Littleton*, to the intent to exclude the common recovery, saith, *tiel alienation et discontinuance*, joyning them together.

If a man before the statute of *Donis conditionalibus* had made a gift to a man and to the heirs of his body, upon condition, that after issue he should not have power to sell, this condition should have bin repugnant and void (2). *Pari ratione*, after the statute a man makes a gift in taile, the law *tacite* gives him power to suffer a common recovery; therefore to add a condition, that he shall have no power to suffer a common recovery, is repugnant and voyd.

If a man make a feoffment to a baron and feme in fee, upon condition, that they shall not alien, to some intent this is good, and to some intent it is void: for to restrain an alienation by feoffment, or alienation by deed, it is good, because such an alienation is tortious and voidable: but to restrain their alienation by fine is repugnant and void, because it is lawfull and unavoydable.

It is said, that if a man infeoffe an infant in fee, upon condition, that hee shall not alien, this is good to restrain alienations during his minoritie, but not after his full age.

It is likewise said, that a man by licence may give land to a bishop and his successors, or to an abbot and his successors, and add a condition to it, that they shall not without the consent of their chapter or convent, alien, because it was intended a mortmain, that is, that it should for ever continue in that see or house, for that they had it *en auter droit*, for religious and good uses.

Le statute de W. 2. cap. 1. Hereby it appeareth, that whatsoever is prohibited by the intent of any act of parliament, may be prohibited by condition, as hath beene said.

(1. Roll. Abr. 412. 418. 10. Rep. 35. b.)

22. E. 3. 9. 17. El. 343. Dyer.

(*) 13. H. 7. 24. b.

10. H. 7. 11. 13. H. 7. 23. Lib. 6. 41. b. in Sir Anthony Mildmay's case, ubi supra. (Hob. 261. 1. Roll. Abr. 421.)

Doctor & Student. 124.

10. H. 7. 11. Doct. & Stud. 124. 13. H. 7. 23.

Sect. 363.

CAR il est prove per les parols comprises en mesme l'estatute, que la volunt del donor en tiels cases serroit observee, et quant le tenant en le taile fait † tiel discontinuance, il fait le contrarie a ceo, &c. Et auxy en estates en le taile d'ascun tenements, quant le reversion de fee simple, ‡ ou remainder en fee simple est en auters persons, quant tiel discontinuance est fait, donques le fee simple*

FOR it is proved by the words comprised in the same statute, that the will of the donor in such cases shall be observed, and when the tenant in taile maketh such discontinuance, hee doth contrary to that, &c. And also in estates in taile of any tenements, when the reversion of the fee simple, or the remainder of the fee simple is in other persons, when such discontinuance is made, then the fee simple

QUANT le reversion ou remainder en fee est en auters persons.

Put the case that a man make a gift in taile to A. the remainder to him and to his heirs, upon condition that he shall not alien; as to the state taile the condition is good, for such alienation is prohibited, as hath been said, by the said statute. But as to the fee simple, some say it is repugnant and voyd, for the reason that *Littleton* hath yielded: and therefore some are of opinion, that this is a good condition, and shall defeat the alienation for the estate taile onely, and leave the fee simple in the alienee, for that the condition did in law extend onely to the state taile, and not to the remainder.

Encounter le profit

(Poft. 298. 333. 338.)

(1. Roll. Abr. 407. 472. 474. Cro. Eliz. 360.)

11. H. 7. 6. 13. H. 7. 23. 24. Dyer 2. & 3. Phil. & Ma. 127. b.

* que fuit al intent de le fefance de mesme l'estatute, added in L. and M. and Roh.

† ou remainder en fee simple, not in L. and M. and Roh.

† tiel—un, L. and M. and Roh.

(1) But this is altered by the 4. and 5. Ann. c. 16. whereby all collateral warranties by ancestors, who have no estate of inheritance in possession in the lands warranted, are made void against their heirs. The restraints which at different times have been laid on the free alienation of property, and the methods used to fet them aside, form one of the most interesting parts of the history of every nation in which the feudal institutions have prevailed. So far as the history of England is concerned in them, they have been discussed with great accuracy by Sir William Blackstone, vol. 2. chap. 7. and Sir John Dalrymple, in his History of the Feudal Law, chap. 3. and 4. The introduction of recoveries, and the circumstances which led the way to them, are accurately stated and explained by Mr. Cruise, in his most excellent Essay on the Law of Recoveries. The restraints on the alienation of property are much greater in Scotland than they are in England. There, if a *tailzie* is guarded with *irritant and resolutive clauses*, the estate intailed cannot be carried off by the debt or deed of any of the heirs succeeding to it, in prejudice of the substitutes. This degree of *tailzie* differs from that of a *tailzie with prohibitory clauses*. The proprietor of an estate of this nature, cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by his creditors; yet the substitutes, as creditors by virtue of the prohibitory clause, may by a process, called in the law of Scotland an *Inhibition*, secure themselves against future debts or contracts. A third degree of *tailzie* used in Scotland is called a *simple Disposition*. This amounts to no more than a designation who is to succeed to the estate, in case the temporary proprietors of it make no disposition of it; for it is defeasible, and attachable by creditors. See Ersk. Inst. 238. 360.

(2) Britton, in his chapter on *Conditional Purchases*, observes, that "if any purchase to him and his wife, and to the heirs of their lawfully begotten, the donees have presently but an estate of *franchhold* for the term of their lives, and the fee accrue to their

fit de ses issues. Hereby it appeareth, that to restrain tenant in taile from alienation against the profit of his issues, is good, for that agreeth with the will of the donor, and the intent of the statute *.

But a gift in taile may be made upon condition, that tenant in taile, &c. may alien for the profit of his issues, and that hath been holden to be good, and not restrained by the said statute, and seemeth to agree with the reason of *Littleton*, because in that case, *Voluntas donatoris observetur*, &c. and it must be for the profit of the issues.

* *en le remainder est discontinue. Et pur ceo que le tenant en taile ne ferratiel chose encounter le profit de ses issues, & bone droit, tiel condition est bone, come est avaut-dit, § &c.*

ple in the remainder is discontinued. And because tenant in taile shall doe no such thing against the profit of his issues, and good right, such condition is good, as is afore-said, &c.

(*) 46. E. 3. 4.
(1. Roll. Abr. 418.)

Sect. 364.

ALienont, &c.

et auxy si tous les issues soient morts, &c.

Note, *Littleton* purposely made parcell of the condition in the copulative, that the tenant in taile should alien, &c. For if a gift in taile be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a voyd condition; for when the issues faile, the estate determineth by the expresse limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate, is void, (1) and in that case the wife of the donee shall be endowed, &c. And therefore *Littleton*, to make the condition good, added an alienation, which amounted to a wrong, and hee restrained not the alienation onely, (for then presently upon the alienation the donor, &c. might re-enter and defeat the estate taile)

IT E M home poit donner terres en taile sur tiel condition, que si le tenant en le taile ou ses beires alienont en fee ou en taile, ou pur terme d'auter vie, &c. et auxy que si tous l'issues veignants del tenant en le taile soient morts sans issue, que adonques bien lirroit al donor et a ses beires de entrer, &c. Et per tiel voy le droit de le taile poet estre salve apres ¶ discontinuance, al issue en le taile, si ascun y soit; issint que per voy d'entre del donor ou de ses beires, le taile ne ferramy defeat per tiel condition: ¶ Quare hoc. Et uncore si le tenant en le taile en ceo case, ou ses beires, font ascun discontinuance, celuy en le reversion ou ses beires, apres ceo que le taile est determine pur default de issue, &c. poyent entrer

ALSO a man may give lands in taile upon such condition, that if the tenant in taile or his heirs alien in fee or in taile, or for terme of another man's life, &c. and also that if all the issue comming of the tenant in taile be dead without issue, that then it shall be lawfull for the donor and for his heirs to enter, &c. And by this way the right of the taile may be saved after discontinuance, to the issue in taile, if there bee any; so as by way of entry of the donor or of his heirs, the taile shall not be defeated by such condition: *Quare hoc.* And yet if the tenant in taile in this case, or his heirs, make any discontinuance, he in the reversion or his heirs, after that the taile is determined for default of issue, &c. may enter into

21. H. 7. 21.

(1. Rep. 16. 84.)

(Dyer 345. b.)

* *en la reversion ou le fee simple*, added in L. and M. and Roh.
issues, not in L. and M. nor Roh.
added in L. and M. and Roh.

§ &c. not in L. and M. nor Roh.

+ issue added in L. and M. and Roh.

† *ceo—ouster* in L. and M. and Roh.

|| *de—en* in L. and M. and Roh.

+ *Quare hoc*, not in L. and M. nor Roh.

‡ *de ses*

§ *tiel*

(1) See *Boraston's case*, 3. Rep. 19. *Webb v. Herring*, Cro. Ja. 416. *King v. Rumball*, Cro. Ja. 448. *Chadock v. Cowley*, ibid. 693. *Fortescue v. Abbott*, Poll. 479. and *Sir Thomas Jones*, 79. ; and *Goodtitle v. Whitby*, 1. Burr. 228. See also 1. P. W. 170 ;—and Mr. Fearn's Essay on Contingent Remainders, p. 167.

"their issue, if they had not issue before; and if they had no issue, then the fee remains on the person of the donor until they have issue, and the purchase returns to the donor, if the purchaser has no off-spring, or if they have issue and that issue fails." But lord Coke in his 2d Inst. 333. observes, that Britton takes the condition to be precedent, but that the donees had, at the common law, a fee simple conditional immediately by the gift. As a proof of this, he mentions, that if a gift was made to a man and the heirs of his body, and before issue, he had before the *stat. de donis* made a feoffment in fee, the donor could not enter for the forfeiture, but that the feoffment would have barred the issue had afterwards.

*en le terre per force de mesme le condition, et ne ferront my * cobert de fuer briefe de formdon en le re-verter.*

the land by force of the same condition, and shall not be compelled to sue a writ of formedon in the reverter.

but added, and die without issue, to the end that the right of the estate in tail might be preserved, and not defeated by the condition, but might be recovered againe by the issue in tail in a *formedon*.

And *Littleton* expressly saith, that the donor and his heirs (Mo. 39.)

after the discontinuance, and after that the estate tail is determined, may re-enter, which is the intention and true meaning of *Littleton* in this place. And where it is said in this section (*quare hoc*), this is added by some that understood not this case, and is not in the originall.

Note, that in a condition consisting of divers parts in the conjunctive, as here in the case of *Littleton*, both parts must be performed, according to the old rule, [a] *Si plures conditiones ascriptae fuerunt donationi conjunctim, omnibus est parendum et ad veritatem copulativè requiritur quod utraque pars sit vera*. But otherwise it is when the condition is in the disjunctive, (1) for the same Author in that case saith, *Si divisim cuilibet, vel alteri eorum satis est obtemperare. Et in disjunctivis sufficit alteram partem esse veram*. What then if the condition or limitation be both in the conjunctive and disjunctive: As if a man make a lease to the husband and wife for the tearme of one and twenty yeares, if the husband and wife or any child beweeene them so long shall live, and then the wife dyeth without issue; shall the lease determine, or continue during the life of the husband? And the answer is, that it shall continue, for the disjunctive referreth to the whole, and disjoyneth not only the latter part, as to the child, but also to the baron and fem, so as the sense is, if the baron, fem, or any child shall so long live.

[b] And so it is if an use be limited to certaine persons, untill *A.* shall come from beyond sea, and attain unto his full age, or dye, if he doth come from beyond sea, or attaine to his full age, the use doth cease.

(Sid. 437. 8. Rep. 85. b.)

[a] *Bracton* lib. 2. fo. 19. Vide Pl. Com. 76. in *Wimbeshe's* case, & fol. 107. in *Fulmerston's* case. *Bracton* ubi supra. (4. Rep. 52. b.)

So it was adjudged in *Communi Banco* pasch. 30. Eliz. inter *Baldwyn & Cocke*, commonly called *Trupennie's* case.

(5. Rep. 112.)

[b] *Hill* 35. Eliz. entrespasse per le Seignior *Mordant* vers *George Vaux* so adjudged in the King's Bench.

Sect. 365.

ITEM, home ne poit pleder en ascun action, que estate fuit fait en fee, ou en fee taile, ou pur terme de vie, sur condition, † s'il ne voucha un record de ceo, ou monstra un escript south seale, provant mesme la condition. Car il est un common erudition, que home per plee ne defeatera ascun estate de franktenement per force d'ascun tiel condition, sinon que il monstra le proosse de condition en escript, &c. si-

ALSO a man cannot plead in any action, that an estate was made in fee, or in fee tail, or for terme of life, upon condition, if he doth not vouch a record of this, or shew a writing under seale, proving the same condition. For it is a common learning, that a man by plea shal not defeat any estate of freehold by force of any such condition, unlesse he sheweth the proosse of the condition in writing, &c. unlesse it bee

EN ascun action. Bee the action reall, personall, or mixt, if a condition be pleaded to defeat a freehold, it is regularly true, that a deed must bee shewed forth [a] in court (2). And the reason why the deed shall bee shewed forth to the court is, for that to every deed there be two things requisite: the one, that it be sufficient in law, and this is called the Legall Part, and therefore the judgment of that belongeth to the Judges of the Law: the other concernes matter of fact, as sealing and delivery, and this belongs to the Jurors. And because every deed ought to approve itselfe, and be proved by others too; it must approve it selfe upon the shewing of it forth in court in two manners.

First, as to the composition of the words, that it bee sufficient in law, and that the court shall adjudge.

Secondly,

39. E. 3. 22. 4. E. 4. 35. a. 9. E. 4. 25. b. 26. a. 6. H. 7. 8. b. 11. H. 7. 22. b. 7. H. 6. 7. 14. H. 8. 22. b. 28. Alf. p. 1. (1. Sid. 50.) [a] Lib. 10. fol. 92. Doctor Layfield's case. 7. E. 3. 57. 25. E. 3. 41. 41. E. 3. 10. acc.

(Ant. 6. a.)

(10. Rep. 92.)

* *cobert*—*arte* in L. and M. and Roh.

† *que* added in L. and M. and Roh.

(1) If the condition of the obligation be in the disjunctive, and gives the obligor liberty to do one thing or another, at his election, and one of the things becomes impossible, the obligation, in some cases, will be saved. See the distinctions taken in *Laughter's* case, Cro. Eliz. 398. *Baker v. Moisecomb*, ibid. 864. *Baskett v. Baskett*, 2. Mod. 200.—Ant. 145.

(2) See 2. Bull. 259. 260. 6. Mod. 237. 2. Salk. 498.

(11. Rep. 26. b. Dyer 261. b.
1. Roll. Abr. 208. Cro. Car. 399.
Doct. Pla. 260.)

(Poit. 227. 2. Cro. 217.)

(45. E. 3. 21. a.
Poit. 308. b. 338. a. sect. 214.)

Lib. 5. fol. 52. 53. &c. Page's
case. 6. Rep. 2. cap. 4.

(5. Rep. 74. 76. 10. Rep. 92.)

[b] Vide 32. H. 8. in Patents Br.
12. H. 7. 12. b.

(2. Inst. 672. 5. Rep. 52. 53.)

[c] 3. & 4. E. 6. cap. 4. and 13.
Eliz. cap. 6.

[d] Dyer 1. Eliz. 167.

(Hard. 118.)

(2. Sid. 145.)
(1. Mod. 117.)

[e] Lib. 8. fol. 8. in the Prince's
case. Vide Page's case ubi supra.

33. E. 3. gard. 162. 20. H. 3.
darrein present. 13. 35. H. 6.
tit. montrans des faits 118.

[f] 20. H. 7. 5.

(5. Rep. 75. 2.)

(2. Cro. 217.)

(10. Rep. 93. 94.)

35. H. 6. tit. montrans des faits

11. b. 7. H. 6. 17. H. 5. 5.

3. H. 6. 21. 33. H. 6. 1. 14. H.

8. 8.

Secondly, of ancient time if the deed appeared to be rased or interlined in places materiall, the judges adjudged upon their view, the deed to be voyd (1). But of latter time, the judges have left that to the jurors to try whether the rasing or interlining were before the delivery.

And there is a difference betweene a rent, and a re-entry; for upon a gift in taile, or a lease for life, a rent may be reserved without deed, but a condition with a re-entry cannot be reserved in those cases without deed.

Escript south seale.
Which *Littleton* intendeth to be a deed under seale.

And well said *Littleton*, a deed under seale. For though the deed be inrolled, yet hee cannot plead the inrolment thereof, though it be of record.

And though it be exemplified under the great seale, [b] yet must he shew forth the deed it selfe under seale, as *Littleton* here saith, and not the exemplification (2). And so when *Littleton* wrote, no *conflat*, or *inspeximus*, of the king's letters patents were available to be shewed forth in court, but the letters patents themselves under seale. For both the *conflat* and *inspeximus* are but exemplifications of the inrolment of the charters, or letters patents: and this appeareth by the resolution of two severall [c] parliaments, one holden in the third and fourth yeare of king *Edward* the sixth, and the other in the thirteenth yeare of queene *Elizabeth*. But now by those statutes the exemplification or *conflat* under the great seale of the inrolment of any letters patents made since the fourth day of February anno 27. H. 8. or after to be made, shal be sufficient to be pleaded and shewed forth in court, aswel against the king, as any other person by the patentees themselves (whereof there was some doubt [d] conceived upon the said statute of E. 6.) and by all and every other person and persons clayming by, from, or under them. Which statutes are general and beneficiall, and especially the act of 13. Eliz. for that extends not only to lands, tenements, and hereditaments, but to every other thing whatsoever, and ought to be favourably construed for advancement of the remedie and right of the subject (3).

The difference betweene a *conflat*, *inspeximus*, and a *vidimus*, you may reade [e] at large in *Page's* case. But none of them by law ought to be had, but only of the inrolment of record, and not of a deed or any other writing that is not of record, and no deed, &c. can be inrolled, unlesse it be duely and lawfully acknowledged.

Si non que soit en ascun especiall cases, &c. Hereby is implied, that if a gardian in chivalrie in the right of the heire entred for a condition broken, hee shall plead the state upon condition without shewing of any deed, because his interest is created by the law. And so it is [f] of a tenant by statute merchant or staple, or tenant by *elegit*.

Likewise tenant in dower shall plead a condition, &c. without shewing of the deed. And the reason of these and the like cases, is, for that the law doth create these estates, and they come not in by him that entred for the condition broken, so as they might provide for the shewing of the deed, but they come to the land by authoritie of law, and therefore the law will allow them to plead the condition without shewing of it.

[f] But

(1) 'Tis to be presumed, that an interlining, if the contrary is not proved, was made at the time of making the deed. 1. Keb. 21. Note to the 11th edit. On the rasure, or interlining, of deeds, breaking or defacing the seals of deeds, and cancelling deeds, see 1. Wood's Conv. 808. 809. Com. Dig. Faits, T. 1. 2.—and Vin. Abr. Faits, T. U. U. 2. X. X. 2. It is to be observed, that the cancelling of a deed does not divest the estate from the persons in whom it is vested by the deed. 1. Rep. in Cha. 100. and Gilb. Rep. 236.

(2) On giving deeds of bargain and sale in evidence, see Bull. Ni. Pri. 255. 3. 10. Ann. c. 18. 3. and 8. G. 2. c. 6. sec. 21.

(3) See also 27. Eliz. 9. and Bull. Ni. Pri. 226.

non que ceo soit en ascuns especiall cases, &c. Mes de chat-tels reals, sicome de leas fait a terme d'ans, ou de grants de gards fait per gardeins in chivalrie, & hujusmodi, &c. home poit pleder que tiels leases ou grants fueront faits sur condition, &c. sans monstre aseun escript de le condition. Issint en mesme le maner home poit faire de dones & grants de chattels personnels, & de contractes personnels, &c.

in some speciall cases, &c. But of chattels reals, as of a lease for yeares, or of grants of wards made by gardians in chivalrie, and such like, &c. a man may plead that such leases or grants were made upon condition, &c. without shewing any writing of the condition. So in the same manner a man may doe of gifts and grants of chattels personnels, and of contracts personnels, &c.

[f] But the lord by escheat, albeit his estate be created by law, shall not plead a condition to defeat a freehold without shewing of it, because the deed doth belong unto him. [f] 35. H. 6. ubi supra.

A tenant by the curtelie shall not [g] plead a condition made by his wife, and a re-entry for the condition broken without shewing the deed; for albeit his estate be created by law, yet the law presumeth that he had the possession of the deedes and evidences belonging to his wife. [g] 35. H. 6. ubi supra.

[h] But lessees for yeares, and all others that claime by any conveyance from the party or justifie as servant by commandement, &c. must shew the deed. [h] 14. H. 8. 8. Pl. com. 149. (10. Rep. 92. 93.)

[i] R. brought an *ejectione firmæ* against E. for ejecting him out of the manor of D. which he held for terme of yeares of the demise of C. E. the defendant pleaded that B. gave the said manor to P. and Katherine his wife in taile, who had issue E. the defendant, and after the donees infeoffed C. of the manor, upon condition that hee should demise the manor for yeares to R. the plaintife, the remainder to the husband and to the wife, &c. C. did demise the land to R. the plaintife for yeares, but kept the reversion to himselfe, wherefore Katherine after the decease of her husband entred upon the plaintife, &c. for the condition broken, and died; after whose decease the land descended to E. the issue in taile, &c. now defendant, judgement upon action, exception was taken against this plea, because E. the defendant maintained his entry by force of a condition broken, and shewed forth no deed, and the plea was ruled to be good, because the thing was executed, and therefore hee need not shew forth the deed. *Nota*, the defendant being issue in taile was remitted to the estate taile. (1) [i] 44. E. 3. 22. (6. Rep. 38.) (Cro. Car. 442.) See after this chapter, sect. 366. 7. Rep. Ughtred's case.

In a *præcipe quid reddat* against S. who pleaded that R. was seised, and infeoffed him in mortgage upon condition of payment of certaine money at a day, and said that R. paid the money at the day, and entred judgement of the writ: exception was taken to this plea, for that he shewed forth no deed of the condition, and it was ruled that hee need not shew forth the deed for two causes. 1. That he ought not to shew any deed to the demandant, because the demandant is a stranger. 2. It might be when R. paid the money, and the condition performed, that the deed was rebailed to R. and thereupon the plea was adjudged good, and the writ abated. 11. Ed. 3. tit. Mns des faits. 175. 45. E. 3. 8. (Cro. Car. 372.)

If land be mortgaged upon condition, and the mortgagee letteth the lands for yeares, reserving a rent, the condition is performed, the mortgagor re-enters, in an action of debt brought for the rent the lessee shall plead the condition and the re-entry without shewing forth any deed. 45. E. 3. 8. b. Finch.

In an assise the tenant pleads a feoffment of the ancestor of the plaintife unto him, &c. the plaintife saith that the feoffment was upon condition, &c. and that the condition was broken, and pleades a re-entry, and that the tenant entred and tooke away the chest in which the deed was and yet detaineth the same, the plaintife shall not in this case be enforced to shew the deed. 10. H. 4. 9. b. 43. E. 3. Vide 10. E. 3. 41. Simile in dower.

If a woman give lands to a man and his heires by deed or without generally, she may in pleading averre the same to be *causâ matrimonii prælocuti*, albeit she hath nothing in writing to prove the same, the reason whereof see Sect. 330. 12. E. 1. Feoffments & Faits 114. F. N. B. 105. b. 13. R. 2. Montraus des faits 165. 4. E. 4. 35. &c. 11. H. 7. 22. b. 6. H. 7. 8. 9. E. 4. 25. 26. 14. H. 8. 22. b. (Doc. Pla. 51.) (See Flo. 23. a.) (1. Roll. Abr. 413.)

Mes des chattels realls, sicome lease fait a volunt a terme des ans, &c.
This is apparant.

Sect. 366.

ITEM, coment que home en ascun action ne poit pleder un condition que toucha & concerna franktenement, sauns monstrier escript de ceo, come est avantdit, uncore home poit estre aide sur tiel condition per verdict de xii. homes

ALSO, albeit a man cannot in any action pleade a condition which toucheth & concernes a freehold, without shewing writing of this, as is aforesaid, yet a man may be aided upon such a condition by the verdict of 12 men taken at large in an assise

VERDIT, or verdict de 12 homes.

(2) *Verdictum, quasi dictum veritatis, as judicium est quasi juris dictum. Et sicut ad questionem juris, non respondent iuratores sed iudices: sic ad questionem facti non respondent iudices sed iuratores.* For jurors are to try the fact, and the judges ought to judge according to the law that riseth upon the fact, for
Lib. 8. fo. 155. Lib. 9. fo. 13. Lib. 11. fo. 10. (Flo. 93. 2. Infl. 425. 2. Roll. Abr. 693. 694. 698. 699. 700. 711. 717. 725. Hob. 117. 4. Rep. 65. b. Cro. El. 699. 1. Sid. 27. 191. 194. 203. 9. Rep. 67. b.)

(1) This is the reason of this case, for now he claims above the condition, and therefore need not shew the deed. *Infra*, 227. b.— Lord Nott. MSS.

(2) See Bacon Abr. vol. 5. 281. Vin. vol. 21. 373. Com. Dig. Abatement, (I. 34.) Amendment, (P.) Appeals, (G. 14.) Estoppel, (E. 10.) Evidence, (A. 5.) Pleader, (C. 27. E. 38. R. 13. S. 1.) Prerogative (D. 76.)

ex facto jus oritur.

Prise a large.

There be two kindes of verdicts; *viz.* one generall, and another at large or especiall. As in an assise of novel disseisin, brought by A. against B. the plaintife makes his plaint, *Quod B. disseisivit eum de 20 acris terræ cum pertinentiis*; the tenant pleades, *Quod ipse nullam injuriam seu disseisinam præfato A. inde fecit, &c.* The recognitors of the assise doe finde, *Quod prædict. A. injuste & sine judicio disseisivit prædict. B. de prædict. 20 acris terræ cum pertinentiis &c.* This is a generall verdict. The like law is if they finde it negatively. And Littleton here putteth a case of a verdict at large, or a speciall verdict; and it is therefore called a speciall verdict, or a verdict at large, because they finde the speciall matter at large, and leave the judgement of law thereupon to the court, of which kinde of verdict it is said, [1] *Omnis conclusio boni & veri judicii sequitur ex bonis & veris præmissis et dictis juratorum.*

And though Littleton here puts his case of a verdict at large upon a generall issue (which in the case hee putteth it was necessary for the tenant to pleade) yet when issue is joyned upon some speciall point, the jury, as shall be said hereafter in this section, may finde the speciall matter if it be doubtfull in law, for as much doubt may arise upon one point upon the speciall issue as upon the generall issue. And as a speciall verdict may be found in Common

prise a large en assise de novel disseisin, ou en aucun autre action, l'ou les justices voient prendre le verdict de xii. jurors a large. Sicome mittomus, que home seisie de certaine terre en fee lessa mesme la terre a un autre pur terme de vie sans fait, sur condition de rendre al lessor un certaine rent, & pur default de paiement un re-entrie, &c. per force de quel le lessée est seisie come de franktenement, et puis le rent est aderece, per que le lessor enter en la terre, et puis le lessée arraigne un assise de novel disseisin de la terre envers le lessor, le quel plead que il fist nul tort ne nul disseisin, et sur ceo l'assise soit prise; en cest case les recognitors de l'assise foyent dire et rendre a les justices leur verdict a large sur tout le matter, come a dire, que le defendant fuit seisie de la terre en son demesne come de fee, et issint seisie, mesme la terre lessée al plaintife pur terme de sa vie, rendant al lessor tiel annuel rent payable a tiel feast, &c. sur tiel condition, que si le rent fuit aderece a aucun tiel feast † a que

of novel disseisin, or in any other action where the justices will take the verdict of 12 jurors at large. As put the case, a man seised of certaine land in fee letteth the same land to another for terme of life without deed, upon condition to render to the lessor a certaine rent, and for default of payment a re-entrie, &c. by force whereof the lessee is seised as of freehold, and after the rent is behinde, by which the lessor entereth into the land, and after the lessee arraigne an assise of novel disseisin of the land against the lessor, who pleads that he did no wrong nor disseisin, and upon this the assise is taken; in this case the recognitors of the assise may say and render to the justices their verdict at large upon the whole matter, as to say, that the defendant was seised of the land in his demesne as of fee, and so seised, let the same land to the plaintife for terme of his life, rendering to the lessor such a yearly rent payable at such a feast, &c. upon such condition, that if the rent were behinde at any such feast at which

doit

(9. Rep. 12. 13.)

(Plow. 93. 2.)

(Post. 227. 228.)

[1] Trin. 33. E. 1. Coram Rege Nott. in thesaur.

43. Ass. 31. Stanf. pl. cor. 161.
105. 3. E. 3. coron. 284. 286.
287. 44. E. 3. 44. 41. E. 3. Co-
ron. 451.

* *le—per* in L. and M. and Roh.

† *a* not in L. and M. nor Roh.

*doit estre pay, donques bien lirroit al lessor d'entrer, &c. per force de quel lease le plaintife fuit seisie en son demesne come de frank-tenement; et que puis apres le rent fuit aderer a tiel feast, * &c. per que le lessor entra en le terre sur le possession le lessee, et prieroit le discretion de les justices, si ceo soit un disseisin fait al plaintife ou nemy; † donque per ceo que appiert a les justices, que ceo fuit nul disseisin fait al plaintife, entant que l'entrie de le lessor fuit congeable sur luy; les justices doyent doner judgement que le plaintife ne prendra riens per son briefe d'assise. Et issint en tiel cas le lessor serra aide, et uncore nul escripture unques fuit fait del condition. Car cibien que les jurors poient aver conusance de le ‡ lease, auxy bien ils poient aver conusance de le condition que fuit declare & rehearse sur le leas.*

it ought to bee paid, then it should bee lawfull for the lessor to enter, &c. by force of which lease the plaintife was seised in his demesne as of freehold, and that afterwards the rent was behinde at such a feast, &c. by which the lessor entred into the land upon the possession of the lessee, and prayed the discretion of the justices, if this bee a disseisin done to the plaintife or not; then for that it appeareth to the justices, that this was no disseisin to the plaintife, insomuch as the entrie of the lessor was congeable on him; the justices ought to give judgement that the plaintife shall not take any thing by his writ of assise. And so in such case the lessor shall bee aided, and yet no writing was ever made of the condition. For as well as the jurors may have conusance of the lease, they also as well may have conusance of the condition which was declared and rehearsed upon the lease.

Pleas, so may it also (Cro. Eliz. 474. Ib. 471. 113. bee found in Pleas of 114. 653. 6. Rep. 46. b.) the Crowne, or criminal causes that concerne life or member.

A verdict finding matter incertainly or ambiguously is insufficient, and no judgement shall be given thereupon; as if an executor plead *pleinment administrare*, and issue is joyned thereupon, and the jury finde that the defendant have goods within his hands to be administred, but finde not to what value, this is incertain, and therefore insufficient.

(8. Rep. 65.)

A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion bee brought against one for intruding into a mesuage, and 100 acres of land, upon the generall issue the jury finde against the defendant for the land, but saith nothing for the house, this is insufficient for the whole, and so was it twice adjudged. (m) But if the jury give a verdict of the whole issue, and of more &c. that which is more is surplusage, and shall not (a) stay judgement; for *Utile per inutile non vitiatur*, but necessarie incidents required by law the jury may finde.

17. E. 3. 47. 18. E. 3. 48. 22. E. 3. 1. 18. E. 3. 56. 15. E. 3. Judgement. 58. 2. H. 5. 3. 7. H. 6. 5. 7. E. 4. 24. 28. H. 6. 10. (Cro. Jac. 31. 2. Roll. Abr. 722. 10. Rep. 119. Hob. 64. 6. Rep. 47. 2. Roll. Abr. 702. 706. Dyer 346. b. 300. b. Post. 303. 2. b. Doctr. Pla. 288. 289. Hob. 54. Cro. El. 174. 2. Roll. Abr. 708. Hob. 18. 9. Rep. 67. b. 112. 4. Rep. 65. Ant. 114. b. Cro. El. 110. 10. Rep. 97. b.)

(m) Hil. 25. Eliz. in a writ of error betweene Brace and the Queene in the Exchequer chamber. Mich. 28. & 29. Eliz. inter Gomerfal & Gomerfal in account in the King's bench.

(a) 32. E. 3. Cessavit. 25.

Vid. sect. 484. 485.

(Post. 282.)

Vid. sect. 58. 13. E. 3. garr. 26. 15. E. 3. Als. 322. 17. E. 3. 6. 18. Als. 2. 35. Als. 8.

(b) 1. H. 4. 6. b. 27. H. 8. 22. b. Pl. Com. 515.

Lib. 4. fo. 53. Rawlins' case, & ibid. Pledol's case.

Hil. 31. Eliz. betweene Sutton and Dicons in the Common Place, the case of the lease for yeares by deed indented.

34. E. 3. Droit. 29.

(Post. 352. Ant. 47. b. Doc. Pla. 164. Post. 283. Cro. El.

(c) After 141.)

* An added L. and M. and Roh. not in L. and M. nor Roh.

† Et added L. and M. and Roh.

‡ lease, auxy bien ils poient aver conusance de le

(c) 7. R. 2. Corone. 108. Plo.
Com. Freman's case 211. 11. H.
4. 2. 20. Aff. 12. 16. Aff. 16.
22. Aff. 23. 5. H. 7. 22.

Pafch. 24. H. 8. of the report of
Justice Spilman in the King's
Bench. 21. H. 4. 17. 35. H. 6.
Examin. 17. 29. H. 8. 37. Dier.
(1. Vent. 125.)
25. H. 8. 55. 4. et. 5. Eliz. 218.
14. H. 7. 1. 20. H. 7. 3.
(d) Pafch. 6. E. 6. in the Com-
mon Place.

(e) 11. H. 4. 16. 17. 3. Mar.
Jurors Br. 8. Vide Dier ubi su-
pra.
(2. Roll. Abr. 713. 814. 1. Leo.
18. Cro. Jac. 121. Sid. 225.)
Pafch. 6. E. 6. ubi supra.
(Mo. 432. 2. Roll. Abr. 714.
715. 716.)

(f) 24. E. 3. 75.
(1. Cro. Jac. 141. 616.)

21. E. 3. 18.
(Ant. 139. b. 9. Rep. 13.)

W. 2. cap. 30. 7. H. 4. 11.
8. E. 4. 29. 9. H. 7. 13. 23. H.
8. tit. verdict. Br. 85. 11. Eliz.
Dier 283. 284. 3. E. 3. Itinere
North 284. 286. 43. Aff. 31.
26. H. 8. 5. 44. E. 3. 41. E. tit.
Coron. 94. 44. Aff. 17. 45. E.
3. 20. Pl. Com. 92. 9. H. 7. 3.
Vide lib. 9. 12. 13. Downman's
case. And see there many other
authorities
31. Aff. pl. 21. 10. H. 4. 9.
(m) See more before in this chap-
ter, sect. 365.
(Sid. 369. 6. Rep. 38.)

10. Aff. p. 9. 21. Affs. 28. 17.
Affs. 20. 31. Affs. 21. 13. Affs. 2.
39. E. 3. 28. 41. E. 3. 22. 10. H.
4. 9. 7. H. 5. 5. 9. E. 4. 26. 18.
E. 4. 12. 15. E. 4. 16. 17. 11. H.
7. 22.
(Ant. 225. Cro. Jac. 335.)

Lib. 10. fo. 4. case de Sewers.

(c) After the verdict recorded, the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand: also they may vary from a privy verdict.

An issue found by verdict shall alwayes be intended true untill it be reversed by attain, and thereupon upon the attain no *superfedeas* is grantable by law.

If the jurie after their evidence given unto them at the barre, doe at their owne charges eat or drinke either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict: but if before they be agreed on their verdict, they eat or drinke at the charge of the plaintife, if the verdict be given for him, it shall avoid the verdict: but if it be given for the defendant, it shall not avoid it, *Et sic è converso*. (d) But if after they be agreed on their verdict they eat or drinke at the charge of him for whom they doe passe, it shall not avoid the verdict.

(e) If the plaintife after evidence given, and the jury departed from the barre, or any for him, doe deliver any letter from the plaintife to any of the jury concerning the matter in issue, or any evidence, or any escrowle touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintife, but not if it be found for the defendant, *Et sic è converso*. But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carried it with them.

By the law of England a jury after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court. And hereby appeareth another division of verdicts, *viz.* a publique verdict openly given in court, and a privy verdict given out of the court before any of the judges, as is aforesaid.

A jury sworne and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict. And the king cannot be non-suit, for he is in judgement of law ever present in court: but a common person may be nonsuit.

En assise de novel disseisin, ou en ascun autre action, &c. Here it is to be observed, that a speciall verdict, or at large, may be given in any action, and upon any issue, be the issue generall or speciall: and albeit there be some contrary opinions in our bookes, yet the law is now settled in this point.

Per que le lessor entra. Here it appeareth that the condition is executed by re-entry, and yet the lessor after his re-entry shall not, by the opinion of *Littleton*, plead the condition without shewing the deed, because he was partie and privie to the condition, for the parties must shew forth the deed, unlesse it be by the act and wrong of his adversary, as hath beene said; (m) but an estranger which is not privie to the condition, nor claimeth under the fame, as in the cases above said appeareth, shall not after the condition is executed in pleading be enforced to shew forth the deed: and by this diversitie all the bookes and authorities in law which seeme to be at variance are reconciled. See also for this matter the section next following.

Les recognitors del assise poient dire, &c. Here it appeareth that the jurors may finde the fact, albeit the deed be not shewed in evidence, and the rather for that the condition upon the livery (as hath beene said) is good, albeit there be no deed at all.

Et prieront le discretion des justices. That is to say, they (having declared the speciall matter) pray the discretion of the justices; which is as much to say, as, that they would discern what the law adjudgeth thereupon, whether for the demandant, or for the tenant: for as by the authoritie of *Littleton*, *discretio est discernere per legem, quid sit justum*, that is, to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion: *Si à jure discedas, vagus eris, Et erunt omnia omnibus incerta*: and therefore commissions that authorise any to proceed, *secundum sanas discretiones vestras*, is as much to say, as, *secundum legem & consuetudinem Angliæ*.

Car cibien come les jurors poient aver conufance, &c. Hereby it appeareth that they that have conufance of any thing, are to have conufance also of all incidents and dependants thereupon, for an incident is a thing necessarily depending upon another.

If a deed be made and dated in a forraigne kingdome, of lands within England, yet if livery and seisin be made, *secundum formam cartæ*, the land shall passe, for it passeth by the livery. 1. E. 3. 17. in Gracye's case.

Sect. 367.

EN mesme le man- **IN** the same manner
ner est de feof- it is of a feoffement
fement en fee, ou in fee, or a gift in
done en le taile, sur taile, upon condition,
condition, coment que although no writing
nul escripture un- were ever made of it.
que fuet fait de ceo*. And as it is sayd of a
Et sicome est dit de verdict at large in an
verdict a large en assise, &c. in the same
assise, &c. en mes- manner it is of a writ
me le manner est en of entrie founded upon
briefe d'entre foun- a disseisin; and in all
due sur disseisin; et en other actions where
touts auters actions the justices will take
ou les justices voy- the verdict at large,
lent prendre le verdict there where such ver-
a large, y† la ou tiel dict at large is made,
verdict a large est the manner of the
fait, la manner del whole entrie is put in
entrie entiere est mis en the issue, &c.
l'issue, &c.

judges of the court, so called because it ought to bee kept secret and privie from each of the parties, before it be affirmed in court.

AND it is to be ob- served, that the court cannot refuse a speciall verdict, if it bee pertinent to the matter put in issue. See the section next preceding.

Verdict a large.

It is called a verdict at large (9. Rep. 13.) because it findeth the matter at large, and leaves it to the judgement of the court: or it is called a special verdict, be- See the section next following.

cause it findeth the speciall matter, &c. So as hereby it appeareth, that a verdict (as hath beene said) is two fold, *viz.* a verdict at large, or a speciall verdict, (which is all one) whereof *Littleton* here speaketh; and a generall verdict that is generally found according to the issue, as if the issue be not guilty, to finde the partie guiltie or not guiltie generally, & *sic de cæteris*. There is also a verdict given in open court, and a privy verdict given out of court before any of the

(10. Rep. 118. Ant. 226.)

See the next preceding section.

Sect. 368.

ITEM en tiel case **ALSO** in such case
l'ou l'enquest poit dire where the enquest
leur verdict a large, may give their verdict
s'ils voient prendre sur at large, if they will take
eux le conissance de la upon them the know-
ley sur le matter, ils ledge of the law upon
poient dire leur verdict the matter, they may give
generalment, come est their verdict generally, as
mis en leur charge; come is put in their charge; as in
en le case avantdit ils the case aforefaid they
poient bien dire, que le may well say, that the
lessor ne disseisa pas le lessor did not disseise the
lessee, s'ils voient, &c. lessee, if they will, &c.

ALTHOUGH (8. Rep. 65.) the jurie if they will take upon them (as *Littleton* here saith) the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attain- (4. Rep. 53.) therefore to find the speciall matter is the safest way where the case is doubtful.

Sect.

* &c. L. and M. and Roh.

† par la ou tiel verdict a large fait la nature de master mys en l'issue, L. and M. and Roh.

Sect. 369.

PUR ceo
que il n'ad
ascun escrip-
ture de ceo.

Hereby it also ap-
peareth, that al-
beit the condition
was executed by
re-entrie, yet the
lessor cannot plead
it without shew-
ing of a deed.
But of this mat-
ter sufficient hath
beene said before
in the two next
preceding sec-
tions.

Quel est
bone plea en
barre.

In a
case where there
have beene some
varietie of opini-
ons in our books,
Littleton here clec-
reth the doubt, and
that upon a good
ground. For hee
himselfe reporteth
in our bookes,
that it was hold-
en by all the jus-
tices of England,
that a lease for
life, the rever-
sion to the plain-
tife, was a good
barre in an assise,
and also that a
lease for yeares,
the reversion to
the plaintife, might
bee pleaded in an
assise: and so of
a feoffment in fee
with warrantie.
And herein the
diversitie of plead-
ing is to be observ-
ed; for in the case
here put by *Little-
ton* of a lease for
life, the tenant
shall pleade it in
barre: but in a
case of a lease for

ITEM en mesme le case,
si le case fuit tiel,
que apres ceo, que le les-
sor avoit enter pur de-
fault de payment, &c. que
le lessee ust enter sur le
lessor, et luy disseisist, en
cest case si le lessor ar-
raigne un assise envers le
lessee, le lessee luy puit
barre de l'assise; car il poit
pleader envers luy en bar,
coment le lessor que est
plaintife fist un lease al
defendant pur terme de
sa vie, savant le rever-
sion al plaintife, quel est
bone plea en barre, entant
que il conust le reversion
estre al plaintife. * En cest
case le plaintife n'ad +
ascun matter de luy ayder,
forsque le condition fait
sur le leas, et ceo il ne poet
pleader, pur ceo que il n'ad
ascun escripture de ceo:
et entant que il ne poet
responder al barre, il serra
barre. Et issint en cest case
poyes veier que home est
† disseisist, et uncore il n'a-
vera assise. Et uncore si le
lessee soit plaintife, et le
lessor defendant, il bar-
rera le lessee per verdict
d'assise, &c. Mes en cest
case l'ou le lessee est de-
fendant, si il ne voile plead
le dit plea en barre, mes
plead nul tort, nul disseisin,
donques le lessor recovers
per assise, causâ quâ suprà.

ALSO in the same case,
if the case were such,
that after that, that the
lessor had entred for de-
fault of payment, &c. that
the lessee had entered
upon the lessor, and him
disseised, in this case if
the lessor arraigne an as-
sise against the lessee, the
lessee may barre him of
the assise; for hee may
pleade against him in bar,
how the lessor who is pl.
made a lease to the defen-
dor for term of his life, saving
the reversion to the pl.
which is a good plea in bar,
insomuch as hee acknow-
ledges the reversion to be
to the pl. In this case the
plaintif hath no matter to
ayd himselfe, but the con-
dition made upon the lease,
& this he cannot plead, be-
cause he hath not any writ-
ing of this: and inasmuch
as he cannot answer the
bar, he shal be barred. And
so in this case you may see
that a man is disseised, &
yet he shal not have assise.
And yet if the lessee be pl.
and the lessor def. he shall
bar the lessee by verdict of
the assise, &c. But in this
case where the lessee is def.
if he wil not plead the
said plea in bar, but plead
nul tort, nul diff. then the
lessor shal recover by as-
sise, causâ quâ suprà.

yeares,

18. E. 4. 10. 12. Aff. 38.
10. Aff. 16. 26. H. 6. Bar. 9.
38. Aff. 26. 4. 31. Aff. 26.
39. Aff. 3. 43. Aff. 18.
44. Aff. 3. 18. E. 3. Aff. 77.
31. E. 3. ibid. 97. 18. Aff. 22.

4. Eliz. Dyer 207.
8. Eliz. Dyer 246.

* Et added in L. and M. 2nd Roh.

† ascun not in L. and M. nor Roh.

‡ disseisist—seisist, L. and M. and Roh.

yeares, or an estate of tenant by statute or *elegit*, the defendant shall not plead in bar, (Ant. 201. a.) as to say, *assisa non*, &c. but justifie by force of the lease, &c. and conclude, *Et issint sans tort*. And if the tenant of the freehold be not named, he shall pleade *nul tenant de franktenement nosme en le briefe*: and in the case of the feoffment with warranty, he must relie upon the warrantie.

Sect. 370.

ITEM pur ceo que tielx conditions sont plus communement mis & especifies en faits endentes, ascun petit chose serra icy dit (a toy, mon firs) de endenture, et de fait poll concernants conditions. Et est asavoir, que si l'indenture soit bipartite, ou tripartite, ou quadripartite, tous les parties de l'indenture ne sont que un fait en ley, & chescun part de l'indenture est de auxi grande force et effect, sicome tous les parts ensemble.

AND for that such conditions are most commonly put and specified in deeds indented, somewhat shall bee here said (to thee, my sonne) of an indenture, (1) and of a deed pol (2) concerning conditions. And it is to bee understood, that if the indenture be bipartite, or tripartite, or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect, as all the parts together be. (3)

EN faits endentes. Vid. sect. 217.

Those are called by severall names, as *scriptum indentatum*, *carta indentata*, *scriptura indentata*, *indentura*, *literæ indentatæ*. An indenture is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more, and is indented in the top (Ant. 143. b.) or side answerable to another that likewise comprehendeth the self same matter, and is called an indenture, for that it is so indented, and is called in Greeke *συμγραφον*.

If a deed beginneth, *hæc indentura*, &c. and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and there be no words of indenture in the deed, yet it is an indenture in law; for it may be an indenture without words, but not by words without indenting. (1. Rep. 173. b.)

En faits indent. And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a peece of wood, or upon a peece of linen, or in the barke of a tree, or on a stone, or the like, &c. and the same be sealed or delivered, yet is it no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption.

Si l'indenture soit bipartite, ou tripartite, ou quadripartite, &c. Bipartite is, when there be two parts and two parties to the deed. Tripartite, when there are three parts and three parties; and so of quadripartite, quinquartite, &c.

Et de fait poll. A deed poll is that which is plaine without any indenting, so called because it is cut even, or polled. Every deed that is pleaded shall be intended to be a deed poll, unless it be alleaged to be indented.

Touts les parts del endenture ne sont que un en ley. If a man by deed indented make a gift in taile, and the donee dyeth without issue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts doe make but one deed in law.

Et chescun part del indenture est de auxy grand force, &c. This is manifest of it selfe, and is proved by the bookes afore said.

It is to be observed, that if the feoffor, donor, or lessor seale the part of the indenture belonging to the feoffee, &c. the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c.

Sect.

(1) In addition to what has been observed in note 4, to page 143. b. it may be remarked, that all deeds were formerly called charters.—Before the indenting of them came into use, when there were more parties than one interested in them, there were as many parts of them taken as there were parties interested, and one part was delivered to each of the parties: these multiplied parts were called *Chartæ paricæ*, or *paricolæ*. The *Chartæ paricæ*, or *paricolæ*, were superseded, in a great measure, by the *Chartæ partite*. One part of the *Chartæ partite* was written on a piece of vellum or parchment, beginning about the middle and continuing to the end of each side. This prevailed as early as the times of the Saxons, as appears by the will of *Æthelwulf*, a nobleman of Kent, dated in 958; by that of prince *Æthelstan*, eldest son of king *Ethelred* the 2d; by a charter of archbishop *Eadsi*, made about the year 1045; and by other Saxon documents preserved in the library of Mr. *Astle*; in all which the parchments are cut in straight lines. Straight lines continued to be generally used till the latter end of the reign of king *Henry* the 3d. Afterwards the cut through the parchment was made in a waiving or undulating line; and the practice of writing an intermediate sentence, or drawing an intermediate figure, was generally disused, and the word *Cyregraphum* adopted. In process of time it became the practice to indent this line in small notches or angles. This practice begun with the lawyers, as early as the reign of king *John*; but was not adopted by the ecclesiastics till a much later period. This made the intermediate writing or drawing unnecessary; and it seems to have been abandoned about the reign of *Edward* the 3d. But the practice of indenting deeds in the intermediate line, remained in use till the close of the 14th century; it then seems to have declined; yet the practice of cutting a waiving or undulating line at the top of the parchment, on which every deed that is not a deed poll is written, has ever since continued. If the deed contains more than one skin of parchment, only the first skin of parchment is indented. Foreign diplomatists contend, that when the parchment on which a deed is written, is cut through the intermediate word or figure in a straight line, it is properly called *Charta undulatoria*; and that it is then only properly called *Charta indenta*, or *indentura*, when it is cut through the intermediate word or figure in a waiving line, and that waiving line is indented or notched in the manner I have mentioned. But with us, every deed the top of which is cut in the undulating or waiving manner I have mentioned, is called an indenture. See Mr. *Madox's* preface to his *Formulare*, and the *Nouveau Traité de Diplomatique*, Vol. I. 351.

(2) This was called *charta de unâ parte*. Some deeds must be indented to be valid for the purposes for which they are used, as bargains and sales by the stat. 27. H. 8. c. 16. leases by persons seised in tail in right of their wives, or ecclesiastical persons, by 32. H. 8. c. 28. a bargain and sale of a bankrupt's estate by the 13. El. c. 7.—and see 43. El. c. 18.

(3) When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor, is usually called the original, and the rest are called counterparts; tho' of late it is most frequent for all the parties to execute every part, which renders them all originals. 2. Bla. Com. ch. 20. f. 1.

Sect. 371.

ET feafance de indenture eft en deux maners. Un eft de faire eux en le tierce perfon. Un autre eft de faire eux en le primer perfon. Le feafance en le tierce perfon eft come en tiel forme.

Hæc indentura facta inter R. de P. ex unâ parte, & V. de D. ex alterâ parte, testatur, quod prædictus R. de P. dedit & concessit, & hæc præfenti cartâ indentatâ confirmavit præfato V. de D. talem terram, &c. Habendum & tenendum, * &c. sub conditione, † &c. In cujus rei testimonium partes prædictæ figilla sua ‡ præfentibus alternatim apposuerunt. *Velfic*: In cujus rei testimonium uni parti hujus indenturæ penes præfatum V. de D. remanenti, prædict' R. de P. figillum suum apposuit, alteri verò parti ejusdem indenturæ penes R. de P. remanenti, idem V. de D. figillum suum apposuit. Dat' &c.

Tiel endenture est appel endenture fait en le tierce perfon, pur ceo que les verbes, &c. sont en la tierce perfon. Et tiel forme d'indentures est de plus sure feafance, pur ceo que est plus communement use, &c.

AND the making of an indenture is in two manners. One is to make them in the third person. Another is to make them in the first person. The making in the third person is in this forme.

This indenture made between R. of P. of the one part, and V. of D. of the other part, witnesseth, that the said R. of P. hath granted, and by this present charter indented confirmed to the aforesaid V. of D. such land, &c. To have and to hold, &c. upon condition, &c. In witness whereof the parties aforesaid to these presents interchangeably have put their seales. Or thus: In witness whereof to the one part of this indenture remaining with the said V. of D. the said R. of P. hath put his seale, and to the other part of the same indenture remaining with the said R. of P. the said V. of D. hath put his seale. Dated, &c.

Such an indenture is called an indenture made in the third person, because the verbes, &c. are in the third person. And this forme of indentures is the most sure making, because it is most commonly used, &c.

9. E. 3. 18. Vide the books afore rehearsed.

Vide 40. E. 3. 2. 7. H. 7. 11. Dier 28. H. 8. 19. lib. 2. fol 4. & 5. Coddard's case. (Ant. 6. 2.)

17. Eliz. Dier 342. 1. R. 3. 14. H. 6. 28. Bab. 12. H. 4. 12. 30. Aff. 31.

ET le feafance del indenture est en deux maners, &c. Here is another of our author's perfect divisions. In this and the next section following *Littleton* doth illustrate his meaning, by setting downe formes and examples which do effectually teach.

In these two formes there are to be observed (amongst other) three generall parts of the same, viz. the premises, the *habendum*, and the *in-cujus rei testimonium*. But hereof hath been spoken at large, *Sect.* 1. 4. & 40. for *Littleton* speaketh not here of the deliverie, but onely of the context or words of the deed.

Pur ceo que est le plus communement use. Here it appeareth that which is most commonly used in conveyances is the surest way. *A communi observantia non est recedendum, & minime mutanda sunt quæ certam habuerunt interpretationem. Magister rerum usus.* It is provided by the statute of 38. E. 3. cap. 4. that all penal bonds in the third person

* &c. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

‡ præfentibus not in L. and M. nor Roh.

person be void and holden for none, wherein some of our bookes [d] seem to differ, but they being rightly understood, there is no difference at all. For the statute is to be intended of bonds taken in other courts out of the realme, and so it appeareth by the preamble of that act. And it was principally intended of the courts of *Rome*, and so it appeareth by justice *Hankford*, in 2. H. 4. in which courts bonds were taken in the third person, so as such bonds made out of the realm are void; but other bonds, in the third person, are resolved to be good, as wel as indentures in the third person, by the opinion of the whole court in 8. E. 4. (1)

Sect. 372.

LE *feasance de indenture en le primer person est * come en tiel forme.* **T**HE making of an indenture in the first person is as in this forme. To all Christian people fidelibus ad quos præsentes literæ to whom these presents indented shall indentatæ pervenerint, A. de B. come, A. of B. sends greeting in our salutem in domino sempiternam. Lord God everlasting. Know ye mee Sciatis me dedisse, concessisse, & to have given, granted, and by this hâc præsenti cartâ meâ indentatâ my present deed indented confirmed confirmâsse C. de D. talem terram, to C. of D. such land, &c. Or thus: &c. Vel sic: Sciant præsentes & futuri, quod ego A. de B. dedi, concessi, & hâc præsenti cartâ meâ indentatâ confirmavi C. de D. talem terram, &c. Habendum † & tenendum, &c. sub conditione sequenti, &c. In cuius rei testimonium tam ego prædictus A. de B. quàm prædictus C. de D. his indenturis figilla nostra alternatim apposuimus. Vel changeably put our seales. Or thus: sic: In cuius rei testimonium ‡ ego præfatus A. uni parti hujus indenturæ figillum meum apposui, alteri verò parti ejusdem indenturæ prædictæ C. de D. figillum suum apposuit, &c.

HERE *Littleton* sets down three formes of deeds indented in the first person, *brevi via per exempla, longa per præcepta.* It is requisite for everie student to get presidents and approved formes not onely of deeds according to the example of *Littleton*, but of fines, and other conveyances, and assurances, and specially of good and perfect pleading, and of the right entries, and formes of judgements, which will stand him in great stead, both while he studies, and after when he shall give counsell. It is a safe thing to follow approved presidents, for *nihil simul inventum est, & perfectum.*

Vid. Sect. 371.

Sect. 373.

AND it seemeth that such indenture which is made in the first person is as good in law, as the *ET il semble que tiel endenture || que est fait en le primer person est auxy bone en la ley,*

* come not in L. and M. nor Roh. † et tenendum, not in L. and M. nor Roh. ‡ ego præfatus et, not in L. and M. nor Roh. || que est not in L. and M. nor Roh.

(1) See Mr. Reeves's accurate and learned History of the English Law, vol. 2. p. 67.

*ley, sicome l'indenture fait en le tierce person, quant ambideux parties ont a ceo mise leur seals; car * si en l'indenture fait en le tierce person, ou en le primer person, † mention soit fait que le grantor avoit mise solement son seale, & nemy le grauntee, donques est l'indenture tant solement le fait le grantor. Mes l'ou mention est fait que le grauntee ad mis ‡ son seale a l'indenture, &c. donques est l'indenture auxy bien le fait le grauntee come le fait le grantor. Issint il est le fait d'ambideux, & auxy chescun part de l'indenture est le fait d'ambideux parties en tiel case.*

indenture made in the third person, when both parties have put to this their seals; for if in the indenture made in the third person, or in the first person, mention be made that the grantor onely hath put his seale, and not the grantee, then is the indenture onely the deed of the grantor. But where mention is made that the grantee hath put to his seale to the indenture, &c. then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and also each part of the indenture is the deed of both parties in this case.

(2. Inst. 673. Ant. 58. b. 2. Roll. Abr. 22.)

HERE is to be observed, that albeit the words in this indenture be onely the words of the feoffor, yet if the feoffor put his seale to the one part of the indenture, it is the deed of them both. And in this speciall case to make it the deed of the feoffee, it appeareth by *Littleton*, that mention must be made in the deed, that hee hath put to his seale, for that he is no way made partie to make it, being made in the first person, but only by the clause of putting his seale thereunto. Otherwise it is of a deed indented in the third person, as before it appeareth, for there hee is made partie to the deed in the beginning. And *Littleton's* rule is true, that every part of an indenture is the dede of both parties; for, as it hath beene said, both parts make but one deed in law in that case.

Sect. 374.

(1. Roll. Abr. 422. 474.)

SUR certaine condition, &c. Here

by this (&c.) is implied, that the condition in this case doth extend both to the estate for life, and to the remainder, but by speciall limitation it may extend to any one of them, and not to the other. And albeit he in the remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life) yet when hee in the remainder entred and agreeth to have the lands by force of the (1) indenture, he is bound to performe the conditions contained in the in-

(10. Rep. Doct. Ball's case cited in Portington's case.)

2. Cro. 240. 399. 522.)

ITEM si estate soit fait per indenture

a un home pur terme de sa vie, le remainder a un auter en fee sur certaine condition, &c. & si le tenant a terme de vie avoit mis son seale al part de l'indenture, & puis morust, & il que est en le remainder entre en la terre per force de son remainder, &c. en cest cas il est tenu de performer tous les conditions comprise en

ALSO if an estate bee made by indenture to one for terme of his life, the remainder to another in fee upon a certaine condition, &c. and if the tenant for life have put his seale to the part of the indenture, and after dieth, and he in the remainder entred into the land by force of his remainder, &c. in this case hee is tied to performe all the conditions comprised

l'en-

* *si* not in L. and M. nor Roh.
‡ *son seale* added in L. and M. and Roh.

† *si* added in L. and M. and Roh.

‡ *son seale* not in L. and M. nor Roh.

(1) So where three were infeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and only two of the feoffees sealed the deed, the third entered and agreed to the estate conveyed by the deed, he was bound in a writ of covenant by the sealing of his companions. 2. Roll. Rep. 63.—In 38. Ed. 3. p. 9. it is said, that if land is leased to two for years, and only one puts his seal, but the other agrees to the lease, and enters, and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, tho' he is party to the lease, he is not party to the condition.

l'indenture, sicome le tenant a terme de vie devoit faire en sa vie, et uncore cestuy en le remainder ne unques en seale ascun part del indenture. Mes la cause est, que entant que il enter et agreea d'aver les terres per force del indenture, il est tenu de performer les conditions deins mesme l'indenture, s'il voile aver la terre, &c.

in the indenture, as the tenant for life ought to have done in his lifetime, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that inasmuch as hee entered and agreed to have the lands by force of the indenture, hee is bound to performe the conditions within the same indenture, if he will have the land, &c.

indenture. And here is also a diversitie to be understood, that any estranger to the indenture may take by way of remainder, but he cannot in this case take any present estate in possession, because he is an estranger to the deed. (1)

If *A.* by deed indentured betweene him and *B.* letteth lands to *B.* for life, the remainder to *C.* in fee reserving a rent, tenant for life dieth, he in the remainder entreth into the lands, he shal be bound to pay the rent, for the cause and reason before yeelded by *Littleton*. An indenture of

(2. Inst. 673.)
(2. Roll. Abr. 22.)

50. E. 3. 22. 3. H. 6. 26. b.
(1. Roll. 474.)
(5. Rep. 16.)

lease is engrossed betweene *A.* of the one part, and *D.* and *R.* of the other part, which purporteth a demise for yeares by *A.* to *D.* and *R.* *A.* sealeth and delivereth the indenture to *D.* and *D.* sealeth the counterpane to *A.* but *R.* did not seale and deliver it. And by the same indenture it is mentioned, that *D.* and *R.* did grant to be bound to the plaintife in 20 pound in case that certaine conditions comprised in the indenture were not performed. And for this 20 pound *A.* brought an action against *D.* onely, and shewed forth the indenture. The defendant pleaded, that it is proved by the indenture that the demise by indenture was made to *D.* and *R.* which *R.* is in full life and not named in the writ, judgment of the writ. The plaintife replied, that *R.* did never seale and deliver the indenture, and so his writ was good against *D.* sole. And there the counsell of the plaintife tooke a diversitie betweene a rent reserved which is parcell of the lease, and the land charged therewith, and a summe in grosse, as here the twenty pound is; for as to the rent they agreed that by the agreement of *R.* to the lease, he was bound to pay it, but for the 20 pound that is a summe in grosse, and collateral to the lease, and not annexed to the land, and groweth due onely by the deed, and therefore *R.* said hee was not chargeable therewith, for that he had not sealed and delivered the deed. But inasmuch as hee had agreed to the lease which was made by indenture, he was chargeable by the indenture for the same summe in grosse; and for that *R.* was not named in the writ, it was adjudged that the writ did abate.

38. E. 3. 8. a. 3. H. 6. 26. b.
Vide 45. E. 3. 11. 12.

Aver la terre, &c. Here is implied an ancient maxime of the law, viz. *Qui sentit commodum sentire debet et onus, et transit terra cum onere.*

Sect. 375.

*ITEM si feoffment soit fait per fait poll sur condition, * et pur ceo que le condition n'est pas performe le feoffor entra et happa la possession de le fait poll, si le feoffee port un action de cel entrie envers le feoffor, il ad este question si le feoffor poit pleder le condition per le dit fait poll eucounter le feoffee. Et ascuns ont dit que non, entant que il*

ALSO if a feoffment bee made by deed poll upon condition, and for that the condition is not performed the feoffor entreth and getteth the possession of the deed poll, if the feoffee brings an action for this entrie against the feoffor, it hath beene a question if the feoffor may plead the condition by the said deed poll against the feoffee. And some have said
semble

* &c. added in L. and M. and Roh.

(1) In *Salter v. Hedgely*, Carth. 76. lord chief-justice Holt held, that a party to a deed cannot covenant with one who is no party to it; — but that one who is no party to a deed may covenant with one who is a party, and oblige himself by sealing of the deed.

*semble a eux que un fait poll, et le proprietie de mesme le fait appartient a celui a que le fait est fait, et nemy a celui que fist le fait. Et entant que tiel fait ne attient al feoffor, il semble a eux que il ne poit pas ceo pleder. * Et auters ont dit le contrarie, et ont monstre divers causes. Un est, si le case fuit tiel, que en action perenter eux, si le feoffee pleder mesme le fait, et monstre † est ‡ al court, en cest cas entant que le fait est en court, le feoffor poit monstre al court coment en le fait sont divers conditions d'estre performes || de le part le feoffee, &c. et pur ceo que ils ne fueront performes, il enter, &c. et a ceo il jerra rescieve. Per mesme le reason quant le feoffor ad le fait en poigne, et ceo monstra a le court, il jerra § bien rescieve de ceo pleder, &c. et nosment quant le feoffor est privie al fait, car † convient esire privie al fait quant il fist le fait, &c.*

(5. Rep. 76.)

(1. Rep. 38.)

hee cannot, inasmuch as it seemes unto them that a deed poll, and the proprietie of the same deed belongeth to him to whom the deed is made, and not to him which maketh the deed. And inasmuch as such a deed doth not appertaine to the feoffor, it seemes unto them that he cannot plead it. And others have said the contrary, and have shewed divers reasons. One is, If the case were such, that in an action betweene them, if the feoffee pleade the same deed, and shew it to the court, in this case inasmuch as the deed is in court, the feoffor may shew to the court how in the deed there are divers conditions to be performed of the part of the feoffee, &c. and because they were not performed he entred, &c. and to this he shall be received. By the same reason when the feoffor hath the deed in hand, and shew this to the court, he shall well be received to pleade it, &c. and namely when the feoffor is privy to the *fait*, for hee must be privy to the deed when he makes the deed, &c.

[1] Vid. sect. 270. 302. 340.

HERE the latter opinion is cleere law at this day, and is *Littleton's* owne opinion [a], as before hath beene observed.

Ont monstre divers causes.

Felix qui potuit rerum cognoscere causas.
Et ratio melior semper praevallet.

24. E. 3. 73. 45. E. 3. Monstrans des faits. 55.
[b] 40. Aff. 34. lib. 5. 75. b. Wymark's case.
[c] 12. H. 4. 8. 42. E. 3. 27. Wymark's case, ubi supra, 38. H. 6. 2. 41. Aff. 29. 12. H. 4. 8. 7. H. 4. 39. 11. H. 4. 73. 45. E. 3. 11. F. N. B. 243.

(5. Rep. 75. 76.)

Entant que le fait est en court, &c. And herewith doe agree [b] many authorities in law. [c] And if the deed remaine in one court, it may be pleaded in another court, without shewing forth; *quia lex non cogit ad impossibilia.*

De part le feoffee, &c. Here also is implied if the condition be to be performed on the part of the feoffor or by a stranger; and it is to be understood that when a deed is shewed forth to the court, the deed shall remaine in court all that tearme in the custody of the *custos brevium*, but at the end of the tearme (if the deed be not denied) then the law adjudgeth the deed in the custody of the party to whom it belongeth, for a man's evidences are as it were the finewes of his land. But if the deed be denied, then the deed in judgment of law remaineth in court untill the plea be determined (1). The residue of this section needeth no explication.

Sect.

* &c. added in L. and M.

† ceo, L. and M. and Roh.

‡ est not in L. and M. nor Roh.

|| de le part de feoffee, &c. et pur ceo que ils ne fueront performes, not in L. and M. nor Roh.

§ de ceo added in L. and M.

† il added in L. and M. and Roh.

(1) But after, though the jury find the deed not to be the deed of the party, yet will not the court on motion detain the same, but will order it to be delivered to the party that brought it into court. 2. Sid. 131. Vid. Salk. 215. Note to the 5th edition.

Sect. 376.

AUXY si deux homes font un trespas a un auter, le quel release a un d'eux per son fait tous actions personals, & nient obstant il fust action de trespasse envers l'auter, le defendant bien poit monstrer que le trespasse fuit fait per luy, et per un auter son companion, et que le plaintife per son fait que il monstre avant releff a son companion tous actions personals, judgment si action, &c. et uncore tiel fait appertient a son companion, & nemy a luy. Mes pur ceo que il poit aver advantage per le fait, si voil monstrer le fait al court, il poit + ceo bien pleder, &c. Per mesme le reason + poit le feoffor en l'auter cas, quant § il doit aver advantage per le condition || compris deins le fait poll¶.

ALSO if two men doea trespasse to another, who releases to one of them by his deed all actions personals, and notwithstanding sueth an action of trespasse against the other, the defendant may wel shew that the trespasse was done by him, and by another his fellow, and that the plaintife by his deed (which he sheweth forth) released to his fellow all actions personals, and demand the judgement, &c. and yet such deed belongeth to his fellow, and not to him. But because hee may have advantage by the deed, if hee will shew the deed to the court, he may well plead this, &c. By the same reason may the feoffor in the other case, when he ought to have advantage by the condition comprised within the deed poll.

SI deux homes font un trespasse a un auter, &c.

Here by this section it is to bee understood, that when divers doe a trespasse, the same is joynt or severall at the wil of him to whom the wrong is done, yet if he releale to one of them, all are discharged, because his own deed shall be taken most strongly against himselfe, but otherwise it is in case of appeale of death, &c. As if two men bee joyntly and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth, albeit the deede appertaine to the other. (1)

If an action of debt upon an obligation bee brought against an heire, he may pleade in barre a release made by the obligee to the executors. But albeit the deed belong to another, yet must he shew it forth, for both of them are privie to the testator.

Per mesme le reason. Ubi eadem ratio, ibi idem jus.

27. E. 3. 83. 13. E. 4. 2. 15. E. 4. 26. 21. E. 4. 72. 22. E. 4. 7. 8. H. 6. 15. 20. H. 6. 41. 21. H. 6. Arbitrement 41. a. R. 3. 9. a. 14. H. 8. 10. 34. H. 8. tit. Estrange al fait 21. 3. H. 6. 18. 26. (11. Rep. 5. 2. Roll. Abr. 412. Hob. 66. 2. Sid. 41. Ant. 125. b.)

13. E. 2. tit. Monstrans des faits. 42.

(Flo. 439. b. Dyer 344. 6. Rep. 7. 10. Rep. 93. b.)

Sect. 377.

AUXY si le feoffee donast ou grantast le fait poll al feoffor, tiel grant serra bone, et donques le fait & le proprietie del

ALSO if the feoffee granteth the deed to the feoffor, such grant shall bee good, and then the deed and the proprietie therof belongeth

LE proprietie del fait appertient al feoffor.

Hereby it (1. Rep. 1.) appeareth that a man may give or grant his deed to another, and such a grant by paroll is good.

* son—le, L. and M. and Roh.
§ le feoffor, L. and M. and Roh.

+ pur added L. and M.
|| compris not in L and M. nor Roh.

† poit le feoffor not in L. and M. nor Roh.
¶ &c. added L. and M. and Roh.

(1) 26. H. 6. T. Barre 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a good plea in bar. Nota, each was bound in the entirety, therefore it was joint and severall. 34. H. 6. So in the case of the king, if he releases to one of the obligors, the other shall take advantage. 5. Rep. 56. contra.—And as a release in deed to one obligor discharges the other, so of a release in law, as 8. Rep. 136, Needham's case. A woman obligee marries the obligor, that is another sort of discharge. 264. b.—But 17. Car. B. R. Two were bound jointly and severally. The plaintiff sued both, and afterwards entered a retraxit against one; whether that discharged the other was the question. Berkley said it was, for it amounts to a release in law, as the plaintiff confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in Hickmot's case, 9. Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to severall, and therefore the other shall have advantage of it. Cro. Inst. contra; for a retraxit is only in the nature of an estoppel; and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in 21. H. 6. it is said, that there must be an actual release to one obligor to discharge the other. See March. Rep. 165.—Pai. 18. Car. Hannan v. Roll. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and

(Ant. 214. a. Post. 260. 280.
2. Roll. Abr. 45. 46. 48.
1. Sud. 212. 213.)

And it is also implied, that if a man hath an obligation, though he cannot grant the thing in action, yet hee may give or grant the deed, viz. the parchment and waxe to another, who may cancell and use the same at his pleasure. (1)

Serra plus tost entend', que il vient al fait per loyall meane, que per tortious meane. Omnia presumuntur legitime facta, donec probetur in contrarium. Injuria non presumitur.

Quære de dubiis.

There be three kinds of unhappy men.

1. *Qui scit & non docet*, Hee that hath knowledge and teacheth not.

2. *Qui docet & non vivit*, He that teacheth, and liveth not thereafter.

3. *Qui nescit, & non inter-*

rogat, He that knoweth not, and doth not enquire to understand. Therefore Littleton saith, *Quære de dubiis.*

Infelix cujus nulli sapientia prodest.

Infelix qui recta docet, cum vivit iniquè.

Infelix qui pauca sapit spernitque doceri.

Quia per rationes pervenitur ad legitimam rationem. For *Ratio est radius divini luminis*. And by reasoning and debating of grave learned men the darknesse of ignorance is expelled, and by the light of legall reason the right is discerned, and thereupon judgment given according to law, which is the perfection of reason. This is of Littleton here called *legitima ratio*, whereunto no man can attaine but by long studie, often conference, long experience, and continuall observation.

Certaine it is, that in matters of difficultie the more seriously they are debated and argued, the more truly they are resolved, and thereby new inventions justly avoided.

Inter cuncta leges, & percunctabere doctos.

Sect. 378.

Condition en ley, &c.

Littleton having spoken of conditions in deed, now according to his owne division commeth to speake of conditions in law.

Que ne soit specifie en escript. A condition in law is that which the law intendeth or implyeth without expresse words in the deed.

ESTATES que

homes ont sur condition en ley, sont tiels estates que ont un condition per la ley a eux annex, comment que ne soit specifie en escript. Si come home grant per son fait a un auter l'office de

ESTATES which

men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the

par-

* *est—eo*, L. and M. and Roh.

† *&c.* added L. and M. and Roh.

(1) It is to be observed, that the king was always an exception to this rule; for he might always either grant or receive a *chose in action* by assignment.—The reason why, by the strict rules of the common law, a *chose in action* cannot be assigned or granted over, was, that it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the antient principle, the form of assigning a *chose in action* is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptance a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose in action*, as much as the law will that of a *chose in possession*. Dyer 30. Br. Ab. tit. Chose in action. 3. P. W. 199. 2. Bla. Com. Ch. 30.

and in an action upon the case the matter was found specially; and Rolls argued, that the debt was not absolutely discharged, but only sub modo, viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient.—See Hobart Rep. 70. Parker v. Sir John Lawrence. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a noli prosequi against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him;—but a noli prosequi, or non-suit before judgment against one, would discharge all. Lord Nott. MS.

*parkership de un park a auter, & occupier mesme l'office pur terme de son vie, l'estate que il ad en l'office est sur condition en ley, cestascavoir, que le parker bien & loyalment gardera le park, & ferra ceo que a tiel office appartient a faire, ou auterment bien lirroit al grantor & a ses heires de luy ouste, & de granter ceo a un auter s'il voit, &c. Et tiel condition que est entendus per la ley estre annexe a ascun chose, est auxy fort sicome la condition fuissoit mis * en escript.*

the office of parkership of a park, to have and occupie the same office for terme of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keepe the parke, and shall doe that which to such office belongeth to doe, or otherwise it shall be lawful to the grantor and his heires to oust him, and to grant it to another if he will, &c. And such condition as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing.

lard, herne, &c. whereof I have seen this record^(*): *Rex concessit Johanni de Beverly Armigero suo quodd ipse cum quibuscunque canibus suis ad quascunque bestias feras regis in quibuscunque forestis, parcis suis quotiescunque voluerit venari possit, & quoscunque falcones possit permittere volare ad quascunque aves de warrenâ in quibuscunque ripariis, &c.*

It is resolved [c] b; the justices and the king's counsell, that *capreoli*, id est roes, non sunt bestia de foresta, sed quodd fugant alias feras. Beasts of forrests be properly hart, hind, bucke, hare, boare, and wolfe, but legally all wild beasts of venery.

A forest and chafe are not, but a parke must be inclosed. The forest and chafe doe differ in offices and lawes: every forest is a chafe, but every chafe is not a forest. A subject may have a forest by especiall grant of the king, as the duke of Lancaster and abbot of Whitbie had.

Ockam cap. quid regis foresta, saith, *Foresta est tuta ferarum mansio non quarumlibet, sed filvestrium, non quibuscunque in locis, sed certis, & ad hoc idoneis; unde foresta E mutata in O, quasi jessita, hoc est, ferarum statio.*

Pudgeld or *Woodgeld* is to bee free from payment of money for taking of wood in any forest. But let us now returne to our *Littleton*.

In this section *Littleton* putteth an example of a condition in law annexed to the office of the keeper of a park, but this example must be understood with a distinction; for if the parker doth not attend on the parke one or two, &c. dayes, this is no forfeiture of the office of parkership; but if in his default any deere be killed, and so a damage to the lord, that is a forfeiture: for (that it may be said once for all) non-user of it selfe without some speciall damage is no forfeiture of private offices, but non-user of publique offices which concern the administration of justice, or the common wealth, is of it selfe a cause of forfeiture.

Luy ouster s'il voit, &c. *Littleton* here speaketh of an ouster by force of a condition in law, therefore it is to be seen in what other cases the grantor may lawfully oust his officer. (1)

There is a diversitie between officers that have no other profit, but a collateral certain fee, for there the grantor may discharge him of his service, as to be a bayly, receiver, surveyor,

Que le parker bien & loyalment gardera le parke, &c. *Parke*

this should be written *parque*, which is a French word, and signifieth that which we vulgarly call a parke, of the French word *parquer*, to im-parke, to inclose. It is called in *Domesday*, *Parcus*. In law it signifieth a great quantity of ground inclosed, priviledged for wild beasts of chafe by prescription, or by the king's grant.

The beasts of *parque*, or chafe, properly extend to the bucke, the doe, the foxe, the matron, the roe, but in a common and legall sense, to all the beasts of the forrest. There be both beasts and fowles of the warren. Beasts, as hares, conies, and roes called in records [d] *Capreoli*. Fowles of two sorts, viz. *Terrestres* and *Aquatiles*. *Terrestres* of two sorts, *Silvestres* and *Campe-*

stres: *Campestres*, as partridge, quaille, raile, &c. *Silvestres*, as pheasant, wood-cocke, &c. *Aquatiles*, as mal-

(Ant. 2. 2. 115. 2. Cro. Car. 59. 60. 3. Inf. 76. 4. Inf. 289. Hutt. 86. 87.)

(8. Rep. 136.)

(F. N. B. 161. d.)

(5. Rep. 104. b.)

[d] Hill. 13. E. 3. coram rege in Thesaur. (7. Rep. 15.)

(*) 38. E. 3. rot. patent pars 1. m. 10.

[c] Hill. 13. E. 3. coram rege in Thesaur.

Vide Sect. 1.

Vide Brañ. fo. 231. & 316. Britton fo. 34. Fleta lib. 2. cap. 34. 35.

(9. Rep. 50. Sid. 14.)

5. E. 4. 15. b. L. 5. E. 4. 26. Pl. Com. 379. 380.

2. H. 7. 11. 30. A. 6. 32 &c. (Cro. 11. Rep. And. Curll's case.)

* *ou mustre*, added in L. and M. and Roh.

(1) Since Sir Edward Coke's time, several statutes have been passed, particularly 25. Car. 2. Ch. 2. 13. & 14. W. 3. Ch. 6. & 1. An. Ch. 22. by which all persons admitted into offices civil or military are to take the oaths of allegiance and supremacy, otherwise they forfeit their offices, and incur other penalties.

18. E. 4. 8. 31. H. 8. grants.
Br. 134. 34. H. 8. ibid. 93. 11.
Eliz. Dyer 285.
(Plo. 379. b. 381. b. F. N. B. 164.
Sid. 74. 81. 2. Roll. Abr. 155.
9. Rep. 50. Cro. Car. 55. 56. 59.
60. 61.)

veyor, auditor, or the like, the exercise whereof is but labour and charge to him, but hee must have his fee: for the maine rule of law is, that no man can frustrate or derogate from his owne grant to the prejudice of the grantee. And where albeit the grantee hath no other profit but his fee, yet that fee is to be perceived and taken out of the profits appertaining to the lord within his office, for there the grantor cannot discharge him of his service or attendance, for that may turn to the prejudice of the grantee, if the grantor will not grant the office at all. But in all cases where the officer relinquisheth his office, and refuseth to attend, he loseth his office, fee, profit, and all.

22. H. 6. 10. 3. 6. E. 6. Dier 71.

There is another diversity where the grantee, besides his certaine fee, hath profits and availes by reason of his office; there the grantor cannot discharge him of his service or attendance, for that should be to the prejudice of the grantee. As if a man doth grant to another the office of the stewardship of his courts of his manors with a certain fee, the grantor cannot discharge him of his service and attendance, because he hath other profits and fees belonging to his office, which he should lose if he were discharged of his office. And as in the case which *Littleton* here putteth of the office of the keeper of a parke, for that hee hath not onely his fee certaine, but profits and availes also, in respect of his office, as deere skinner, shouldiers, &c. But now let us proceed and see what other particular forfeitures in law bee of this office here spoken of by *Littleton*, and somewhat of conditions in law in generall.

(Ant. 54. a.)

15. E. 4. 2. b. 5. E. 4. 26. 28. H.
8. Bendloe's enter evesque de
Londres & Hieron. lib. 9. fo. 50.
95. 96. 99.

[f] Mich. 33. E. 1. coram rege
in Thefaur. L'evesque de Dur-
ham's case.

Pl. Com. 373. a. Sir Henric Ne-
vill's case 21. E. 4. 20. 93.

(1. Rep. 14. b.)

Lib. 8. fo. 41. Wittingham's case.

And it is to be understood, that if any keeper kill anydeere without warrant, or fell or cut any trees, woods, or underwoods, and convert them to his owne use, it is a forfeiture of his office, for the destruction of vert is, by a meane, destruction of venison. So it is if he pull downe the lodge, or any house within the park for putting of hay into it for feeding of the deere or such like, it is a forfeiture; and the reason wherefore the office in these and in like cases shall be forfeited [f] is, *quia in quo quis delinquit in eo de jure est puniendus*.

As to conditions in law, you shal understand they bee of two natures, that is to say, by the common law, and by statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence: upon skill and confidence, as here the office of parkership, and other offices in the next section mentioned, and the like.

Touching conditions in law without skill, &c. some be by the common law, and some by the statute. By the common law as to every estate of tenant by the courtesie, tenant in tayle after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, tenant by *elegit*, gardian, &c. there is a condition in law secretly annexed to their estates, that if they alien in fee, (1) &c. that he in the reversion or remainder may enter, and *sic de similibus*, or if they claime a greater estate in court of record, and the like.

Concerning conditions in law founded upon statutes, for some of them an entrie is given, and for some other a recovery by action: where an entrie is given, as upon an alienation in mortmaine, &c. and the like: where an action is given, as for waste against tenant for life and yeares, and the like.

Et tiel condition que est entendus per la ley estre annex a ascun chose, est auxi fort, &c. Here it is worthy the observation to take a view of the divisions afore-

(Cro. Car. 279.)

Lib. 8. fo. 44. Wittingham's case.

(Mo. 92. 1. Cro. 7. 9. Rep. 72.

Plo. 205. Ant. 100.)

saied in some particular case. As for example. Admit that an office of parkershippe bee granted or descend to an infant or feme covert, if the conditions in law annexed to this office which require skill and confidence be not observed and fulfilled, the office is lost for ever, because, as *Littleton* saith here, it is as strong as an expresse condition. But if a lease for life be made to a feme covert, or an infant, and they by charter of feoffment alien in fee, the breach of this condition in law, that is, without skill, &c. is no absolute forfeiture of their estate. So of a condition in law, given by statute, which giveth an entrie onely. As if an infant or feme covert with her husband aliens by charter of feoffment in *mortmaine*, this is no barre to the infant, or feme covert. But if a recovery be had against an infant or feme covert in an action of waste, there they are bound and barred for ever.

And it is to be observed, that a condition in law by force of a statute which giveth a recovery, is in some case more strong than a condition in law without a recovery. For if lessee for life make a lease for yeares, and after enter into the land, and make waste, and the lessor recover in an action of waste, he shal avoid the lease made before the waste done. But if the lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shal not avoid the lease for yeares. Nor in any of the said cases a precedent rent granted out of the land shal be avoyded. For if lessee for life grant a rent charge, and after doth waste, and the lessor recovereth in an action of wast, he shal hold the land charg-
ed.

(Ant. 185. a.)

(1) But this must be understood of an alienation which divests the remainder or reversion, as a feoffment, fine, or common recovery; but a conveyance by lease and release, or bargain and sale, is no forfeiture. Neither is it a forfeiture of the particular estate, if the reversioner, or remainder-man in fee, joins with the tenant for life or years in making the alienation; nor is his grant of an advowson, remainder, or any thing else which lies in grant, a forfeiture. But if a tenant for life or years claims the fee, as by joining the *mise* upon the meve right; or if he affirms the fee to be in a stranger, as by accepting a fine *sur consens de droit come ceo* from a stranger, it is a forfeiture. See post. 251. b. 152. a.

ed during the life of the tenant for life, but if the rent were granted after the waste done, the lessor shall avoid it.

And the reason wherefore the lease for years in the case aforesaid shall be avoyded, is because of necessity the action of waste must be brought against the lessee for life, which in that case must bind the lessee for yeares, or else by the act of the lessee for life the lessor should be barred to recover *locum v. statum*, which the statute giveth. (1)

If a man hath an office for life which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after com- mit a forfeiture of his office, the rent charge shall not be avoyded during his life, for regularly a man that taketh advantage of a condition in law shall take the land with such charge as he finds it. And therefore *Littleton* is here to be understood, that a condition in law is as strong as a condition in deed, as to avoid the estate or interest it selfe, but not to avoide precedent charges, but in some particular cases, as by that which hath beene said appeareth.

There be at this day more conditions in law annexed to offices then were when *Littleton* wrote: for example, for offices in any wise touching the administration or execution of justice, or clerkship in any court of record, or concerning the king's treasure, revenue, account, customes, alnage, auditorship, king's surveyor, or keeping of any of his majesties castles, forts, &c. For if any of these officers bargain or sell any of the said offices or any deputation of the same, or take any money or profit, or any promise, covenant, bond, or assurance, to have any money or reward for the same, the person so bargaining or selling or that shall take any such promise, covenant, bond or assurance, shall not only forfeit his estate, but also every person so buying, giving or assuring, be adjudged a disabled person to have or enjoy the same office or offices, deputation or deputations, &c. and that all such bargains, sales, promises, covenants and assurances, as be before specified, shall be voide, except as in the said act is excepted.

Sir Robert Vernon, knight, being coferer of the king's house of the king's gift, and having the receipt of a great summe of money yearly of the king's revenue, did for a certaine summe of money bargain and sell the same to Sir A. I. and agreed to surrender the said office to the king, to the intent a grant might be made to Sir A. who surrendered it accordingly: and thereupon Sir A. was by the king's appointment admitted and sworne coferer. And it was resolved by Sir Thomas Egerton, lord chancellor, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute, and that Sir A. was disabled to have or to take the said office, and that no *non obstante* could dispence with this act to enable the said Sir A. for the reason and cause before-mentioned, *Sect.* 180. And hereupon Sir A. was removed, and Sir Marmaduke Darrell sworne (by the king's commandment) in his place. And note, that all promises, bonds and assurances as wel on the part of the bargainor as of the bargainee, are void by the same act. (*) *Nulla alia re magis Romana* *res publica interit, quam quod magistratus officia venalia erant.* *Ærod.* fo. 353.

(g) *Jugurtha* going from Rome, said to the city, *Vade venalis civitas, mox peritura si emptorem invenias.* (g) *Salust.*

Therefore by the law of England it is further provided, that no officer or minister of the king shall be ordained or made for any gift or brokerage, favour or affection, nor that any which pursueth by him or any other, privily or openly, to be in any manner of office, shall be put in the same office or in any other, but that all such officers shall be made of the best and most lawfull men and sufficient. A law worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never shall justice be duely administred, but when the officers and ministers of justice be of such quality, and come to their places in such manner, as by this law is required.

Tiel condition que est entendus per la ley estre annex a ascun chose, est auxi fort sicome la condition fuit mise in escript. And this accords with that ancient rule, *Uniquè fortior & potentior est dispositio legis quam hominis.* Vide *Sect.* 419. 429. 430.

Sect. 379.

EN mesme le maner
est de grants d'
offices de seneschal,
constabularie, bedelary,
bailiwick, ou auters

IN this manner it is of
grants of the offices
of steward, constable,
bedelarie, bayliwick, or
other offices, &c. But if

Seneschall. Of this
I have spoken be-
fore. *21. E. 4. 20. Pl. Com. 379.*
(Ant. 61. a.)

Constabularie. Of
this likewise something
hath beene spoken be-
fore. *8. E. 4. 6.*
(5. Rep. 59.)

(1) For the recovery relates to the time of the waste done, which is paramount to the grant, but it does not relate to the time of making the estate, to avoid charges by force of this condition in law, unless in the case of a lease for years, which is of necessity to have the place wasted. Lord Nott. MS.

before. But a constable is often taken in the law for a warden or keeper, as *Constabularius castri de Dover* & 5. portuum; for the warden of the castle of Dover and the Cinque ports, &c. So as in this sense *Constabularius* is taken for *Castellanus*, and this is proved by the statute (*) of *W. 1. ca. 7. Des prises des Constables ou Castellains faitz des auters, &c.* And *Magna Carta, c. 19. Nullus constabularius vel ejus ballivus capiat blada vel alia catalla alicujus*

(*) *W. 1. ca. 7.*

(b) *Magna Carta, ca. 19.*

Stanf. fo. 152. 32. H. 8. ca. 28.

qui non sit de villâ, ubi castrum suum situm est, &c. Stanford fo. 152. Constabularius Turris London, for Custos Turris, 32. H. 8. ca. 28. Constable of the Forest, for the Keeper of the Forest.

Bedelarie. Bedell is derived of the French word *Beadeau*, which signifies a messenger of the court, or under Baylife, in Latine *Bedellus*.

And the oath of a bedell of a manor is, that he shall duly and truly execute all such attachments and other proces as shall be directed to him from the lord or steward of his court, and that he shall present all pound breaches, which shall happen within his office, and all chattels wayved, and estrayes.

Bayliwicke. Of this sufficient hath beene said before.

Sect. 380.

HERE Littleton termeth words of limitation to be conditions in law: for his first example is,

Durant le co-verture enter eux, Durante coopturâ inter eos. This word (*durante*) is properly a word of limitation, as *durante virginitate*, or *durante vitâ*, &c. And properly a condition in law is, as hath beene said, where the law createth the same without any expresse words.

37. H. 6. 27. 3. E. 3. 15. 3. Aff. Pl.

Dum also maketh a limitation; as if a lease be made, *dum sola fuerit*, or *dum sola & casta vixerit*. *Dummodo* is also a word of limitation; as *dum-*

ITEM *Mestates de terres ou tenements purront estre sur condition en ley, coment que sur l'estate fait ne fuit ascun mention ou reherfal fait de le condition. Si come mittomus que un leas soit fait a le baron et a sa feme, a aver et tener a eux durant le couverture enter eux; en cest cas ils ont estate pur terme de leur deux vies sur condition en ley, scilicet, si un de eux devie, ou que devorce soit fait entre eux, donque bien*

ALSO estates of lands or tenements may be made upon condition in law, albeit upon the estate made there was not any mention or reherfall made of this condition. As put the case that a lease be made to the husband and wife, to have and to hold to them during the couverture betweene them; in this case they have an estate for terme of their two lives upon condition in law, *scil.* if one of them die, or that there be a divorce be-
lirroit

* *le grantor*—il, L. and M. and Roh.

† *le grantee* not in L. and M. nor Roh.

lirroit a le lessor et a ses beires d'entrer, &c. tween them, then it shall bee lawfull for the lessor and his heires to enter, &c.

quandiu the grantor shall bee dwelling upon the mannor, this is good, or *quandiu se bene gesserit*.

And so be these words, *donec, quousque, usque ad, tamdiu, ubicunque.*

Si l'un de eux devie, &c. For if any of them die the coverture is dissolved, and consequently the state determined by the limitation.

Ou que divorce soit fait enter eux, &c. Here is a distinction to be understood: for there bee two kinde of divorces, viz. one, *à vinculo matrimonii*,* and the other *à mensâ et thoro*. *Divortium dicitur à divertendo*, or *divortendo, quia vir divertitur ab uxore*. Divorces *à vinculo matrimonii* are these: *Causâ præcontractûs, causâ metûs, causâ impotentia seu frigiditatis, causâ affinitatis, causâ consanguinitatis, &c.* And I reade in an ancient record, *coram rege Termino Pasch. 30. E. 1. William de Chadworthe's case*, that he was divorced from his wife for that he did carnally know her daughter before he married the mother; all which are causes of divorce preceding the marriage.

A mensâ et thoro, as *causâ adulterii*, which dissolveth not the marriage *à vinculo matrimonii*, for it is subsequent to the marriage. And the divorce that *Littleton* here speaketh of is intended of such divorces [*] as dissolve the marriage *à vinculo matrimonii*, and maketh the issue bastard, because they were not *justæ nuptiæ*. And therefore in *Littleton's* case though the husband and wife be divorced *causâ adulterii*, yet the freehold continueth, because the coverture continueth. And it is further to be understood, that many divorces that were of force by the canon law when *Littleton* wrote, are not at this day in force; for by the statute of 32. H. 8. c. 38. it is declared that all persons be lawfull (that is, may lawfully marry) that be not prohibited by God's law to marry, that is to say, that be not prohibited by the Leviticall degrees.

A man married the daughter of the sister of his first wife, and was drawne in question in the ecclesiasticall court for this marriage, alleging the same to be against the canons; and it was resolved [a] by the court of common-pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said act of parliament to be good, inasmuch as it was not prohibited by the Levitical degrees, *et sic de similibus.* (1)

modo solveret talem redditum. Quandiu also is a word of limitation, for if a man grant a rent out of the mannor of D. good, or *quandiu se bene* (Ant. 214. b. 4. Rep. 3. a.) 14. E. 2. Grant. 92. (10. Rep. 42. Plo. 242. a. Vaughan 32. 4. Rep. 33.) 37. H. 6. 27. (9. Rep. 95.)

10. Aff. 4. 6. E. 3. 8. 9. 11. 3. E. 3. 18. Annuite 40. 19. H. 6. 54. Temps E. 1. Annuite 150. 11. Aff. p. 8. 21. Aff. p. 18. 26. E. 3. 69. 7. E. 4. 16. 9. E. 4. 25. 26. 9. H. 6. 39. 14. H. 8. 13.

* 47. E. 3. 27. 39. E. 3. 32. 33. 11. H. 4. 14. 76. Bracton fo. 298. 18. E. 4. 28. 24. H. 8. bastards. Br. 44. 39. E. 1. bastard 21. 22. E. 4. tit. Consultat. 5. 6. E. 3. 249. 25. E. 3. 39.

(1. Sid. 64. 1. Roll. Abr. 341. 360. 681.) (*) Vid. Sect. 399. (Sid. 13. 118. 5. Rep. 98. 7. Rep. 42. Cro. Car. 463. 2. Inlt. 682. Vaug. 221. 319. 321.) 32. H. 8. ca. 38.

[a] Tr. 2. Jac. Rot. 1032. Richard Parsons' case. (Cont. 1. Cro. 228. Acc. Mo. 907. Vid. Sid. 434.)

Sect. 381.

ET que ils ont estate pur terme de leur deux vies, probatur sic: Chescun home que ad estate de franktenement en ascun terres ou tenements, ou il ad estate en fee, ou en fee taile, ou pur terme de sa vie demesne, ou pur terme d'auter vie, et per tiel lease ils ont franktenement, mes ils n'ont per cest grant fee, ne fee taile, ne pur terme d'auter vie, ergo, ils ont estate pur terme de leur vies, mes ceo est sur condition en ley en le forme avantdit; et en cest cas s'ils fieront wast, le feoffor avera envers eux brieve de wast

AND that they have an estate for term of their two lives, is proved thus: Every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee taile, or for terme of his own life, or for terme of another man's life, and by such a lease they have a freehold, but they have not by this grant fee, nor fee taile, nor for terme of another's life, ergo, they have an estate for terme of their owne lives, but this is upon condition in lawe in forme aforefaid; and in this case if they shal do wast, the feoffor shall

sup-

(1) This passage exposed Sir Edward Coke to much censure. — It was struck out of the third and every following edition to the ninth. — It was restored to its place in that edition, and is to be found in all the subsequent editions. — The following account is given of this circumstance in Burn's Ecclesiastical Law, vol. 3. p. 402. 3d edit. — "There are several degrees, which, although not expressly named in the Levitical law, are yet prohibited by that, and by the statute of 32. H. 8. c. 38. by parity of reason. Hence, in the case of Wortly and Watkinson, a consultation was granted, where one had married the daughter of the sister of his former wife; which (as Sir John King laid the argument) is the same degree of proximity, as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other by parity of reason is so likewise; as it had been declared E. 16. J. in Pennington's case, before the High Commissioners. Which point was again argued T. 1. An. in the case of Snowling and Nursey, and consultation granted as before, notwithstanding the case of Richard Parsons, mentioned by lord Coke, 1. Inlt. 235. in which it was first determined not to be within the Levitical degrees, and prohibition granted; but a consultation being awarded on debate, two years after, that case is said to have been expunged out of the First Institute, by order of the King and Council. And this was the very point in which (presently after the making of the act) lord Cromwell desired a dispensation for one Massey, who was contracted to his sister's daughter of his late wife; but the archbishop denied it, as contrary to the law of God, and gave for reason, that as several persons are prohibited, which are not expressed, but understood by like prohibition in equal degree; so in this case, it being expressed that the nephew shall not marry his uncle's wife, it is implied, that the niece shall not be married to the aunt's husband. Gibf. 412. 413. Much less can it be doubted, whether the like rule concerning parity of reason, doth not forbid the uncle

supposant per son briefe, quòd have a writ of waste against them, *tenet ad terminum vitæ, &c.* supposing by his writ, *quòd tenet* * *mes en son count il declare coment* *ad terminum vitæ, &c.* but in this count he shall declare how and in what maner the lease was made.

Pl. Com. 561. b. Vid. sect. 345. simile.

PRobatur sic. By this argument logically drawne à *divisione*, it appeareth, how necessary it is that our student should (as *Littleton* did) come from one of the universities to the studie of the common law, where he may learne the liberall arts, and especially logick, for that teacheth a man not onely by just argument to conclude the matter in question, but to discern between truth and falsehood, and to use a good method in his studie, and probably to speake to any legall question, and is defined thus, *dialectica est scientia probabiliter de quovis themate differendi*, whereby it appeareth how necessary it is for our student.

37. H. 6. 27.

Supposant per son briefe, quòd tenet ad terminum vitæ, &c. This and the rest of this section is evident and plaine.

Sect. 382.

Vid. Bracl. lib. 5. 414.

(Flo. 242.)

SI un Abbe.

So it is of a bishop, archdeacon, and other ecclesiasticall or temporall body politique or corporate, or of any officer or graduate, or the like.

Resigne ou soit depose. And so it is of a translation and cession.

EN mesme le man-

ner est, si un abbe fait un lease a un home, a aver et tener a luy durant le temps que le lessor est abbe; en cest case le lessée ad estate pur terme de sa vie demesne: mes ceo est sur condition en ley, scilicet, que si l'abbe resigna, ou soit depose, que bien lirroir a son successeur d'entrer, &c.

IN the same maner it is, if an abbot make a lease to a man for yeares, to have and to hold to him during the time that the lessor is abbot; in this case the lessee hath an estate for term of his own life: but this is upon condition in law, *scilicet*, That if the abbot resigne, or be deposed, that then it shall be lawfull for his successor to enter, &c.

Sect. 383.

LIVRE d'Assises

is a booke of the Reports of Cases in the reign of king *Edward* the Third, and it is called the Booke of *Assises*, because the greatest part of the cases therein are upon writs of *assises* brought as hath been said, and which hath been cited before.

Devisa les tene-ments a vendre per son executor. This must

ITEM home poit veier en le Livre d'Assise, viz. anno 38.

E. 3. † p. 3. un plea d'Ass. en cest forme que ensuist: scilicet, Un assise de Novel disseisin auterfois fuit port vers A. que ple- da al assise, et trove fuit per verdict, que

ALSO a man may see in the Book of *Assises*, an. 38. E. 3. p. 3. a plea of *Assise* in this form following, *scilicet*, An *assise* of *Novel Disseisin* was sometime brought against *A.* who pleaded to the *assise*, and it was found by verdict, that

* *mes—et*, L. and M. and Roh.

† p. 3. not in L. and M. nor Roh.

“to marry his niece, which, though not expressly forbidden, is virtually prohibited in the precept that forbids the nephew “to marry the aunt; nor is it of moment to alledge, that the first is a more favourable case, as the natural superiority is preserved; since the parity of degree, which is the proper rule of judging, is the very same. *Gibf. 413.* But where in the case “of *Harrison* and *Burwell*, T. 20. C. 2. in the spiritual court, one had married the wife of his great uncle, this was declared not “to be within the Levitical degrees; and accordingly, after the opinion of all the judges taken by the king’s special command, a prohibition was granted. *Gibf. 413.*” — Note the case of *Richard Parsons*, T. 2. Ja. Ro. 1032. where a man may marry the daughter of his wife’s sister, which is in the editions of 1628, and that of 29, and is here left out. See *Moor 1266*, *Mame’s case*, 33. Eliz. in the case of the widow of one *Rennington*, who claimed a widow’s estate, but was denied because she was niece to the former wife of *Rennington*, who had done penance for the incestuous marriage; but it was resolved she should have her widow’s estate, because there was never any divorce had in the life of her husband, though there was cause. *Hob. 181.* in the case of *Howard v. Bartlett*, 2. Inst. 683. 1. Cro. 228. *Vaugh. 302.* *Hill v. Geed*, 3. Lev. 364. *Vide auxy 2. Jones 118.* 3. Mo. 161. and *B. Stillingfleet’s Life*, 121. *Lord Nott. MS.*

*l'auncestor le plaintiff devisa ses tenements a vendre per le defendant, que fuit son executor, et de faire distribution des deniers pur son alme: et fuit trove, que maintenant apres la mort le testator, un home luy tendist certaine somme de deniers pur les tenements, mes non pas al value, et que le executor puis avoit tenu les tenements en sa main demesne per deux ans, al entent de les vender plus cbier a ascun auter; et trove fuit que il avoit tout temps prist les profits de les tenements a son use demesne, sans rien faire pur l'alme le mort, &c. Moubray * justice disoit, l'executor en tiel case est tenu per la ley a faire le vender a plus tost que il purroit apres la mort son testator, et trove est que il refuse de faire vendre, & issint de avoit un default en luy, et issint per force del devise il fust tenu d'aver mis tous le profits † avenants de les tenements al use le mort, et trove est que il ad*

the ancestour of the plaintife devised his lands to bee sold by the defendant, who was his executor, and to make distribution of the money for his soule: and it was found, that presently after the death of the testator, one tendred to him a certaine sum of mony for the lands, but not to the value, and that the executor afterwards held the lands in his own hands two yeares, to the entent to sell the same dearer to some other; and it was found that he had all the time taken the profits of the lands to his owne use, without doing any thing for the soule of the deceased, &c. Moubray justice said, the executor in this case is bound by the law to make the sale as soone as he may after the death of his testator, and it is found that hee refused to make sale, and so there was a default in him, and so by force of the devise he was bound to put all the profits comming of the lands to the use of the dead, and it is found that he tooke them to his

be intended to be of lands devisable by custome, for lands by the common law were not devisable (as hath been said): for in this section is implied a diversity, viz. when a man deviseth that his executor shal sell the land, there the lands descend in the meane time to the heire, and untill the sale bee made, the heire may enter and take the profits. But when the land is devised to his executor to be sold, there the devise taketh away the descent, and velleth the state of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth by our author, that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold: and the reason is, because he deviseth the tenements whereby hee breakes the descent. (1)

(Latch. 9. Ant. 113. a. 181.)

Mowbray. John

Mowbray was a reverend judge of the court of common pleas, and descended of a noble family.

L'executor en tiel case est tenu per la ley a faire le vender a plus tost que il purroit apres la mort son testator, &c.

And the reason hereof is, for that the meane profits taken before the sale, shall not bee assets, so as he may be compellable to pay debts with the same, and therefore the law will enforce him to sell the lands as soone as he can, for otherwise hee shall take advantage of his owne laches: but if a man devise that his executor shall sell his land, there he may sell it at any time, for that he hath but a bare power, and no profit. And by this case it appeareth what construction the law maketh for the speedy payment of debts. And here is to be observed, that many words

(4. Rep. 81. b.)

* justice disoit, not in L. and M. nor Roh.

† avenants—prevenances, L. and M. and Roh.

(1) 1. Co. 25. b. Porter's case. Breach of condition assigned, because he has not performed within convenient time, viz. 8 years.—Ant. 113. cont. that where lands are devised to executors to sell, and one refuses, yet it is within 21. H. 8. though it be an interest, and though the words of the statute are, where lands are willed to be sold by executors, which gives only a power; so there was a difference between them.—40. E. 3. 17. The case was, a woman seised of lands in London devised them to be sold by her executors, and died without an heir; that devise prevented the escheat which the king pretended to have, and the executors could enter and sell, therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, between Wilkinson and White, this case was started; and lord chief justice Rolls doubted of this opinion, because, he said, it was only a descent, according to the words of Littleton; and that it appeared to him, that when lands are devised to be sold by executors, there no interest passes, as in the last clause here.—Lord Nott. MSS.

(3. Cro. 19. 21. a.)

Mich. 31. & 32. El. in the King's Bench. Crickmer's case adjudged. Dy. 6. E. 6. fo. 74. 7. E. 6. 70.

(1. Leo. 174. 10. Rep. 41. Cro. Car. 185.)

words in a will doe make a condition in law, that make no condition in a deed: As here to devise lands to an executor *ad vendendum*, so if lands be devised to one *ad solvendum* 20 l. to I. S. or paying twentie pounds to I. N. this amounts to a condition. And Crickmer's case was this, A man seised of certaine lands holden in so- cage had issue two daughters A. and B. and devised all his lands to A. and her heires, to pay unto B. a certaine summe of money at a certaine day and place; the money was not paid, and it was adjudged, That these words, "to pay," &c. did amount in a will to a condition; and the reason was, for that the land was devised to A. for that purpose, otherwise B. to whom the money was appointed to be paid, should be remediless, *et interest reipublice suprema hominum testamenta rata haberi*: and the lessee of B. upon an actuall ejectment recovered the moitie of the land against A.

Et issint appiert per le judgement, &c. This conclusion upon a judgment is of great authoritie in law, *quia judicium pro veritate accipitur*, and, as it hath beene said, *judicium is quasi juris dictum*.

prise a son use demesne, et issint auter default en luy. Per que fuit adjudge, que le plain- tife recovers. Et issint appiert per le dit judgement, que per force del dit devise, l'executor n'avoit estate ne poyer en les tenements, forsque sur condition en ley.* owne use, and so another default in him. Wherefore it was adjudged, that the Pl. should recover. And so it appeareth by the said judgement, that by force of the said devise the executour had no estate nor power in the lands, but upon condition in law.

Sect. 384.

9. E. 4. 36. (5. Rep. 74. 6. Rep. 38.)

(Ant. 214. b.)

Vid. Sect. 220.

Bract. li. 2. fo. 16. 17. Aff. p. 2. 5. E. 3. 42. E. 3. 1. 43. E. 17. 43. Aff. 12. 7. H. 6. 43. 8. H. 6. 23. 32. E. 3. Annu. 30. 5. E. 3. Annuity 44. 30. Aff. p. 1. 30. Aff. p. 11. 31. Aff. 32. (Ant. 207. a. 1. Roll. Abr. 590.)

HEREBY it appeareth, that limitations (which, as hath beene said, *Littleton* termeth conditions in law) may be pleaded without deed; and the reason of our author is observable, because the law in itselfe purporteth the condition, whereof somewhat hath bin said before, and therefore looke backe to the conditions in law, or words of limitation, and withall that a stranger may take advantage of a limitation, as hath beene said.

Littleton having spoken at large of conditions in deed and in law, somewhat seemeth necessary to bee said of defeasances, whereby the state or right of freehold and inheritance may be defeated and avoyded.

Defeasance, Defeasantia, is fetched from the French word *defaire*, i. e. to defeat or undoe, *infectum reddere quod factum est*. There is a diversitie between inheritances executed, and inheritances executorie; as lands executed by livery, &c. cannot by indenture of defeasance be defeated afterwards. And so if a disseisor release a disseisor, it cannot bee defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, &c. the same may be defeated by indentures of defeasance, for it is a maxime in law, *Quæ incontinenti fiunt in esse videntur*. (1)

† ET mults auters choses et cases y sont d'estates sur condition en la ley, et en tiels cases il ne besoigne d'aver monstre ascun fait, rehearsing la condition, pur ceo que la ley en luy mesme purport le condition, &c.

Ex paucis dictis intendere plurima possis.

Plus ferra dit de conditions en le † prochain chapter, en le chapter de Releases, et en le chapter de Discontinuance.

AND many other things there are of estates upon condition in law, and in such cases hee needed not to have shewed any deed, rehearsing the condition, for that the law it selfe purporteth the condition, &c.

Ex paucis dictis intendere plurima possis.

More shall be said of conditions in the next chapter, in the chapter of Releases, and in the chapter of Discontinuance.

But

* *Et* added in L. and M. and Roh. M. nor Roh.

† *Et mults auters choses et cases y sont d'estates sur condition en la ley*, not in L. and M. nor Roh. † *prochein chapter—chapitre de discentz que tollent entres*, L. and M. and Roh.

(1) A power of revocation may be defeated by a defeasance made at the same time, or any time after. 1. Rep. 113.—See Carth. 64. But if a thing executory on its commencement be after executed, it cannot be defeated by a subsequent defeasance. 5. Rep. 90. b. In the case of Cottrel v. Purchase, lord Talbot said he should always discourage the practice of drawing an absolute deed, and making a defeasance, as it wore the face of fraud.

But rents, annuities, conditions, warranties, and such like, that be inheritances executorie, may be defeated by defeasances made, either at that time, or any time after : and so the law is of statutes, recognizances, obligations, and other things executorie.

20. Aff. pl. 7. 7. E. 4. 29. Blowing and Belton's case, Pl. Com. 131. 28. H. 8. Dier 6. 27. H. 8. 15. 19. R. 2. done 10. Albanie's case, lib. 1. 107.

Ex paucis dictis intendere plurima possis.

Verbes at the first were invented for the helpe of memorie, and it standeth well with the gravitie of our lawyer to cite them. By this verbe of our author, inferences and conclusions in like cases are warrantable.

Lastly, somewhat were necessarie to be spoken concerning clauses of provisos, containing power of revocation, which since *Littleton* wrote are crept into voluntarie conveyances, which passe by raising of uses, being executed by the (*) statute of 27. H. 8. and are become verie frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sonnes, by deed indented, covenanteth in consideration of fatherly love, and for the advancement of the blood, or upon any other good consideration, to stand seised of three acres of land to the use of himselfe for life, and after to the use of *Thomas* his eldest son in taile; and for default of such issue, to the use of his second son in taile, with divers like remainders over; with a proviso that it shall be lawfull for the covenantor at any time during his life to revoke any of the said uses, &c. this proviso being coupled with an use, is allowed to be good, and not repugnant to the former states. But in case of a feoffment, or other conveyance, whereby the feoffee or grantee, &c. is in by the common law, such a proviso were merely repugnant and void.

(6. Rep. 32. 3. Rep. Twyne's case.) (*) 27. H. 8. cap. 10. (Cro. Car. 472. Hob. 348. 9. Rep. 107. 1. Rep. 173. 175.)

And first, in the case aforesaid, if the covenantor, who had an estate for life, doe revoke the uses according to his power, he is seised againe in fee simple without entrie or claime.

Secondly, he may revoke part at one time, and part at another.

Thirdly, If he make a feoffment in fee, or levie a fine, &c. of any part, this doth extinguish his power but for that part; whereas in that case the whole condition is extinct. But if it be made of the whole, all the power is extinguished; so as to some purposes it is of the nature of a condition, and to other purposes in nature of a limitation.

Lib. 1. fol. 173. 174. Digge's case, lib. 1. fol. 107. Albanie's case, lib. 10. fol. 143. Scrope's case, lib. 7. fol. 12. 13. Sir Francis Englefield's case.

Fourthly, If hee that hath such power of revocation hath no present interest in the land, nor by the ceasor of the state shall have nothing, then his feoffment or fine, &c. of the land is no extinguishment of his power, because it is mere collateral to the land.

(2. Roll. Abr. 263. 1. Roll. Abr. 331.)

Fifthly, By the same conveyance that the old uses be revoked, may new be created or limited, where the former cease *ipso facto* by the revocation, without either entrie or claime.

Sixtly, That these revocations are favourably interpreted, because many men's inheritances depend on the same. (1) And here I may apply the aforesaid verbe:

Ex paucis dictis intendere plurima possis.

CHAP. 6. Discents quetollent Entries. Sect. 385.

DISCENTS que tollent entries
*font en deux maners, cest ascavoir, ou discent est en fee, ou en fee taile. Descents en fee que tollent entries * font, si come home seisie de certaines terres ou tenements est per un auter disseisie, &*

DISCENTS which toll entries are
in two manners, to wit, where the discent is in fee, or in fee taile. Descents in fee which toll entries are, as if a man seised of certaine lands or tenements is by another disseised, and the discentor hath issue, and

DISCENTS.

This word commeth of the Latine word *discentere*, id est, *ex loco superiore in inferiorem movere*; and in legall understanding it is taken when land, &c. after the death of the ancestor is cast by course of law upon the heire, which the law calleth a discent. And this is the noblest and worthiest meanes whereby lands are derived from one to another, because it is wrought and vested by the act of law, and right of blood,

Mirror, cap. 2. sect. 5. Bracton, lib. 5. fol. 370. and 434. Britton, fol. 115. 215. Vide Sect. 5. (Sid. 198. Ant. 13. b. Ant. 163.)

* font—est, L. and M. and Roh.

(1) Some observations will be made in the notes to the chapter of Releases, on powers of revocation, and other powers deriving their effect from the statute of uses.

blood, unto the worthiest and next of the blood and kindred of the ancestor, and therefore it hath not in the common law altogether the same signification that it hath in the civill law; for the civilians call him, *heredem, qui ex testamento succedit in universum jus testatoris*. But by the common law he is only heire which succeedeth by right of blood. And this agreeth well with the etymologie of the word (heire) to whom the lands descend, for *heres dicitur ab herendo, quia qui heres est heret, hoc est, proximus est sanguine illi cujus est heres*. So as hee that is *heres, sanguinis est heres, & herus hereditatis*.

Discents que tollent entrees sint en deux manners. Here is an exact and perfect division made by our author, and yet withall plaine and perspicuous.

Now, as a discent is the worthiest meanes to come to lands, &c. so hath the heire more privileges than any that by other order or meanes come to the lands, &c. as shall appear hereafter.

Nota, In ancient time * if the disseisor had beene in long possession, the disseisee could not have entred upon him. [a] Likewise the disseisee could not have entred upon the feoffee of the disseisor, if he had continued a yeare and a day in quiet possession. But the law is changed in both these cases, only the dying seised being an act in law, doth hold at this day, and this seemeth to be verie ancient, for this was the law before the Conquest. [b] *Porro autem quam maritus sine lite et controversia sedem incoluerit, eam conjux et proles sine controversia possident, si qua in illum lis fuerit illata viventem, eam heredes ad se (perinde atque is vivus) accipiunt.*

And one of the reasons of this ancient law may be, that the heire cannot suddenly by entredment of law know the true state of his title. And for that many advantages follow the possession and tenant, the law taketh away the entrie of him that would not enter upon the ancestor, who is presumed to know his title, and driveth him to his action against the heire that may be ignorant thereof.

Et morust de tiel estate seisie. To a discent that taketh away an entrie, a dying seised is necessarie, as here it appeareth; but a man to other purposes may have lands by discent, though his ancestor died not seised, as hath beene said before.

Des terres ou tenements. That is, of such tenements as be corporeall, and doe lye in liverie, and not of inheritances which lye in grant, as advowsons, rents, commons in grosse, and such like, which bee inheritances incorporeall, and yet are included within this word (tenements). For discents of them doe not put him that right hath to an action; and the reason of this diversitie is, for that houses serve for the habitation of men, and lands to be manured for their sustenance, and therefore the heire after a discent shall not be molested or disturbed in them by entrie.

Est per un auter disseisie. The like law is of an abatement or intrusion, and of their feoffees, or donees, &c.

Upon the words of *Littleton* a diversitie may be collected, that if a recoverie be had by *A.* against

(Ant. 7. b.)

* *Bracton*, lib. 4. fol. 162. & 209. *Britton*, fol. 115. *Fleta*, lib. 4. cap. 2.

[a] 50. E. 3. 21. 1. Aff. 13. 20. H. 3. Aff. 432. 0. Aff. 15. 29. Aff. 5. 54. 26. Aff. 12. 21. Aff. 28. 43. Affise 17.

[b] *Lamb. explicat.* fol. 120. 70.

31. H. 7. 12. 40. E. 3. 24.

33. E. 3. gard. 162. 6. H. 4. 4. 39. E. 3. 36. 15. E. 4. 14. F.N.B. 143. q. 7. H. 4. 12. 5. 2. Aff. p. 9. 21. E. 3. 2.

(8. Rep. 101.)

* &c. added in L. and M. and Roh.

against *B.* and before execution *B.* die seised, this discent shall not take away the entrie of the recoveror. But if after execution *B.* had disseised the recoveror and died seised, this discent shall take away the entrie of the recoveror within the expresse words of *Littleton*: and so it is in case of a fine.

(*n*) A recoverie is had against tenant for life, where the remainder is over in fee, tenant for life dieth, he in remainder entreteth before execution, and dieth seised, the entrie of the recoveror is lawfull, because he is privie in estate; otherwise it is if the discent had bene after execution.

A. recovereth an advowson against *B.* in a writ of right, and hath judgement finall; the incumbent dieth; *B.* by usurpation presents to the church, and his clarke is admitted and instituted; *B.* dieth: *A.* is put out of possession, and the heire of *B.* is not so bound by the judgement either in blood or estate but that he shall present. (*o*) *B.* levies a fine to *A.* of an advowson to him and his heires; after the church becomes void; *B.* presents by usurpation, and his clarke is admitted and instituted: this shall put *A.* the conusee out of possession. And the reason of these two cases is, for that at the common law, everie presentation to a church did put the rightfull patron out of possession, and did put him to his writ of right, whether the presentation were by title or without, and therefore albeit the usurpation were in both the said cases before execution, yet it put the rightfull patron out of possession. So note a diversitie betwene a recoverie of land, and of an advowson.

L'entrie le disseisee est tolle. Here is one of the privileges which the law giveth to the heire by discent of houses and lands.

(*p*) At the common law if the disseisor, abator, or intruder had died seised soone after the wrong done, the disseisee and his heires had been barred of his and their entrie without any time limited by law; but now by the statute (*q*) made since *Littleton* wrote, it is enacted, that except such disseisor hath been in the peaceable possession of such mannors, lands, &c. whereof he shall die seised by the space of five yeares next after such disseisin, &c. without entrie or continuall claime, &c. that there such dying seised, &c. shall not take away the entrie of such person or persons, &c. But after the five yeares the disseisee must take such continuall claime as our author hath taught us, the learning whereof is necessarie to be knowne. And it is said that abators and intrudors are out of this statute, because the statute is penall, and extends only to a disseisor, and that was the most common mischief. *Et ad ea quæ frequentius accidunt jura adaptantur.*

The feoffee of a disseisor is out of the said statute, and remaines as at the common law. But to a disseisor, the statute is taken favourably for advancement of the ancient right: for whether the disseisin be without force, or with force, it is within the statute. And albeit the statute speake of him that at the time of such discent had title of entrie, &c. or his heires, yet the successors of bodies politique or corporate, so you hold yourselfe to a disseisin, are within the remedie of this statute, for the statute extendeth cleerely to the predecessor, being disseised; and consequently without naming of his successor extendeth to him, for he is the person that at the time of such discent had title of entrie.

But if a man make a lease for life, and the lessee for life is disseised, and the disseisor die seised within five yeeres, the lessee for life may enter; but if he die before he doth enter, it is said that the entrie of him in the reversion is not lawfull, because his entrie was not lawfull upon the disseisor at the time of the discent, as the statute speaketh. But if lessee for life had died first, and then the disseisor had died seised, he in the reversion had bene within the remedie of the statute, because he had title of entrie at the time of the discent, as the statute speaketh, and so within the expresse letter of the statute, albeit the disseisin was not immediate to him, and the like is to be said of a remainder, &c.

Briefve d'entrie sur disseisin, Breve de ingressu super disseisinam. Of this writ somewhat shall be said in the next section.

Sect. 386.

DISCENTS en taile que tollent entries * sont, sicome home est disseisee, et DISCENTS in taile which take away entries are, as if a man bee disseised, and the

MORUST de tiel estate seisee.

If a disseisor make a gift in taile, and the donee continueth in fee, and disseise the

* sont—est, L. and M. and Roh.

(6. Co. 51. b.)

33. E. 3. tit. 3. Entrie conge 57.

45. E. 3. quare Imp. 139. 27. b.

3. 83. 9. H. 6. 49. 21. H. 6. 17.

3. E. 4. 6. 12. E. 4. 19. 3. H.

7. 3. 6. E. 4. 11. 7. H. 7. 15.

5. H. 7. 31. 10. H. 7. 5. b.

(*n*) 5. H. 7. a.

45. E. 3. quare Imp. 139.

(*o*) 8. E. 2. quare Imp. 166.

(6. Co. 48.)

(*p*) L'estatute de 32. H. 8. cap. 33.

Vide Sect. 422. 426.

(*q*) 37. H. 6. 1.

Pl. Com. 47. in Wimbeshe's case.

(11. Co. 46. Mo. 151.)

Mich. 4. & 5. Eliz. 219. acc.

(Post. 246. a.)

Vide Pl. Com. 47. ubi supra.

the discontinuee, and dieth seised, this discent shall not take away the entrie of the disseisee, for the discent of the fee simple is vanished and gone, by the remitter; and albeit the issue be in by force of the estate taile, yet the donee died not seised of that estate, and of necessitie there must be a dying seised, as hath beene said, which is a point worthy of observation, and implyeth many things.

En cest case l'entrie le disseisee est tolle.

If a disseisor make a gift in taile, and the donee hath issue and dieth seised, now is the entrie of the disseisee taken away; but if the issue die without issue, so as the estate taile which descended is spent, the entrie of the disseisee is revived, and he may enter upon him in the reversion or remainder.

So if there be grandfather, father and son, and the son disseiseth one, and infeofeth the grandfather who dieth seised, and the land descendeth to the father, now is the entrie of the disseisee taken away; but if the father dieth seised, and the land descendeth to the sonne, now is the entrie of the disseisee revived, and he may enter upon the son, who shall take no advantage of the discent, because he did the wrong unto the disseisee. But in the case above-said some have said, that where after such discent to the father, he made a lease to the son for terme of another man's life upon whom the disseisee entred, that the son brought an assise and recovered; and the reason that hath beene yeilded is, for that the son had not the fee simple which he gained by disseisin, but is a purchaser of the free-hold only from the father, and the discent remaine not purged. Contrarie it were, as it is there said, if the son were heire to the discent. But the booke cited there in *Fitzherb. tit. title placit. 6.* doth not warrant that case, and I hold the law to be contrarie, viz. that the disseisee in that case shall enter upon the disseisor, aswell as if the father had conveyed the whole fee simple to the son, for in that case also the discent to the father is not purged. If a disseisor make a lease to an infant for life, and he is disseised, and a discent cast, the infant enters, the entrie of the disseisee is lawfull upon him. More shall be said of the like matter in this chapter hereafter in his proper place, *Sec. 393. 395.*

Briefe d'entrie sur disseisin, Breve de ingressu super disseisinam.

This writ lieth only upon a disseisin made to the demandant or to some of his ancestors, and of this writ there be foure kindes. The first is a writ that lieth for the disseisee against the disseisor upon a disseisin done by himselfe, and this is called a writ of entrie in the nature of an assise. The second is a writ of *entrie sur disseisin en le per*, whereof *Littleton* here speaketh, for the heire by discent is in the *per* by his ancestor: so it is if the disseisor make a feoffment in fee, a gift in taile, or a lease for life, for they are in the *per* by the disseisor. (*) The third is a writ of entrie *sur disseisin en le per & cui*; as where *A* being the feoffee of *D.* the disseisor maketh a feoffment over to *B.* there the disseisee shall have a writ of entrie *sur disseisin* of lands, &c. in which *B.* had no entrie but by *A.* to whom *D.* demised the same, who unjustly and without judgement disseised the demandant. These are called *gradus*, degrees, which are to be observed, or else the writ is abatable; for *sicut natura non facit factum, ita nec lex.*

The fourth is a writ of *entrie sur disseisin in le post*, which lieth when after a disseisin the land is removed from hand to hand beyond the degrees; and it is called *in le post*, because the words of the writ be, *post disseisinam quam D. injuste, &c. fecit, &c.* The formes of these writs you shall read in the *Register* and *F. N. B.* and therefore it were needlesse to recite them here. So then a degree is of two sorts; either by act in law, whereof *Littleton* here putteth an example of a discent, or by act of the partie, by lawfull conveyance, as is aforesaid. But it is to be understood, that at the common law, if the lands were conveyed out of the degrees, the demandant was driven to his writ of right, in respect of such long possession in so many men's hands, which the law doth ever respect and favour. And therefore by the statute (a) of *Moriebridge*, the writ of entrie *in le post* is given: *Provisum est etiam quod si alienationes illarum de quibus breve de ingressu dari consuevit, per tot gradus fiant, per quod breve illud in forma prius usitata fieri non possit habeant conquerentes breve ad recuperandam seisinam suam sine mentione graduum.*

* &c. added in L. and M. and Roh.

10. H. 7. 24.
(Post. 240.)

11. H. 4. 8. 9. 33. H. 6. 5. b.
per Moyle. 34. H. 6. 11. a. per
Curiam. Vide Sect. 395.
(Ant. 206. b.)

13. E. 3. Br. tit. Entrie Cong. 127.
(Post. 241. a. lect. 395.)

(Sect. 408. F. N. B. 192. d.)

19. H. 6. 56. 9. H. 5. 9.

Bracton lib. 5. fol. 210. b. & 3. 8.
Brit. fol. 264. 265. Fleta, lib. 5.
cap. 35. 5. E. 3. 216.
(*) 22. E. 3. 1. b. 7. E. 3. 25.
F. N. B. 192.

34. H. 4. 40.
(6. Co. 9. b.)

[a] Maribr. cap. 29. 24. E. 3.
70.

graduum, ad cuiusque manus per huiusmodi alienationes res illa devenit, per breve originale, & per commune consilium domini regis inde providendum, &c. (1)

Now it is necessarie to be knowne, what doth make a degree. First, no estate gained by wrong doth make a degree, and therefore neither abatement, intrusion, or disseisin upon disseisin, doth make a degree. Neither doth everie change by lawfull title worke a degree, as if a bishop or an abbot, or the like, disseise one and die, where his successor is in by lawfull title; for though the parson be altered, yet the right remaines where it was, viz. in the church, and both of them seised in the same right, viz. in the right of the church, and therefore in that verie case *Bracton* [b] demands the question, *An faciunt gradum de abbate in abbatem sicut de barede in baredem? Et videtur quod non magis quam in computatione descensus, quia et si alternatur persona, non propter hoc alternatur dignitas, sed semper manet.* And herewith agreeth [c] *Fleta*.

Also an estate made to the king doth make no degree, and therefore if a disseisor by deed inrolled convey the land to the king, and the king by his charter granteth it over, the disseisee cannot have a writ of *entrie in le per & cui*, but in *le post*, for the king's charter is so high a matter of record, as it maketh no degree.

Also an estate of a tenant by the curtesie, or of the lord by escheat, or of an execution of an use, by the statute of 27 H. 8. or by judgement, or recoverie, or of any others that come in in the *Post*, worke no degree. [d] But a tenancie in dower by assignement of the heire doth worke a degree, because she is in by her husband; but assignement of dower by a disseisor worketh no degree, but is in the *Post*, as hereafter shall be said in his proper place.

When the degrees are past, so as a writ of *entrie in the Post* doth lye, yet by event it may be brought within the degrees againe; as if the disseisor infeoffe A. who infeoffes B. who infeoffes C. or if the disseisor die seised, and the land descend to A. and from him to C. now are the degrees past; and yet if C. infeoffe A. or B. now it is brought within the degrees againe.

If the disseisor make a lease for life, the remainder in fee, tenant for life dieth, he in the remainder is in the *Per*, because he now claimeth immediately from the disseisor, and both these estates make but one degree. (2)

Note, there bee divers other writs of *entrie* besides this writ of *entrie sur disseisin*, whereof *Littleton* here speaks; as a writ of *entrie ad terminum qui preterit, in casu proviso, in consimili casu, ad communem legem, sine assensu capituli, dum fuit infra etatem, dum non fuit compos mentis, cui in vita, sur cui in vita, intrusion, cessavit*, and the like; and that which hath bene said of one, may be applied to all.

Sect. 387.

Et nota, que en tiels discents que tollent entries, il convient que home morust seise en son demesne come de fee, ou en son demesne come de fee taile. Car un morant seise pur terme de vie, ne pur terme d'auter vie, ne unquez tollent entre.*

AND note, that in such discents which take away entries, it behoveth that a man die seised in his demesne as of fee, or in his demesne as of feetaile. For adying seised for terme of life, or for terme of another man's life, doth never take away an entry.

So it is if there be tenant for life, the remainder in taile, the remainder in fee, and tenant in taile disseiseth the tenant for life and dieth seised, this shall take away the *entrie* of the tenant for life.

But if the king's tenant for life be disseised, and the disseisor die seised, this discent shall not take away the *entrie* of the lessee for life, because the disseisor had but a bare estate of freehold during the life of the lessee, and *Littleton* saith, that a discent of an estate for terme of another man's life shall not take away an *entrie* (5).

En son demesne come de fee. If an infant bee disseised, and the disseisor die seised,

* &c. added L. and M. and Roh.

(1) The different degrees of title which a person dispossessing another of his lands acquires in them in the eye of the law (independently of any anterior right), according to the length of time and other circumstances which intervene from the time such dispossession is made, form different degrees of presumption in favour of the title of the dispossessor; and in proportion as that presumption encreases, his title is strengthened; the modes by which the possession may be recovered vary; and more, or rather different proof is required from the person dispossessed, to establish his title to recover. Thus if A. is disseised by B. while the possession continues in B. it is a *mere naked possession*, unsupported by any right, and A. may restore his possession, and put a total end to the possession of B. by an *entry* on the lands, without any previous action: if B. dies, the possession descends on the heir by act of law. In this case the heir comes to the land by a lawful title, and acquires in the eye of the law an apparent *right of possession*; which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an *action at law*. The actions used in these cases are called *Possessory Actions*, and the original writs by which the proceedings upon them are instituted, are called *Writs of Entry*. But if A. permits the possession to be with-held from him beyond a certain period of time without claiming it, or suffers judgement in a possessory action to be given against him by default, or upon the merits; or if, being tenant in tail, he makes a discontinuance; in all these cases, B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right. These last actions are called *Droituel Actions*, in contradistinction to *Possessory Actions*. They are the ultimate resource of the person disseised; so that if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete. The original writs by which *droituel actions* are instituted are called *Writs of Right*. The dilatoriness and niceties in these processes, introduced the Writ of *Affize*. The invention of this proceeding is attributed to Glanville, chief justice to Henry II. (See Mr. Reeves's History of the English Law, Part I. ch. 3.) It was found so convenient a remedy, that persons, to avail themselves of it, frequently supposed or admitted themselves to be disseised by acts which did not in strictness amount to a disseisin. This disseisin, being such only by the will of the party, is called a *disseisin by election*, in opposition to an *actual disseisin*: it is only a disseisin as between the disseisor and the disseisee, the disseisee still continuing the freeholder as to all persons but the disseisor. The old books, particularly the Reports of *Affize*, when they mention disseisins, generally relate to those cases where the owner admits himself disseised (See 1. Burr. 111. and see *Bract* lib. 4. cap. 3.). As the processes upon writs of entry were superseded by the *affize*, so the *affize* and all other real actions have been since superseded by the modern process of ejectment. This was introduced as a mode of trying titles to lands in the reign of Henry VII. From the ease and expedition with which the proceedings in it are conducted, it is now become the general remedy in these cases. Booth, who wrote about the end of the last century, mentions real actions as then worn out of use. It is rather singular that this should be the case, as many cases must frequently have occurred in which a writ of ejectment was not a sufficient remedy. Within these few years past some attempts have been made to revive real actions: the most remarkable of these are the case of *Tiffen v. Clarke*, reported in 3. Will. 419. 541. and that of *Carlos and Shuttlewood v. Lord Dorner*. The writ of summons in this last case is dated the 1st day of December, 1775. The summons to the four knights to proceed to the election of the grand *affize*, is dated the 22d day of May, 1780. To this summons the sheriff made his return; and there the matter rested. The last instance in which a real action was used, is the case of *Sidney v. Perry*. All these were actions on the right. That part of Sir William Blackstone's Commentary which treats upon real actions, is not the least valuable part of that excellent work.

(2) Booth, in his Real Actions 171, makes the first degree to consist in the original wrong; but Sir Henry Finch 262, and Mr. Justice Blackstone, vol. 3. ch. 10. agree with Sir Edward Coke. Abatement, disseisin, escheat, recovery, election, succession, dower, judgement, and a third, and every subsequent feoffment, are in the *Post*. Finch *ibid*.

(3) See note 4, page 241. a.

(4) But it will not take away the entry of a stranger; for as to him it is but the estate for life still, a fictitious not true descendible estate. Lord Nott. MS.

(5) This is by reason of the king's prerogative, that he cannot be disseised. See Hob. 322.

Bracton, ubi supra. *Britton*, ubi supra. *Fleta*, ubi supra. 4. E. 2. brev. 790. 21. H. 6. 8.

(a. Inft. 155. Stat. Marl. 30. Post. Sec. 413.)

[b] *Bracton* lib. 4. fol. 321.

5. E. 3. 38. 5. E. 2. entrie 66.

11. H. 4. 83.

[c] *Fleta*, lib. 5. cap. 34. 3. H. 3.

entrie 11. 22. E. 3. 7.

F. N. B. 191. k.

(Post. 318. a.)

5. E. 2. entrie 66. 7. E. 3. 360.

[d] 36. H. 6. dower 30.

44. E. 3. 4. 5. 39. E. 3. 25.

5. H. 7. 6. 3. H. 6. 38.

50. E. 3. 27.

(F. N. B. 192. a.)

(8. Rep. 86.)

Dier 8. El. 2. 253. 7. H. 4. 46.

8. H. 4. 15.

17. E. 3. 48. 11. H. 4. 42.

(1. Rep. 140. b.)

[d] *Pasch*. 16. Eliz. in communi

banco.

(Ant. 41. b.)

3. E. 3. tit. Entr. Cong.

58. F. N. B. 145. m.

9. H. 7. 25. a.

9. H. 7. 25.

(Hob. 323.)

(Post. 276. a.)

(Flo. 546. a.)

Temps E. 1. Reliefe 12. Dier 14.
Eliz. 308. 40 E. 3. 9. b.

(*) 24. E. 3. 47.
(8. Rep. 99.—)

seised, and after the infant commeth to full age, and the heire of the disseisor die before he entreth, albeit he died not seised of an actuall seisin (1), but of a seisin in law, yet that dying seised shall take away the entrie of the disseisee. (*) And yet in pleading the second heire shall (as hath beene said) make himsele heire to the disseisor, and that land shall not be recovered in value for the warrantie made of other lands by the first heire; but though the first heire had but a seisin in law, yet he is within the words of *Littleton*, for he was seised and died seised in his demesne as of fee.

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AND therefore if a disseisor make a lease for yeares, and die seised of the reversion, this discent shall take away the entrie of the disseisee, because hee died seised of the fee and franktenement. Like law it is if the land be extended upon a statute, judgement, or recognizance, and so it is in case of a remainder.

But if he had made a lease for life, and die seised of the reversion, this discent shall not take away the entrie of the disseisee, for that though he had the fee, yet he had not the franktenement. (2)

So it is of a tenant in taile, *mutatis mutandis*; and note, the law doth ever give great respect to the estate of freehold, though it be but for terme of life.

If a disseisor make a lease for terme of his own life, and dieth, this discent shall not take away the entrie of the disseisee; for though the fee and franktenement discent to the heire of the disseisor, yet the disseisor died not seised of the fee and franktenement: and *Littleton* saith, that unlesse he hath the fee and franktenement at the time of his decease, such discent shall not take away the entrie. (3)

ITEM, un discent de reversion, ou de remainder, ne unques tollent entrie*. *Issint que en tiels cas les que tollent entries per force de discents, il covient que celuy que morust seise ad fee et franktenement al temps de son morant †, ou fee taile et franktenement al temps de son morant, ou auterment tiel discent ne tolle entre.*

ALSO, a discent of a reversion, or of a remainder, doth not take away an entrie. So as in those cases which take away entries by force of discents, it behoveth that hee dieth seised of fee and freehold at the time of his decease, or of fee taile and freehold at the time of his death, or otherwise such discent doth not take away an entrie.

Vide Sect. 302. 393.

Sect. 389.

BY this it appeareth, that a discent in the collateral line doth take away an entrie, as well as in the lineall.

Moront seises, &c. Here (&c.) implieth fee simple, or fee taile.

ITEM, come est dit de discents que descendent al issue de ceux que moront seises, &c. *mesme la ley est lou ils n'ont ascun issue, mes les tenements descendent al frere, soer, uncle, ou auter cousin de celuy que morust seise ‡.*

ALSO, as it is said of discents which discent to the issue of them which die seised, &c. the same law is where they have no issue, but the lands discent to the brother, sister, uncle, or other cousin of him which dieth seised.

Sect.

* &c. added in L. M. and Roh.
‡ &c. added L. and M. and Roh.

† ou fee taile et franktenement al temps de son morant, not in L. and M. nor Roh.

(1) See 1. Rep. 140. temp. Edw. The eldest son before entry died without issue, the youngest will pay two reliefs, for the death of his father and the death of his brother; for they both were tenants to the lord. So note, the death of a person seised of a seisin in law, is a discent to entitle the lord to relief.—By Thorp and Wilby, the grandfather leased for life and died. The father makes a feoffment of Black Acre with warranty, the son shall not render in value the term of which the reversion descends upon him, because the father had only a seisin in law. 24. E. 3. 47. L. Nott. MS.

(2) The necessity that there should be a tenant to do the feudal duties, and the notoriety of title which the disseisor acquired by being permitted to continue during his life in the peaceable possession of the fee, and to die seised of it, are the grounds upon which the law is induced to defend the possession of the heir of the disseisor from the entry of the disseisee, and to leave the disseisee to his remedy by action. But when the disseisor parts with the freehold, there is no vacancy in the possession; and the possession of the disseisor, and consequently the notoriety of it, is lost. Thus the principles which apply to the discent of an estate in possession, do not apply to the discent of an estate in remainder or reversion expectant on an estate of freehold. But they apply when the particular estate is only for years; a tenant for years being considered merely as the bailiff of the freeholder, and to hold the possession for him.

(3) But suppose the disseisor in this case had conveyed the estate to the use of himself for life, remainder to the use of his first and other sons in tail, with the immediate reversion or remainder to himself in fee, and that he died without issue living at the time of his decease; it seems to be a question, whether he is to be considered as seised in fee at the time of his decease, so as to entitle his wife to dower. See Cordall's case, Cro. El. 315. Hooker v. Hooker, Cas. temp. Hardw. 13. Duncomb v. Duncomb, 3. Lev. 447. In the latter case, between the estate of the tenant for life, and the limitation to his first and other sons, there was interposed an estate to trustees during the life of the tenant for life, for preserving the remainder to the sons. This was held to be a vested estate, and that it prevented the wife from dower; and lord Hardwicke in Hooker v. Hooker admitted this reasoning. The passage in the text and the three cases cited above were mentioned, and great stress laid upon them, in the case between the heir and next of kin of the late lord Thomond. In that case, lord Thomond being tenant for life, with remainder to his first and other sons in tail male, with the immediate reversion expectant thereupon to himself in fee, paid off a sum of 18,000l. charged upon the estate under the trusts of a term of years; and afterwards died intestate, and without issue. Now it is a rule in equity, that when a person, having a partial estate in land, is entitled to a sum of money charged upon it, his right to the money does not merge in the land, but he may keep it as a subsisting charge on the estate; and in some cases, if he makes no particular disposition of it in his life-time, it goes upon his decease to his personal representative. Upon this ground, it was contended that lord Egremont, upon whom the estate descended at lord Thomond's decease as his heir at law, took the estate charged with the 18,000l. for the benefit of the intestate's representatives. To this it was answered, that tho' lord Thomond was, at the time of his decease, seised of an estate for life, with the immediate reversion in fee; yet as he had no children living at the time of his decease, and his heir at law immediately upon his decease took the lands in fee simple in possession by descent, he was to be considered as seised of an estate in fee simple in possession, and consequently that the 18,000l. was to be considered as merged in the inheritance. But lord chancellor Bathurst, before whom the cause was heard, was of opinion, that lord Thomond was to be considered as seised only for life, and that of course his lordship's personal representatives were entitled to the 18,000l.

Sect. 390.

ITEM, si soit seignior et tenant, et le tenant soit disseise, et le disseisor aliena a un autre en fee, et l'alienee devie sans heire, et le seignior enter come en son escheat: en cest case le disseisee peut enter sur le seignior, pur ceo que le seignior ne vient a la terre per descent, mes per voy d'escheat.

heire of the disseisor dieth without heire, the disseisee cannot enter upon the lord by escheat. So as there is a diversitie as touching the descent, when after a descent call, the issue in taile dieth without issue, and when after a descent call, the heire in fee simple dieth without heire; for he in the reversion, or remainder, upon a state taile claimeth in above the state taile, but the lord by escheat claimeth in under the heire in fee simple.

ALSO, if there bee lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enter as in his escheat: in this case the disseisee may enter upon the lord, because the lord commeth not to the land by descent, but by way of escheat (1).

LE disseisee peut enter sur le seignior, &c.

For albeit the alienee of the disseisor die seised, and the lord by escheat commeth to the land by act in law, yet because the land descendeth not to him, the entrie of the disseisee in respect of the escheat shall not be taken away. For a dying seised, and a descent, and not a dying seised and an escheat, doth take away the entrie: for (as hath beene said) the descent is the worthier title. But in that case, if the lord by escheat die seised, and the land descend to his heire, that descent shall take away the entrie of the disseisee. So it is if the disseisor die seised, and the

(F. N. B. 144. a.)

37 H. 6. 1. 9. II. 7. 24. b. (Post. 364. b.) (Ant. 238. b.)

Sect. 391.

ITEM, si home seise de certaine terre en fee, ou en fee taile, sur condition de render certaine rent, ou sur autre condition, coment que tiel tenant seise en fee, ou en fee taile, morust seise, uncore si le condition soit enfreint en leur vies, ou apres leur decease, ceo ne tollera pas l'entrie del feoffor, ou del donor, ou de leur heires, pur ceo que le tenancie est charge

ALSO, if a man be seised of certain land in fee, or in fee taile, upon condition to render certain rent, or upon other condition, albeit such tenant seised in fee, or in fee taile, dieth seised, yet if the condition bee broken in their lives, or after their decease, this shall not take away the entrie of the feoffor or donor, or of their heires, for that the tenancie is char-

UPON these two sections is to bee observed a diversitie betweene a right, for the which the law giveth a remedie by action, and a title, for the which the law giveth no remedie by action, but by entrie only (2). For example, the feoffee upon condition in this case hath a right to the land, and therefore his entrie may be taken away, because hee may recover his right by action; but the feoffor or donor that hath but a condition, his title of entrie cannot be taken away by any descent, because he hath no remedie by action to recover the land, and therefore if a descent should take away his entrie, it should barre him for ever. And the law is all one whether the descent were before the condition broken, or after.

33. Aff. 11. 24. 21. H. 6. 17.

33. Aff. 11. 24. (Ant. 205.)

(1) When the lord comes to the land by escheat, the law only casts the freehold upon him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and as, by his entry, he fills the possession, the lord's title, which was only good while a tenant was wanting, must necessarily be at an end.

(2) Though by the disseisin a tortious possession is acquired, it is so in the present case, only as between the disseisor and the disseisee, and does not affect the estate of the feoffor on condition; the condition being so inseparably annexed and inherent to the land, as to bind it, in whose hands soever it comes. See Ow. 141.

Brook tit. Mortmaine 6.
47. E. 3. 11. 21. E. 3. 17.

40. Aff. 13.

Also hee that hath a title to enter upon a mortmaine, shall not be barred by a discent, because then he should bee without all remedie. And so it is in case where a woman hath a title to enter *causâ matrimonii prælocuti*, no discent shall take away her entrie, because shee hath but a title, and no remedie by action. (1)

ove le condition, et l'estate del tenant est conditionall, en queconque mains que le tenancie vient, &c.

ged with the condition, and the state of the tenant is conditionall, in whose hands soever that the tenancie commeth, &c.

Seet. 392.

IF a man be seised of lands in fee, and by his last will in writing deviseth the same to another in fee, and dieth, after whose decease the freehold in law is cast upon the devisee, and the heire, before any entrie made by the devisee, entreth, and dieth seised, this discent shall not take away the entrie of the devisee; for if the discent, which is an act in law, should take away his entrie, the law should barre him of his right, and leave him utterly without remedie. (2) And so it is of him that entreth for consent to a ravishment; and so it was resolved in the case of *Martin Trotte* of London, [n] *Paschæ* 32. *El. in Com. Banco*; and accordingly was the opinion of the court of common pleas, [e] *Pasch. 1. Jac. Reg.* To this may be added as a like case, the king's patentee before he enter, &c. Another reason wherefore a discent shall not take away the entrie of him that hath a title to enter by force of a condition, &c. is, for that the condition remaines in the same essence that it was in at the time of the creation of it, and cannot be divested or put out of possession, as lands and tenements may (3).

*ITEM, si tiel tenant sur condition soit disseise, et le disseisor devie ent seise, et la terre descendist al heire le disseisor, ore le entrie le tenant sur condition, que fust disseise, est toll. Mes uncore si le condition soit enfreint *, donque poit le feoffor ou le donor que fierent estate sur condition, ou leur heirs, enter, causâ quâ supra.*

ALSO, if such tenant upon condition be disseised, and the disseisor die thereof seised, and the land descend to the heire of the disseisor, now the entrie of the tenant upon condition, who was disseised, is taken away. Yet if the condition be broken, the feoffor or the donor which made the estate upon condition, or their heires, may enter, *causâ quâ supra*.

[n] *Pasch. 32. Eliz. in Communi Banco. 7. R. 2. Scir. Fac. 3. 41. E. 3. 14. per Finchden.*

[e] *Pasch. 1. Jac. Regis in Communi Banco.*

Seet. 393.

DEVIE seise, &c. viz. in fee simple or in fee tayle.

Et son heire enter, &c. So as he hath an actuall fee simple.

De la 3. part de les tenements, &c. id est, in severaltie.

By this section it appeareth, that an entrie being taken away by the discent, is revived by the endowment, albeit the tenant in dower shall have it but for her life. And the cause is, for that although the heire entred, yet

ITEM, si un disseisor devie seise, &c. et son heire enter, &c. lequel endowa la feme le disseisor de la tierce part de les tenements, &c. en cest cas quant a cest tierce part que est assigne a la feme en dower, maintenant apres ceo que la feme enter, et ad le

ALSO, if a disseisor die seised, &c. and his heire enter, &c. who endoweth the wife of the disseisor of the third part of the land, &c. in this case as to this part which is assigned to the wife in dower, presently after the wife entreth, and hath the possession of the same third

pos-

* &c. added in L. and M. but not in Roh.

(1) The assertion, that a woman in this case has no remedy by action, may, perhaps, be disputed, as the writ *causâ matrimonii prælocuti* extends to all the degrees. See the writ in the Register. Booth's Real Actions 197. and Fitz. Nat. Br. 205.

(2) Acc. the case of *Mattheson v. Trot*, Owen 141. 1. Leo. 209. But the reason given in the Commentary, that the devisee, in this case, has no remedy by action, is not well founded, if what Sir Edward Coke observes in page 111 a. be true, that the devisee may either enter, or have his writ *ex gravi querelâ*. Upon this head, the judges Anderson and Walmesley seem to differ on the case above cited. Whatever may be the case with respect to a descent, a fine levied by the heir at law, is a bar to a devisee after five years non-claim. *Hulm v. Heylock*, Cro. Car. 200. It is also a bar to a title of entry for a condition broken, or a right or title of entry upon any other account. *Mayor of London v. Alsford*, Cro. Car. 575. 1. Jones 452. See Mr. Cruise's Essay on Fines, 146. 147.

(3) *Hamsworth v. Pretty*, Cro. Eliz. 919. Thomas devised to Richard, his eldest son, in fee, upon condition that he should pay to his other children the sums appointed to them according to the intent of his will; and on refusal, that his younger sons and daughters should have it to them and their heirs. Thomas refused payment, and died; and William, his son, entered, and the younger sons and daughters entered upon him: it was contended, that the descent upon William took away the entry of the younger sons and daughters; but the court held the contrary. For it was not as a descent by a stranger after a devise, before the entry of the devisee, which, perhaps, might take away their entry, because it was not then an immediate devise; but it was *quasi* a devise upon a limitation, or upon a condition broken, which no descent should take away or prejudice.

possession de mesme la tierce part, le disseisee poit loyalment enter sur la possession le feme en mesme la tierce part. Et la cause est, pur ceo que quant la feme ad son dower, el sera adjudge eins immediate per son baron, et nemy per l'heire; et issint quant a le franktenement de mesme la tierce part, le discent est defeate. Et issint poies veir, que devant le endowment le disseisee ne poit enter en aucun part, &c. et apres le dowment il poit enter † sur la feme, &c. mes uncore il ne poit enter sur les auters deux parts que l'heire le disseisor ad per le discent ‡.*

part, the disseisee may lawfully enter upon the possession of the wife into the same third part. And the reason is, for that when the wife hath her dower, she shall be adjudged in immediately by her husband, & not by the heire (1); and so as to the freehold of the same third part, the discent is defeated. And so you may see, that before the endowment the disseisee could not enter into any part, &c. and after the endowment he may enter upon the wife, &c. but yet hee cannot enter upon the other two parts which the heire of the disseisor hath by the discent (2).

when the wife is endowed she shall not be in by the heire, [a] but immediately by her husband being the disseisor, who is in for her life by a title paramount the dying seised and discent, and therefore in judgement of law, the discent as to the freehold, and the possession which the heire had is taken away by the endowment; for that the law adjudgeth no meane seisin between the husband and the wife.

[1] 8. E. 2. Entric 75. 19. E. 2. Dower 171. 5. E. 2. Entric 66. 24. E. 3. 34. 40. 38. Aff. Pl. 26.

43. E. 3. 32. 45. E. 3. 9. b. 11. H. 4. 11. 7. H. 5. 3. 10. E. 3. 27. 28. 36. H. 6. Dower 30.

31. E. 1. Mesne 55. (F. N. B. 136.)

If there bee lord, mesne and tenant, the mesne doth grant to the tenant to acquite him against the lord and his heires, the lord dies, his wife hath the seigniorie assigned to her for her dower, and distraines the tenant; albeit the grant was to acquite him against the lord and his heires only, yet because shee continued the estate of her husband, and the reversion remained in the heire, this grant of acquitall did extend to the wife, which is a notable case.

If after the dying seised of the disseisor, the disseisee abate, against whom the wife of the disseisor recover by confession in a writ of dower, in that case, though the discent bee avoided as *Littleton*

here saith, yet the disseisee shall not enter upon the tenant in dower, because the recoverie was against himselfe; but if he had assigned dower to her *in pais*, some say hee should enter upon her (3).

A man makes a gift in taile reserving twentie shillings rent, and dies, the donee takes wife, and dieth without issue, the heire of the donor entreth and endoweth the wife, shee is so in of the estate of her husband, that albeit the estate taile be spent, and the rent reserved thereupon determined, yet after she be endowed, she shall be attendant to the heire in respect of the said rent. And so it is of lord and tenant, the wife that is endowed shall be attendant for the due services; but if any services be encroached, albeit that encroachment shall binde the heire, yet the wife shall be contributorie but for the services of right due (4).

10. E. 3. 26. (7. Rep. 9. a.)

Issint poies veir, que devant le dowment le disseisee ne poit enter, et apres l'endowment il poit enter, &c. The like hath beene said before in this chapter, *Sec. 386*. where the entrie of the disseisee may be taken away for a time, and by matter *ex post facto* revived againe.

Nota, albeit the disseisor after a discent taketh to him but an estate for life, yet when the disseisee doth enter upon him, he shall thereby devest the reversion, for the estate of freehold is that whereupon a *præcipe* doth lye, and therefore the entrie of the disseisee is as available in law, as if he had recovered it in a *præcipe*. And so it is if a disseisor make a lease for life, and grant the reversion to the king, the entrie of the disseisee upon the tenant for life shall devest the reversion out of the king in the same manner as if the disseisee had recovered the lands against the tenant for life in a *præcipe*.

Vide *Sec. 372-388*. 25. E. 3. 48. Pl. Com. 553. (Post. 354. b. Dyer 31. b.) (1 Roll. Abr. 638. Ant. 55. b.)

Sect.

* &c. added in L. and M. and Roh.

† *sur la feme*, not in L. and M. nor Roh.

‡ &c. added in L. and M. and Roh.

(1) The dowress holds of the heire; but by the institution of the law, she is in of the estate of her husband; so that after the heire's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is that dower defeats discent, because the lands cannot be said to descend as demesne which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descended as demesne. *Gilb. on Dower 395*.—See ant. 31. b.

(2) The doctrine contained in this section seems to apply to the cases of a recovery suffered by the heire, either before or after the assignment of dower.

(3) *So note*, though the disseisee, being an abator, did an act to which he was compellable, yet it is not as good as if he had been actually compelled. *Supra*, 35. Lord Nott. MS.

(4) Sir Edward Coke, in this passage, and in a former part of his Commentary, puts several cases on the continuance of the wife's dower after the fee charged with it is determined. Perhaps the following distinctions and observations will assist in clearing up the complex and abstruse points of learning in which this question is involved. I. In those cases where the fee is evicted by title paramount, the dower and courtsey necessarily cease upon the eviction. Such is the case put by *Littleton* in the section before us. II. When the donor enters for breach of condition; as his entry absolutely defeats the estate of the tenant on condition, so it defeats his wife's right of dower, and the husband's right of courtsey, and all other charges brought upon the estate, either by the donee's own act, or by act of law. See Note 2, fo. 202. b. III. If a person seised in fee tail, or any other determinable fee, conveys in fee, the wife's right of dower, and the husband's courtsey, can only be commensurate with the estate of the grantor, and must necessarily cease whenever that estate ceases. See 10 Rep. 97. b. 98. a. IV. As to estates in fee simple conditional at the common law, and estates tail under the statute *de donis*;—the wife was entitled to her dower, and the husband to his courtsey, out of them, after the failure of the issues in tail. But it may be observed, that though it now is difficult to avoid considering estates in fee simple conditional in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversioner expectant on the failure of these heirs; yet this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or being such, if they afterwards failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter. — This entry, therefore, was not an entry upon the natural expiration of a previous estate, but for a condition broken; in which case, as in all others where entry is made for breach of a condition, the right of the wife to her dower, and the husband to his courtsey, if the general rule were adhered to, would be defeated. But for reasons now rather to be guessed than demonstrated, this case was made an exception from the general rule. So with respect to the right of the wife of tenant in tail to her dower, and the husband to his courtsey, after the failure of the issues in tail; the statute *de donis* introduced no new estate, but only preserved estates limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them; and as they preserved the estates, so they preserved the incidents belonging to them, and, among others, the right of the wife to her dower, and the husband to his courtsey. V. If a person makes a gift in tail, reserving rent; after failure of the issues in tail, the rent will not be continued, either for the dower of the wife, or the courtsey of the husband. *Plow. Com. 155*. VI. As to limited fees;—by which, in this place, are to be understood those fees which are qualified, not because the estate of the grantor is limited — (such

Sect. 394.

EN cest case jeo poy enter sur le possession l'issue, &c.

Vide 9. H. 7. 24. and 37. H. 6. 1.

See before the chapter of Homage.

(3. Rep. 34. 2.)

For here was but a discent of a reversion at the time of the dying seised, for the estate of the tenant by the courtsey had commencement by the having of issue, and is consummate by the death of the wife, so as the fee & franktenement did not after the decease of the wife descend to the heire, and albeit the tenant by the courtsey dieth afterwards, and that the franktenement is cast upon the heire, so as now he hath the fee and franktenement by discent, yet because the heire came not to the fee and franktenement at once, immediately after the decease of the wife, such a mediate discent shall not take away the entrie of the disseisee. On the other side, an immediate discent may take away an entrie for a time, and mediate may be avoided by matter *ex post facto*, as hath beene said. But if a dying seised taketh not away the entrie of him that right hath at the time of the discent, it shall not by any matter *ex post facto* take away his entrie.

If a disseisor die without heire, his wife privement enseint with an issue, and after the issue is borne, who entreteth into the land, he hath the land by discent, and yet thereby the entrie of the disseisee shall not be taken away, because, as *Littleton* here saith, the issue cometh not to the lands immediately by discent, after the decease of the father.

And so it is if a disseisor make a gift in taile, the remainder in fee, and the donee dieth without issue, leaving his wife privement enseint with a sonne, and he in the remainder enters, and after the sonne is borne, who entreteth into the land, this discent shall not take away the entrie of the disseisee, *causa qua supra*.

Contrarium tenetur, &c. This is an addition, and therefore to be passed over. And at this day, this case of *Littleton* is holden for cleere law.

*ITEM, si un feme soit seisee de terre en fee, dont jeo aye droit et tite d'entre, si la feme prent baron, et ont issue enter eux, et puis la feme devie seisee, et apres le baron devie, et l'issue enter, &c. en cest case jeo * poy enter sur le possession l'issue, pur ceo que l'issue ne vient a les tenements immediate per discent apres la mort sa mere, &c. † eins per le mort del pier. (1)*

Contrarium tenetur P. 9. Hen. 7. per tout le court, & M. 37. H. 6.

Contrarium tenetur P. 9. H. 7. per tout le court, & M. 37. H. 6.

Sect. 395.

ITEM, si un disseisor enseoffe son pier en fee, et le pier mort de tiel estate seisee, per que les tenements descendont a le disseisor, † come s'its et heire, &c. en cest case le disseisee bien poit enter sur le disseisor, nient obstant le discent,

ALSO, if a disseisor enseoffe his father in fee, and the father die seised of such estate, by which the land descend to the disseisor, as sonne and heire, &c. in this case the disseisee may well enter upon the disseisor, notwithstanding the discent,

* poy not in L. and M. and Roh.
† ent added in L. and M.

† eins per le mort del pier, and the note that follows, not in L. and M. nor Roh.

(1) Conformably to this it was held by lord Holt in the case of *Carter v. Tash*, 1. Salk. 241. that a discent which tolls entry ought to be an immediate discent; and therefore if a feme disseisores take husband, and hath issue and dies, and after the husband dies, the discent of the issue does not take away entry, because the interposition of tenant by the courtsey does impede it, and that coverture to avoid a discent ought to be continual from the time of the disseisin to the discent; for if a feme be sole at the time of the disseisin, or of the discent, or any time intermediate, her entry is not prevented, because she had an opportunity to enter and prevent the discent: as if a feme covert is a disseisee, and after her husband dies she takes a second husband, and then the discent happens, this discent shall take away the entry of the feme: and upon this last point the plaintiff in that case was nonsuited.

as those which are classed under the third distinction)—but those which being created by a person seised in fee simple, are by the original grant by which they are created, only to continue till a certain event; as a grant to A. and his heirs, tenants of the manor of Dale, or to A. and his heirs, while there shall be heirs of the body of B.—or those fees which are originally devised or limited in words importing a fee simple or fee tail absolute and unconditional, but which, by subsequent words, are made determinable upon some particular event (see Note 1. 203.):—as to fees of this description, it should seem by the case cited in the Note to F. N. B. 149. G. and the cases of *Flavell v. Ventrice*, Roll. Abr. 676. and *Sammes v. Payne*, 1. Leo. 167. 1. And. 184. 8. Rep. 34. Gouldf. 81. that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his courtsey, after the expiration of the period to which the fee charged with the dower or courtsey is to continue; but that where the fee is originally devised in words importing a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's courtsey cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases. But a different doctrine as to cases of the latter description, seems to have been laid down in the case of *Buckworth v. Thirkell*, determined in last Trinity term in the court of king's bench. There Joseph Sutton the testator devised his estates to trustees upon trust to pay the rents and profits of them for the maintenance and education of Mary Barrs, till she arrived at twenty-one, or was married: "And from and after the said Mary Barrs should have attained her age of twenty-one years, or should be married, he gave and devised all the said lands and premises to the said Mary Barrs, her heirs and assigns for ever; but in case the said Mary Barrs should happen to die before she arrived at the age of twenty-one years, and without having issue of her body lawfully begotten; then, from and after the decease of the said Mary Barrs without issue, as aforesaid, he gave and devised all his said estates unto his grandson Walter for life," with several remainders over. Mary Barrs married Solomon Hanford, and had issue a son, who died in her life; and afterwards Mary Barrs died under twenty-one. In this case, the court were unanimously of opinion, that on the decease of Mary Barrs, her husband became intitled by the courtsey to the estates for his life, and that, subject thereto, the devisees over became entitled to them by way of executory devise. By a manuscript report of this case, the ground upon which the court appears to have formed their opinion on it, is,

*pur. ceo que quant al disseisin, le disseisor ferra adjudge eins for- que come disseisor, nient obstant le discent, * quia particeps criminis.*

discent, for that as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the discent, *quia particeps criminis.* (1)

(Ant. 238. b.)

OF this sufficient hath been said before in this chapter, Sect. 386. And regularly it is true, that albeit a discent be cast, and the entrie of the disseisee taken away, yet if the disseisor commeth to the land againe, either by discent or purchase, of any estate or freehold, which is implied in the (&c.) the disseisee may enter upon him, or have his assise against him, as if no discent or meane conveyance had beene, *quia particeps criminis.*

15. E. 4. 23. a. 11. E. 4. 4.
18. E. 4. 25. a. 33. H. 6. 5. b.
34. H. 6. 11. 12. H. 8. 9.
24. H. 8. 3. 9. 18. H. 8. 5.
5. H. 7. 29. Aff. 54. 39. E. 3.
25. 26.
(Poll. Sect. 409.)

Sect. 396.

ITEM, si home seise de certaine terre en fee ad issue deux firs, et morust seise, et le puisne firs entra per abatement en la terre, quel ad issue, et de ceo morust seise, et les tenements descendont al issue, et l'issue entra en la terre: en cest case le firs eigne, ou son heire, poit enter per la ley sur l'issue del firs puisne, nient contristeant le discent, pur ceo que quant le firs puisne abatist en la terre apres le mort son pier devant aucun entrie per le firs eigne † fait, la ley intendra que il entra en claymant come heyre a son pier. Et pur ceo que l'eigne firs clayma per mesme le title, cestascavoir, come heyre a son pier, il et ses heires poient enter sur l'issue de puisne ‡ firs, nient obstant le discent, &c. pur ceo que ils clay-

ALSO, if a man seised of certaine land in fee have issue two sons, and die seised, and the younger sonne enter by abatement into the land, and hath issue, and dieth seised thereof, and the land descend to his issue, and the issue enters into the land: in this case the eldest sonne, or his heire, may enter by the law upon the issue of the younger son, notwithstanding the discent, becaule that when the younger son abated into the land after the death of his father before any entrie made by the eldest sonne, the law intend that hee entred claiming as heire to his father. And for that the eldest sonne claimes by the same title, that is to say, as heire to his father, hee and his heires may enter upon the issue of the younger son, notwithstanding the dis-

EN cest case le firs eigne, &c. poit enter sur l'issue del firs puisne, &c.

And the reason hereof is, for that the law intendeth the youngest sonne entred claiming the land as heire to his father, and because the eldest sonne claimeth also by the same title, viz. as heire to his father, therefore hee and his heires may enter upon the second sonne and his heires, in respect of the privitie of the blood betwene them, and of the same claime by one title, albeit the youngest son gained a fee simple by his entrie: for *Littleton* here calleth it an abatement, which proveth the gaining of a fee simple.

(Plow. 306. a.)

And it is to be observed, that *assisa mortis antecessoris non tenet inter conjunctas personas sicut fratres & sorores, &c.* for these are privie in blood, but it lyeth against strangers, and then damages are to be recovered against a stranger, but not against his brother.

Lands were given to the husband and wife, and to the heires of their two bodies, they had issue a daughter, the wife died, the husband had issue by another wife foure sons and died, the eldest sonne abated

Bract. lib. 4. fol. 261. 282. 283.
Brinton, fol. 183. 181. Fleta,
lib. 5. cap. 1. 2, &c. 20. E. 3.
Darr. present 13. 12. H. 3.
Mord. pl. ultim. 13. E. 1.
Mord. 47. 29. Aff. 11.
F. N. B. 196. b.
(8. Rep. 42.)
(Poll. 271. a.)

Pasch. 3. E. 3. Coram Rege
Kanc. in Theaur.

* &c. added: *quia particeps criminis*, not in L. and M.

† *fait* not in L. and M.

‡ *firs—frere*, L. and M. and Roh.

(1) For when the disseisor enfeoffs the father, it is presumed to be done in order afterwards to come in by discent, and the act of law shall not give function to the wrong of the party; nor shall any man by his own wrong, however cunningly contrived, give to himself a right; for when the heir by the discent gains a *jus possessionis*, he is supposed innocent of the wrong of his ancestor, but here he is partner of his guilt. See Gilb. Ten. 27. 28.

is, an analogy they supposed it to bear to the case of estates in fee simple conditional, and estates tail; in both of which dower and courtesy continue after failure of the issues; and in both of which the wife's being seised of a fee, to which the issue might by possibility inherit, entitles the husband to courtesy. Some observations have been offered above to shew that the continuation of dower and courtesy in the cases of estates in fee simple conditional, was an exception to a general rule (dower and courtesy, in all other cases of conditions, being defeated by the entry for the condition broken); and that the same reasoning may be applied to the continuation of dower and courtesy out of an estate tail, after the failure of issue. It may therefore seem singular that the court, on this occasion, should prefer reasoning by way of analogy from the only admitted exception to the general rule, to reasoning by analogy from the *general rule* itself:—it is the more singular, as the general case of estates on condition approached nearer to the case then under consideration of the court, than the particular case of estates in fee simple conditional, or estates tail; for the distinguishing feature of the devise which gave rise to the case before the court (as of all devises of that description) is, that after the whole fee is first devised, it is made defeasible by a subsequent clause. Now neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it; but this quality forms the very essence of all other estates upon condition.—With respect to the application of the maxim, that where the issue may by possibility inherit, the husband shall have his courtesy (and so *vice versa* of dower); in every place in the books where that is mentioned, it is to introduce an enquiry whether the wife, being in the actual seisin of an estate, was in fact seised of an estate, the *quality* of which was such, that the issue of the husband might inherit it, but never with a view to shew that the *quantity* of the estate was such, that it might endure so long as to be inheritable by the issue. On the contrary, when the wife's estate is evicted by title paramount, or by an entry for the breach of a condition, in both cases the issue might have inherited; but the husband would be entitled to his courtesy in neither, after the eviction or entry. Another difference between the case of an estate in fee simple made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation or devise, cannot, by any means whatever, be discharged by the first taker, or devisee, from the operation of the subsequent limitation or devise; but an estate in fee simple conditional may immediately after the birth of a child, and an estate tail immediately after marriage, be destroyed, and a fee-simple absolute acquired, by the husband and wife joining in a fine or common recovery.—The case is the same with respect to the wife's right of dower.—Besides, the quality we are speaking of is not sufficient of itself to entitle the husband to courtesy, or the wife to dower; it is only one of many incidents which the estate ought to have to give that title.

abated and died seised, this discent did take away the entrie of the daughters, because they claimed not by one title. And in ancient bookes the eldest sonne is called *heres propinquus*, and the younger sonne *heres remotus*. And albeit the eldest sonne hath issue and dieth, and that after his decease the youngest son or his heire entreth, and many discents be cast in hisline, yet may the heires of the eldest sonne enter in respect of the privitie of the blood, and of the same claime by one title; but if the youngest sonne make a feoffment in fee, and the feoffee die seised, that discent shall take away the entrie of the eldest, in respect that the privitie of the blood faileth. And admit that the youngest sonne be of the halfe blood to his brother, yet he is of the whole blood to his father; and therefore if he entreth by abatement, and dieth seised, it shall not barre his elder brother of his entrie. But if the eldest sonne entreth, and gaineth an actuall possession and seisin, then the entrie of the youngest is a disseisin. And then a dying seised shall take away the entrie of the eldest, for *possessio terræ* must be *vacua* when the youngest sonne enters by abatement, as *Littleton* saith, because he hath more colour in that case to claime, as heire to his father, who last was actuall seised. Therefore if after the decease of the father, an estranger doth first enter and abate, upon whom the youngest sonne entreth and disseise him and die seised, this discent shall binde the eldest, for he entered by disseisin, and not by abatement.

If a man bee seised of lands of the nature of

mont per un mesme title. Et en mesme le maner il serra, si fueront plusors discents de un issue a un autre issue del puisne fits.

cent, &c. because they claime by the same title. And in the same manner it shall be, if there were more discents from one issue to another issue of the younger sonne (1).

Sect. 397.

MES en tiel cas, si le pier fuit seise de certaine terres en fee, et ad issue deux fits, et devie, et l'eigne fits enter, et est seise, &c. et puis le puisne frere luy disseisist, per quel disseisin il est seise en fee, et ad issue, et de tiel estate morust seise, donques l'eigne frere ne poit enter, mes est mis a son brieve d'entre sur disseisin, &c. † de recoverer la terre. Et la cause est, pur ceo que le puisne frere vient a les tenements per tortious disseisin fait a son eigne frere, et per cel tort la ley ne poit entendre que il claime come heire a son pier, nient plus que une strange person que ust disseisie l'eigne frere ‡ que n'avoit ascun title, &c. Et issint poyes veier la diversitie, lou le puisne frere enter apres le mort le pier devant ascun entrie fait per l'eigne frere en tiel cas, || et ou l'eigne frere*

BUT in this case, if the father were seised of certaine lands in fee, and hath issue two sons, and die, and the eldest sonne enter, and is seised, &c. and after the yonger brother disseiseth him, by which disseisin he is seised in fee, and hath issue, and of this estate dieth seised, then the elder brother cannot enter, but is put to his writ of *entrie sur disseisin*, &c. to recover the land. And the cause is, for that the youngest brother commeth to the lands by wrongfull disseisin done to his elder brother, and for this wrong the law cannot intend that he claime as heire to his father, no more than if a stranger had disseised the elder brother which had no title, &c. And so you may see the diversitie, where the younger brother entreth after the death of the father before any entrie made by the elder brother in this

8. E. 2. Aff. 380.

40. E. 3. 24. b. 19. Aff. 24.

Vid. Brooke tit. Entrie 27.

(Roll. Abr. 628. 629.)

(4. Rep. 58.)

* fits—frere, L. and M. and Roh.

|| &c. added in L. and M. and Roh.

† &c. not in L. and M. nor Roh.

‡ frere not in L. and M. nor Roh.

(1) When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possession in the family, that nobody else abates. *Gilb. Ten.* 25.

Frere enter apres la mort son fier, et puis est disseisie per le puisne frere, lou le puisne frere puis morust seisie *

case, and where the elder brother enters after the death of his father, and after is disseised by the younger brother, where the younger after dieth seised.

burgh English, and hath issue two sonnes and die, and the eldest sonne before any entrie made by the youngest, entreth into the land by abatement, and dieth seised, this shall not take away the entrie of the youngest brother. *Et sic de similibus.* And these and the like cases are all

within the reason and rule of our author. And where our author speaketh only of an abatement, so it is not an intrusion; for if the father make a lease for life, and hath issue two sonnes and dieth, and the tenant for life dieth, and the youngest sonne intrude, and die seised, this descent shall not take away the entrie of the eldest. But if the father had made a lease for yeares, it had bene otherwise, for that the possession of the lessee for yeares maketh an actual freehold in the eldest sonne. And it is to be observed, that the reason of *Littleton* in this case (for that both the brethren hold by one title) holdeth also in many other cases.

If two coparceners make partition to present by turne, and one of them usurpe in the turne of the other, this usurpation shall not put the other out of possession, because they claime by one title.

If two coparceners be, and they severally present to the ordinarie, yet the church is not litigious, because they claime all by one title (1).

If upon a writ of *diem clausit extremum*, the youngest sonne be found heire, the eldest son had no remedy by the common law, because they claimed by one title; but otherwise it is, if they claime by severall titles, as it appeareth in our bookes (2). But this is now holpen by a statute * made since *Littleton* wrote.

If two parsons be in debate for tithes, which amount to above the fourth part, and one man is patron of both churches, no *indicavit* doth lye, for that both incumbents claime by one and the same patron. *Et sic de similibus.*

And where *Littleton* saith, seised of lands in fee, the same law it is if a man bee seised of lands in taile, and hath issue two sonnes *mutatis mutandis*.

Et est seisie, &c. That is to say, actually seised, either by entrie, as *Littleton* here putteth it, or by possession of the lessee for yeares, or the like. (Post. 245. a.)

N'avait ascun title, &c. That is to say, any pretence or semblance of title, as the younger brother here hath; and in many other cases, there is a great diversitie holden in our bookes [o] where one hath a colour or pretence of right, and when he hath none at all, whereof you may read plentifully in our bookes.

(1. Roll. Abr. 629. Ant. 15. a.)

22. E. 4. 4.
(F. N. B. 34. Ant. 136. b.)

Doctor & Stud. cap. 30. fol. 119

12. E. 4. 18.

* 2. E. 6. cap. 8.

2. H. 7. 12. a.

See the Section next following.

(Post. 245. a.)

[o] 2. E. 2. bastardie 19. 21.
E. 3. 34. 22. Aff. 85. 39. E. 3. 26.
17. E. 3. 59. 11. E. 3. Aff. 88.
21. H. 6. 14. 11. E. 3. age 3.
Vide Sect. 400. & cap. Gattan.

Sect. 398.

EN mesme le maner est, si home seisie de certaine terre en fee ad issue deux files et devie, l'eigne file entra en la terre claymant tout la terre a luy, et ent solement prisl les profits, et ad issue et morust seisie, per que son issue enter, quel issue ad issue et devie seisie, et le second issue enter†, & sic ultra, uncore le puisne file ou son issue, quant a le moitie soit enter sur quecunque issue de l'eigne file, nient obstant tiel

IN the same manner it is, if a man seised of certaine land in fee, hath issue two daughters and dieth, the eldest daughter entreth into the land claiming all to her, and thereof onely taketh the profits, and hath issue and dieth seised, by which her issue enter, which issue hath issue and dieth seised, and the second issue enter, & sic ultra, yet the younger daughter or her issue as to the moitie may enter upon any issue whatsoever of the elder discent,

* &c. added in L. and M. and Roh.

† &c. added L. and M. and Roh.

(1) Acc. Dig. p. 1. c. 3.—See 7th Ann. c. 18.

(2) At the common law, if the youngest son were found heir, the eldest might have an office; the doubt was, whether it should be tried which of them was heir by immediate interpleader, or at the full age of him that was first found heir: but the 2d and 3d Ed. 6. ch. 8. hath remedied it, and given an interpleader immediately, on traversing the first office, which cannot be, unless the party who traversed had an office found for himself. 7. Co. 44. a. b. Kenn's case.

discent, pur ceo que ils claimont per un mesme title, &c. Mes en tiel case si ambideux soers avoyant enter apres la mort leur pier, et ent fueront seises, et puis l'eigne soer ust disseise la puisne soer de ceo que a luy affiert, et ent fuit seise en fee, et ad issue, et de tiel estate morust seise, per que les tenements discent al issue del eigne soer, dunque le puisne soer ne ses heires ne poient enter, &c. causâ quâ supra, &c.

daughter notwithstanding such discent, for that they claime by one same title, &c. But in such case where both sisters have entred after the death of their father, and were thereof seised, and after the eldest sister had disseised the younger of her part, and was thereof seised in fee, and hath issue, and of such estate dieth seised, whereby the lands descend to the issue of the elder sister, then the younger sister nor her heires cannot enter, &c. *causâ quâ supra, &c.*

(Hob. 120. Post. 373. b. Ant. 198.)
21. Aff. 19. 21. E. 3. 7. 27. 32.
26. Aff. 2. 27. Aff. 68. 36. Aff.
p. 1. 43. E. 3. 19. 4. H. 7. 10.
16. H. 7. 4.
(Mo. 60.)
See more of this in the chapter
of Warrantie. Sect. 710. 28. Aff.
30. Vide Sect. 710.
(4. Leo. 52. Ant. 174. a.)

CLaimont tout la terre. Here it appeareth, that when the one coparcener doth specially enter, claiming the whole land, and taking the whole profits, that the gainer the one moitie, viz. of her sister by abatement, and yet her dying seised shall not take away the entrie of her sister; whereas when one coparcener enters generally, and taketh the profits, this shall be accounted in law the entrie of them both, and no divesting of the moitie of her sister (1).

If one coparcener enter claiming the whole, and make a feoffment in fee, and take backe an estate to her and her heires, and hath issue and die seised, this discent shall take away the entrie of the other sister, because by the feoffment the privie of the coparcenarie was destroyed.

Claimont per un mesme title, &c. Of this sufficient hath beene said in the next precedent Section.

Ne poient enter, &c. Of this there hath beene also spoken in the same Section.

Sect. 399.

Pl. Com. 57. 39. E. 3.
Le darreine case.

Lib. 8. fol. 101. 102. Sir Rich.
Lechford's case.
(2. Roll. Abr. 584. 586. Doctor
& Stud. 68. 69.)

Glanvil. lib. 7. cap. 2. Bract.
lib. 5. cap. 19. Brit. cap. 70.

Vide Sect. 289.

SEise en fee. For this holds not in case of an estate taile.

Mulier, seu filius mulieratus. Mulier hath three significations. First, *Sub nomine mulieris continetur quælibet femina.* Secondly, *Proprie sub nomine mulieris, continetur virgo.* Thirdly, *Appellatione mulieris, in legibus Angliæ, continetur uxor. Et sic filius natus vel filia nata ex iustâ uxore, appellatur in legibus Angliæ filius mulieratus, seu filia mulierata, a femme mulier, or a daughter mulier. Sicut bastardus (2) dicitur à Græco verbo Bastaris, i.e. meretrix, seu concubina, quia procreatur ex meretrice seu*

ITEM, si home est seise de certaine terre en fee, et ad issue deux fits, et l'eigne fits est bastard, et le puisne frere est mulier, et le pier devie, et le bastard enter enclaimant come beire a son pier, et occupia la terre tout sa vie, sans ascun entre fait sur luy per le mulier, et le bastard ad issue, et morust seise de tiel estate en fee,

ALSO, if a man be seised of certain lands in fee, and hath issue two sonnes, and the elder is a bastard, and the younger mulier, and the father die, and the bastard entereth claiming as heire to his father, and occupieth the land all his life, without any entrie made upon him by the mulier, and the bastard hath issue, and dieth seised

et

(1) Hob. 120. *Smale v. Dales.* The contrary is held, that one coparcener cannot be disseised without actual ouster, and claim shall not alter the possession. Lord Nott. MS.

(2) Sir Henry Spelman *verbo Bastard* rejects this derivation, and holds it to be a pure Saxon word *Bastart*, viz. impure natus, ut apud nos, Upstart dicitur homo novus. Lord Nott. MS. In Germany, and with us, (who derive many of our customs and political opinions from the Germans) bastardy was always a circumstance of ignominy. But in Spain, Italy, and France, bastards were in many respects on an equal footing with legitimate children. During the first and second races of the kings of France no difference appears to have been made between their legitimate and illegitimate offspring. The same seems to have been the case of the offspring of all the sovereign princes and higher ranks of nobility in France. Their acknowledging a natural child to be their child, was considered as tantamount to any formal act of legitimation. But the natural children of all other persons were considered as villeins. After the accession of the Capetian line, the condition of bastards was altered for the worse in many respects. Those of royal parentage were excluded from the throne, and were no longer held to be of blood royal. They were only permitted to bear the arms of France, with a bar. A similar change took place with regard to the bastards of the princes and nobility. By an ordinance of the year 1600, it was declared, that the children of nobility should not be considered even as gentlemen, unless they obtained letters of nobility. On the other hand, the bastards whose parents were of a lower order, instead of being considered villeins, as before, began about the commencement of the 16th century to be considered as free men, and except as to the right of receiving and transmitting succession, they are now, in France, on an equal footing with their fellow-subjects.—See *Oeuvres du Chancelier D'Aguesseau*, t. 7. p. 881. *Dissertation dans laquelle on discute les principes du droit Romain et du droit François par rapport aux Bastards.*

*et la terre discent, dist a son issue, et son issue enter, &c. en cest case le mulier est sans remedie, car il ne poit enter, ne aver aucun action pur recoverer la terre, pur ceo que est un antient ley en tiel case use, &c.**

of such estate in fee, and the land descend to his issue, and his issue entreth, &c. in this case the mulier is without remedie, for he may not enter, nor have any action to recover the land, because there is an antient law in this case used, &c.

concupinā. In English, hee is called base borne, and thereupon some say, that a bastard is as much to say, as one that is a base naturall, for *aerd* signifieth nature. I read in *Fleta*, [p] that there be three kindes of bastards, viz. *manser, nothus, & spurius*, which are described in two old verses:

*Manseribus scortum, notho machus dedit ortum.
Ut fides è spicā, sic spurius est ab amicā. (1)*

[p] Flet. lib. 1. cap. 5. Vide Sect. 380.
(1. Roll. Abr. 356. 357. 358. 359. Cro. Jac. 541. Godb. 281. Paim. 9. 4. Init. 36.)

But we terme them all by the name of bastards, that be borne out of lawfull marriage. By the common law, [r] if the husband be within the foure seas, that is, within the jurisdiction of the king of England, if the wife hath issue, no prooffe is to be admitted to prove the childe a bastard, (for in that case *filiatio non potest probari*) unless the husband hath an apparent impossibilitie of procreation; as if the husband be but eight yeates old, or under the age of procreation, such issue is bastard, albeit he be borne within marriage. (2) [f] But if the issue be borne within a moneth or a day after marriage, betweene parties of full lawfull age, the childe is legitimate. (3)

[r] Brañ. lib. 4. fol. 278. 279.
7. H. 4. 9. 43. E. 3. 19. 41. E. 3. 7.
41. E. 3. 10. 29. Aff. 54.
98. Aff. 14. 1. H. 6. 7.
19. H. 6. 17. 39. E. 3. 13.
[f] 18. E. 4. 28.
(1. Salk. 120.)

Discendist a son issue. For if the bastard dieth seised without issue, and the lord by escheat entreth, this dying seised shall not barre the mulier, because there is no discent. If the bastard enter, and the mulier dieth, his wife privement enseint with a sonne, the bastard hath issue and dieth seised, the sonne is borne, his right is bound for ever. But if the bastard dieth seised, his wife enseint with a sonne, the mulier enter, the sonne is borne, the issue of the bastard is barred: for *Littleton* putteth his case, that there must not only be a dying seised, but also a discent to his issue.

(Post. 267. 273. 1. Roll. Abr. 624. 8. Rep. 101. b. Ant. 15. a. 7. Rep. 42.)

Et son issue enter, &c. And so it is to be understood, albeit the mulier, after the decease of the bastard, doth enter before the heire of the bastard; for the discent bindeth, and not the entrie of the heire.

Le mulier est sans remedie. Hereby it appeareth that this discent differeth from other discents, for this discent barreth the right of the mulier, whereas other discents doe take away the entrie only of him that right hath, and leaveth him to his action, but here by the dying seised of the bastard, his issue is become lawfull heire. [a] It is holden, that if the mulier be within age at the time of the dying seised, that neverthelesse hee shall be barred, because the issue of the bastard is in judgement of law become lawfull heire, and the law doth preferre legitimation, before the privilege of infancie.

Lib. 8. 101. 102. Sir Rich. Lechford's case.

[a] 5. E. 2. Discent. Br. 49.
31. Aff. 18. 22. 33. E. 3.
Verdict. 48. 36. Aff. 2. Pl. Com.
Stowel's case. 10. E. 3. 2.

And the reason of this case is, for that *Justum non est aliquem post mortem facere bastardum, qui toto tempore vite sue pro legitimo habebatur*. And so it seemeth to be, that if a man hath issue a sonne being bastard eigne, and a daughter, and the daughter is married, the father dieth, the sonne entreth and dieth seised, this shall barre the feme covert. And the discent in this case of services, rents, reversions, expectant upon estates taile, or for life, whereupon rents are reserved, &c. shall binde the right of the mulier, but a discent of these shall not drive them, that right have, to an action.

13. E. 1. tit. Bastardie 28.
(Post. 246. a. 5. Rep. 98.)

So if the bastard dieth seised, and his issue endoweth the wife of the bastard, yet is not the entrie of the mulier lawfull upon the tenant in dower, for his right was barred by the discent.

Sir Rich. Lechford's case, ubi supra.
(Ant. 241.)

If the bastard eigne entreth into the land, and hath issue, and entreth into religion, this discent shall barre the right of the mulier.

20. H. 3. Bastardie 29.
(Post. 248.)

Ad issue deux fis. If a man hath issue such a bastard as is aforesaid, and dieth, and the bastard entreth and dieth seised, and the land descendeth to his issue, the collateral heire of the father is bound as well as where there be two sonnes.

Hil. 18. E. 3. cor. Reg. Rot. 144.
Ebor. 17. E. 3. 59. F. tit. Bastard.
32. Sir Rich. Lechford's case, ubi supra. See afterwards in the Chapter of Warranties.
(Post. 368. a.)

And where our author speaketh of sonnes, so it is if a man hath issue two daughters, the eldest being a bastard, and they enter and occupie peaceably as heires; now the law in favour of legitimation shall not adjudge the whole possession in the mulier, (who then had the only right) but in both, so as if the bastard hath issue and dieth, her issue shall inherit.

[b] And

* &c. not in L. and M. nor Roh.

(1) Filius naturalis à vulgo barbarorum opponitur legitimo. Sed revera opponitur filio adoptivo, in quo sensu Tiberius vocat Drusum filium suum naturalem. Cal. Lex. verb. nat. filius. Spuri Latini et Græci sine patre. Ib.—Lord Nott. MS. Jure pontificio nostro dicuntur qui ex adulterino concubitu, manseres qui ex scorto, spurii exitus qui sacris initiati sunt, aut religionem professi sunt.—15.

(2) It is now held that the husband's being within the four seas, is not conclusive evidence of the legitimacy of the child, and it is left to a jury to consider whether the husband had access to his wife. See 3d P. W. 275, 276. *Pendrell v. Pendrell*, 2. Stra. 925. So evidence may be given, that the husband's habit of body was such, as to make his having children an impossibility. *Lomax v. Holmden*, 2. Stra. 940. See also 1. Roll. Abr. 358. 1. Salk. 123. But the rule laid down by lord Coke, was once generally received. In *Jenk. c. 10. pl. 18.* it is said, "that if the husband be in Ireland for a year, and the wife in England during that time has issue, it is a bastard; but it seems otherwise now for Scotland, both being under one king, and make but one continent of land."—See ant. note 2. to p. 126.

(3) See note 1. to page 261. a.

[b] 2. E. 3. tit. bastardie 15.
21. E. 3. 34. b. 30. Aff. p. 7.
Sir Rich. Lechford's case, ubi
sup.
[c] Britt. cap. 73. 20. E. 3.
Vouch. 129. 11. E. 3. Age 3.
5. H. 7. 2. Sir Rich. Lechford's
case, ubi sup.
(Ant. 170. b.)

[b] And in the same case, if both daughters enter and make partition, this partition shall binde the *mulier* for ever.

[c] And an assise of *mortd'ancestor* lieth not betweene the bastard and the *mulier* in respect of the proximitie of blood.

And the bastard being impleaded or vouched shall have his age.

Et le bastard enter come heire a son pier. If a man hath issue bastard eigne and *mulier puisne*, and the bastard in the life of the father hath issue and dieth, and then the father dieth seised, and the sonne of the bastard entreth, as heire to his grandfather, and dieth seised, this discent shall binde the *mulier*.

Pur ceo que est antient ley en tiel case use, &c. As hereafter in our Commentarie upon the two next Sections shall appeare, by our antient bookes, and the antient statutes of the realme. And here is implied how necessarie it is, after the example of our author, to looke into the antiquities, than which nothing is more venerable, profitable, and pleasant. (1)

Sect. 400.

*MES il ad estre l'opinion d'ascuns, que ceo serra intendue lou le pier ad un fits bastard per un feme, et puis espousa mesme la feme, et apres le espousels il ad issue per mesme la feme un fits, ou un file mulier, et puis le pier morust, &c. si tiel bastard enter, &c. et ad issue et devie seise, &c. denque avera l'issue de tiel bastard le terre cleerement a luy, come avant est dit, &c. et nemy ascun auter bastard la mere que ne fuit unque espouse a son pier. Et ceo semble bone et reasonable opinion: car tiel bastard née devant espousels celebres pe-renter son pier et sa mere, per la ley de saint esglise est mulier, comment que per la ley del terre il est bastard, et issint il ad un colour d'entrer come heire a son pier, pur ceo que il est per un ley mulier, &c. scilicet, per la ley de saint esglise. Mes autrement est de bastard que n'ad ascun * maner colour d'entre come heire, entant que il ne poit per nul ley estre dit mulier, car tiel bastard est dit en la ley, quasi nullius filius, &c.*

BUT it hath beene the opinion of some, that this shall be intended where the father hath a sonne bastard by a woman, and after marrieth the same woman, and after the espousels he hath issue by the same woman a son or a daughter, and after the father dieth, &c. if such bastard entreth, &c. and hath issue and die seised, &c. then shall the issue of such bastard have the land cleerely to him, as it is said before, &c. and not any other bastard of the mother which was never married to his father. And this seemeth to be a good and reasonable opinion: for such a bastard borne before marriage celebrated betweene his father and his mother, by the law of holy church is *mulier*, albeit by the law of the land he is a bastard, and so he hath a colour to enter as heire to his father, for that he is by one law *mulier*, scilicet, by law of holy church. But otherwise it is of a bastard which hath no manner of colour to enter as heire, in so much as hee can by no law bee said to be *mulier*, for such a bastard is said in the law to be *quasi nullius filius*, &c. (2)

Mes

* *maner* not in L. and M. but in Roh.

(1) In the case of *Pride v. the earls of Bath and Montague*, it was held, that the rule that a person shall not be bastardized after his death, is only good in the case of bastard eigne and *mulier puisne*. 1. Salk. 120.

(2) Nota. 2. Inst. 96. 97. On the statute of Merton, Pope Alexander III. (ann. 1165. 6. H. 2.) ordained, that children born before matrimony, where matrimony follows, should be as legitimate as those born after marriage, quia ecclesia tales habet pro legitimis. — Constitutio pontifica, or the canon law, est intelligenda solummodo de filiis natis ex coitu, qui poterunt esse conjugales; qui vero ex damnato coitu nascuntur, scilicet ex coitu incestuoso vel adulterino, cujusmodi coitus non poterat esse uxorius, tamen nunquam legitimari possunt per subsequens matrimonium. Ratio est quia matrimonium subsequens ex fictione legis retrahitur ad tempus susceptionis liberorum, ut legitimati habeantur legitime suscepti (i. e.) post contractum matrimonium. Fictio autem juris nunquam admittitur contra naturam et bonos mores. Quapropter lex non potest fingere matrimonium fuisse cum eis, cum quibus nuptie non potuerunt esse per leges; quia in fictionibus translationis requiritur habitus extremorum a quo et ad quem. Ideoque leges civiles et decretales olim matrimonium inter adulteros prohibebant, contractumque dirimebant. Jam vero ista prohibitio locum non habet, nisi in mortem prioris conjugis alteruter fuerit machinatus, vel prematurus, dum adhuc viveret, de contrahendo post mortem ejus connubio pacta fuerit fides. Secundò, notandum est quòd subsequens matrimonium legitimos facit quoad spiritualia, non quoad temporalia, quia Papa non potest legitimare, quoad temporalia, extra sui ipsius dominica, scilicet extra terras que sunt de patrimonio sancti Petri, quod Papa Innocentius III. committatur (ergo Anglia non est ex patrimonio sancti Petri quicquid fecerit Rex Johannes). Et Sanchez quem Clemens III. valde laudavit, aperte dicit si proles habita sit ex concubitu omnino fornicario, eam non posse pontificem, quoad temporalia et secularia, legitimare. All this was said and proved out of antient authors by a learned advocate, whose discourse is printed at large in the modern arrears collected by Mons. de Maisons, Arreft 20. And there the principal case was, the uncle, in the life of his wife, had a child by his niece and god-daughter, on promise of marriage when time should serve; the wife dies, and then the uncle had other children, and ten years after, by dispensation from the pope, containing a clause of legitimization of the children born before, marries her. Res. The pope's dispensation was void as to any legitimization, which, whether it were because the marriage were within the Levitical degrees, or because of spiritual kindred, or because against the council of Trent, a general council being held by the Sorbonne to be above the pope, appears not; but may be for all these reasons, or for none of them, but only because the pope cannot legitimate in temporalis. 2dly, That the children of this marriage should have portions to live on, which may seem to approve the dispensation as to the marriage. 3dly, That no such be granted for the future. Ibid. 360. Romani filios naturales tantum non alio jure habuerunt quam peregrinos. Theodosii & Arcadii principatu temperata fuit legum severitas, ac deinde Zenonis lege obtinuit, ut naturales liberi consequentibus eum matre nuptiis iusti ac legitimi haberentur. Eodinus de Repub. lib. 1. cap. 4. p. 29. Sed nota, quòd ante Zenonis tempora, viz. per legem Divi Constantini, nati ante matrimonium, fiebant legitimi per matrimonium subsequens; quod tamen explicatur in eodem codice, viz. per matrimonium legitimantur liberi naturales modò procreati sunt muliere liberâ, & cujus matrimonium non est legibus interdictum. Vide Mons. de Maisons, Arreft 20. page 359 — Lord Nott. 215.

MES ad este l'opinion d'ascuns, &c. And our author here saith, that this opinion is good and reasonable, for that such a bastard, by the law of holy church (*) is a mulier.

Matrimonium subsequens legitimos facit quoad sacerdotium non quoad successionem. propter consuetudinem regni quod se habet in contrarium. Yet the canon law holdeth them legitimate quoad successionem. At a parliament holden [q] anno 20. H. 3. for that to certify upon the king's writ, that the sonne borne before marriage as a bastard, was contra communem formam ecclesie, rogaverunt omnes episcopi magnates ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis: et omnes comites & barones una voce responderunt, quod nolant leges Anglie mutare, quae hucusque usitatae sunt & approbate.

Issint que il ad un colour d'entre, &c. Here it is to be observed, that the law more respecteth him that hath a colourable title, though it be not perfect in law, than him that hath no title at all, as hath beene said (r) before. (1)

* Vid. Britton fol. 128. b. 166. 203. And the statute of Merton 20. H. 3. cap. 19. confirmeth this opinion. Hil. 18. E. 3. coram rege in Thesaur. Eborum. Bracton lib. 2. fol. 63.

[q] Statut. de Merton. 20. H. 3. cap. 9. Vid. Bract. 1. 5. f. 416. 417. 10. Aff. Pl. 20.

[r] Vide Sect. 397. & cap. garr. Sect.

Sect. 401.

MES en le case avant dit, lou le bastard enter apres la mort le pier, et le mulier luy ousta, et puis le bastard disfeist le mulier, et ad issue, et devie seisie, et l'issue enter, donque le mulier poit aver briefe d'entre sur disfeisin envers l'issue del bastard, et recovers la terre, &c. Et issint poies veir le diversite lou tiel bastard continue la possession tout sa vie sans interruption, et lou le mulier enter et interrupt le possession de tiel bastard, &c.

BUT in the case aforesaid, where the bastard enter after the death of the father, and the mulier oust him, and after the bastard disfeise the mulier, and hath issue and dieth seised, and the issue enter, then the mulier may have a writ of entrie sur disfeisin against the issue of the bastard, and shall recover the land, &c. And so you may see a diversity where such bastard continues the possession all his life without interruption, and where the mulier entreth and interrupts the possession of such bastard, &c.

ET le mulier luy ousta. An estranger in the name of the mulier without his commandement cannot enter upon the bastard, for that the bastard may gaine the estate and barre the mulier. And therefore regularly none shall enter but the mulier, or some other by his commandement. And therefore Littleton saith (and the mulier put him out) no more than in the case [a] of the lord Audley: for there an estranger of his owne head could not enter in the name of him that right had to enter within the five yeares to avoid the fine. But in both those cases, first, if the mulier agree thereunto before the descent of the bastard; or secondly, if he that right hath before the five yeares be past do assent thereunto, the claime is good, and shall avoid the estate both of the bastard and of the consuee, as it was holden in the lord Audley's case, quia omnis ratihabitio retrotrahitur & mandato equiparatur, and it standeth well

[a] Mich. 38. & 39. Eliz. in the king's bench upon evidence by the whole court. Vide 31. H. 8. contr. conge. Br. 123.

4. H. 7. cap.

with the words of the statute, so that they pursue their title, &c. by way of action or entry; and so is the booke in [b] 31. H. 8. to be intended.

But in the case of the bastard cigne, which is Littleton's case, gardein in socage, or gardein in chivalrie, may enter, for they are no strangers, as in another place is plainly shewed. If an infant make a feoffment in fee, an estranger of his owne head cannot enter [c] to the use of the infant, for the estate is voidable. But where an infant or a man of full age is disfeised, an entrie by a stranger of his owne head is good, and vesteth presently the estate in the infant, or other disfeisee. So it is if tenant for life make a feoffment in fee, an estranger may enter for a forfeiture in the name of him in the reversion, and thereby the estate shall be vested in him, et sic de similibus.

Vide Sect. 334.

[b] 31. H. 8. contr. conge. Br. 123.

[c] Pasch. 39. Eliz. in communi banco per curiam. 10. H. 7. 16. 7. E. 3. 69. 26. E. 3. 62. per Thorp. 45. E. 3. release 28. 11. Aff. 11.

Lou

(1) Both by the civil and canon law, children born before marriage are made legitimate by the subsequent marriage of their parents. This was established in the civil law by the emperor Constantine, and confirmed by the emperor Justinian. It was established in the canon law by a constitution of pope Alexander the Third, in 1160. This legitimation is a privilege or incident inseparably annexed to the marriage; so that tho' both the parents and the children should waive or refuse it, the children nevertheless would be legitimate. But it holds in these cases only where, at the time of the birth of the children, it was lawful for both parents to intermarry; for if the father were married to another woman at the time of the birth of the children, and afterwards his wife died and he married the mother of the child, the child would not be legitimated by this subsequent marriage. Children thus legitimated are on an equal footing with the legitimate children; and if they die before the marriage of their parents, still they are considered as legitimate, and transmit their legitimacy to their issue: but whether they are considered legitimate from the time of the marriage of their parents, or whether their legitimacy by their parents' marriage has a relation back only to the time of their birth, is a point warmly disputed by the civilians and canonists. The prevailing opinion seems to be, that they are to be considered as legitimate from the time of their birth to all purposes but those in which to consider them as such would operate to the detriment of a third person. Thus, if there be a natural-born child, and the father afterwards marries and has sons; his wife dies, and he marries the woman by whom he had the natural child; it seems to be the better opinion, that the child legitimated by the subsequent marriage does not acquire the right of progeniture over the sons of the first marriage. The doctrine of legitimacy by a subsequent marriage was never admitted into the English law; and the refusal of the noblemen of our nation to admit it, on the occasion mentioned in sir Edward Coke's Commentaries, is spoken of by sir William Blackstone and other writers as a memorable instance of their jealousy of the civil law, and their firmness in opposing foreign innovations. The doctrine of legitimation prevails, with different modifications, in France, Germany, and Holland. By an arret d'audience of the 21st of June, 1668, it was adjudged, that if a person marries in England a woman by whom he had children previous to the marriage, the children born in France are legitimated by it, and acquire all the rights of legitimacy under the French law. See c. 10. C. de Natur. lib. Nov. 89. c. 8. Vinn. in Inst. l. 1. t. 10. f. 13. Hein. Elem. Jur. de Legitimatione. Traité des Successions par le Brun, ed. 1776. lib. 1. c. 2. f. 1. D. 1. l. 2. c. 2. f. 1. n. 13. and sir John Fortescue, c. 39. Till the statute of Merton, the question whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But after the solemn protest made by the barons at Merton against the introduction of the doctrine of the civil and canon law in this respect, *special bastardy* has been always triable at common law; and *general bastardy* alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2. Ingg. Reeves's Hist. of the English Law, 85. 201. and see ant. note 2. to page 126. 2.

Lou tiel bastard continue tiel possession sans interruption. If the *mulier* entred upon the bastard, and the bastard recovereth the land in an assise against the *mulier*, now is the interruption avoided; and if the bastard dieth seised, this shall barre the *mulier*.

3. Aff. 9.

If the bastard eigne after the decease of the father entred, and the king seifeth the land for some contempt supposed to be committed by the bastard, for which no freehold or inheritance is lost, but only the profits of the land by way of seifure, and the bastard die, and his issue is upon his petition restored to the possession, for that the seifure was without cause, the *mulier* is barred for ever; for the possession of the king when he hath no cause of seifure shall be adjudged the possession of him for whose cause he seifed. But if after the death of the father the *mulier* be found heire and within age, and the king seifeth, in that case the possession of the king is in right of the *mulier*, and vesteth the actual possession in the *mulier*, and consequently the bastard eigne is fore-closed of any right for ever.

And so it is when the king seifeth for a contempt, or other offence of the father, or of any other ancestor; in that case, if the issue of the bastard eigne upon a petition be restored, for that the seifure was without cause, the *mulier* is not barred, for the bastard could never enter, and consequently could gain no estate in the land, but the possession of the king in that case shall be adjudged in the right of the *mulier*. And it is to be observed, that the bastard must enter in *vacuam possessionem*, and continue during his life, without interruption made by the *mulier*.

Pl. Com. Parson de Honylane's case, 91.

35. H. 6. 24. 21. H. 6. 9.

1. E. 4. 3. 21. E. 4. 5.

5. E. 4. 60.

Interrupt le possession del bastard, &c. If the bastard invite the *mulier* to see his house, and to see pictures, &c. or to dine with him, or to hawk, hunt, or sport with him, or such like upon the land descended, and the *mulier* commeth upon the land accordingly, this is no interruption, because he came in by the consent of the bastard, and therefore the coming upon the land can be no trespass; but if the *mulier* commeth upon the ground of his own head, and cutteth downe a tree, or diggeth the soile, or take any profit, these shall be interruptions; for rather than the bastard shall punish him in an action of trespass, the act shall amount in law to an entry, because he hath a right of entry. So it is if the *mulier* put any of his beasts into the ground, or command a stranger to put on his beasts, these doe amount to an entry; for albeit in these cases the *mulier* doth not use any express words of entry, yet these, and such like acts, doe without any words amount in law to an entry; for acts without words may make an entry, but words without an act (*viz.* entry into the land, &c.) cannot make an entry, (all which interruptions are implied in the said *&c.*) More shall be said hereafter of Interruptions, in the chapter of Continuall Claime.

Sect. 402.

Brooke tit. descent. 40.

SI un enfant deins age ad cause d'entrer.

If a man seised of lands in fee die, his wife *privement enseint* with a son, and a stranger abate and die seised, and after the sonne is borne, hee shall bee bound by the descent, because hee at the time of the descent had no right to enter, and this is to be gathered upon these words of *J. titleton*, *ad cause d'entrer*, which at the time of the descent he hath not.

20. H. 6. 28. b. 2. E. 4. 25. 26.
15. E. 4. descent. 30.

Est eins per descent, &c. Here is implied any other heire, collaterall or lineall.

An infant is accounted in law (as hath beene often said,) [d] untill he passeth the

ITEM, si un enfant deins age

ad tiel cause de entry en ascuns terres ou tenements sur un autre, que est seise en fee, ou en fee taile de mesme les terres ou tenements, si tiel home que est tielment seise, morust de tiel estate seise, et les terres descendent a son issue durant le temps que l'enfant est deins age, tiel descent ne tollera

ALSO, if an infant within age hath

such cause to enter into any lands or tenements upon another, which is seised in fee, or in fee taile of the same lands or tenements, if such man who is so seised, dieth of such estate seised, and the lands descend to his issue during the time that the infant is within age, such descent shall not take away the entry of the

l'entry

[d] Vide Sect. 259. 403:

l'entry l'enfant, mes que il poit enter sur le issue que est eins per discent, &c. pur ceo que nul laches ferra adjudge en un enfant deins age en tiel case.

infant, but that hee may enter upon the issue which is in by discent, for that no laches shall be adjudged in an infant within age in such a case.

age of 21 yeares, and certaine privileges hee hath in respect of his infancy.

Nul laches ferra adjudge en le enfant deins age en tiel case.

And Littleton well added (*en tiel case*) that is, in case of discent, for in some other cases, laches shall prejudice

33. E. 3. quar. imp. 46.
(Ant. 171 a. Post. 337. b. 350. b. 380.)

Pl. Com. 372.
(F. N. B. 33 b. 6. Rep. 48. b. 3. Rep. 84.)

(Post. 318. a. 357. a.)

[c] 11. E. 4. 1. 2.
F. N. B. 35. m.

[f] 35. H. 6. 60.

an infant. As laches shall be adjudged in an infant, if he present not to a church within six moneths, for the law respecteth more the privilege of the church (that the cure bee served) than the privilege of infancy. And so the publike repose of the realme, concerning mens freeholds and inheritances, shall be preferred before the privilege of infancy, in case of a fine, where the time begins in the time of the ancestor. So non-claim of a villaine of an infant by a yeare and a day, who hath fled into ancient demesne, shall take away the seisure of the infant. And if an infant bring not an appeale of the death of his ancestor within a yeare and a day, he is barred of his appeale for ever, for the law respects more liberty and life than the privilege of infancy. And here it is to be observed, that Littleton putteth his case, that an infant shall enter upon a discent, when a stranger dieth seised, but hee put it not so before, in the case of the bastard eigne. B. tenant in taile infeofeth A. in fee, A. hath issue within age and dieth, B. abateth and dieth seised; the issue of A. being still within age, this discent shall binde [e] the infant, for the issue in taile is remitted: and the law doth more respect an ancient right in this case, than the privilege of an infant that had but a defeasible estate. And it is said [f] if the king die seised of lands, and the land descend to his successor, that this shall bind an infant, for that the privilege of an infant in this case holds not against the king (1).

Sect. 403.

ITEM, si le baron et sa feme, come en droit la feme, ont tite et droit d'enter en tenements que un auter ad en fee, ou en fee taile, et tiel tenant morust seisie, &c. en tiel case l'entrie le baron est tolle sur l'heire que est eins per discent. Mes si le baron devie, donque la feme bien poit enter sur le issue que est eins per discent, pur ceo que laches le baron ne turnera la feme ne ses beires en prejudice ne en damage

ALSO, if husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee taile, and such tenant dieth seised, &c. in such case the entry of the husband is taken away upon the heire which is in by discent. But if the husband die, then the wife may well enter upon the issue which is in by discent, for that no laches of the husband shall turn the wife or her heires to a ny prejudice nor losse

SI baron et feme, come en droit sa feme, ont tite et droit d'enter, &c. et tiel tenant morust seisie, &c.

These words are generally, but are particularly to be understood, viz. when the wrong was done to the wife during the coverture; for if a feme sole be seised of lands in fee, and is disseised, and then taketh husband; in this case the husband and wife, as in the right of the wife, have right to enter, and yet the dying seised of the disseisor in that case shall take away the entry of the wife after the death of her husband; and the reason is aswell for that shee herselfe when shee was sole, might have entred and recontinued the possession, as also it shall be accounted her folly that shee would take such a husband which would not enter before the discent.

9 H. 7. 24. a. 2. E. 4. 25.
7 E. 3. 47. b. 20. H. 6. 28. b.
42. E. 3. 12.

15. E. 4. discent. 30.

But

(1) This and many other passages in this work, respecting the operation and force of the acts of infants, were fully considered in the cases of Zouch v. Parsons, 3. Burr. 1794; and May v. Hook, heard before lord chancellor Bathurst, in 1773. — There being no printed account of the last case, it may not, perhaps, be unacceptable to the reader to find an account of it here. — Ann May and her two sisters were, under their father's will, seised of a considerable freehold estate; and possessed of a considerable leasehold estate, as joint-tenants. Previous to the marriage of Ann May with John Hook the defendant, she being then an infant, by articles of agreement dated the 28th of October 1761, and made between her of the first part, John Hook of the second part, and trustees of the third part, it was covenanted and agreed, that the leasehold estates should be assigned to John Hook for his own use and benefit; and that the freehold estates should be settled on him for life; and then on her for her life; remainder to their first and other sons successively in tail male; — remainder to their daughters, as tenants in common in tail; remainder to John Hook in fee. And he covenanted to pay 100 l. to the trustees upon trust to pay Ann Hook, if she survived him, the interest of it for her life, and after her decease to divide it among the children. — Afterwards Ann May died under age. The question was, Whether these articles were in equity a severance of the joint-tenancy? Lord chancellor Bathurst, when he made his decree in this cause, observed, that the first point attempted to be established by the counsel was, that had Ann May been of full age when she entered into the articles, they would have amounted to a severance; but that no determination to that effect had ever been made: — That the co-joint-tenants were not, in this case, to be considered as volunteers, as they claimed by title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor: — That the utmost which the infant could do would be an avoidable act; and that, of course, it would be in the discretion of the court either to give or refuse their assistance to it; and, by a parity of reason, it must always be in their power to model his contracts at their pleasure: — That the contract, in the present case, was not such as the court would uphold. Had the infant lived to come of age, and a bill been filed against her for a performance of the articles, the court would have set them aside, and referred it to a master to draw new proposals for a proper settlement: — That as the contract was not such as would have bound the infant herself, *à fortiori* it should not bind the co-joint-tenants: — That it would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint-tenancy, as if that were allowed, it would always be in the power of the infant to say, whether the joint-tenancy should be severed or not; then, if any of the co-joint-tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the co-joint-tenants. — On these grounds his lordship was of opinion, that the articles did not amount in equity to a severance of the joint-tenancy.

9. H. 7. 24.

But there if the woman were within age at the time of her taking of husband, then the dying feised shall not after the decease of her husband take away her entry; because no folly can bee accounted in her, for that shee was within age when shee tooke husband, and after coverture she cannot enter without her husband; all which is implied in the said (Sec.)

en tiel cas, mes que la feme et ses heirs bien poient enter, lou tiel discent est eschue durant le coverture.

in such case, but that the wife and her heires may well enter, where such discent is eschued during the coverture.

Vid. Sect. 402.

(Hob. 96. Ant. 233. b. 1. Lev. 266. 8. Rep. 100. 1. Roll. 421. Flo. 235.)

27. H. 6. 28. b.

[*] 31. All. p. 17. 42. F. 3. 1. Pl. Com. 55. 10. H. 7. 13. H. 7. 35. H. 6. 41. Pl. Com. 136. b. Fleta lib. 2. cap. 50.

[e] Le statute de Merton ca. 5.

Laches le baron ne turnera la fem, &c. al prejudice, &c. Laches signifieth in the common law, retchlesnesse, or negligence, *et negligentia semper habet infortunium comitem*. Here is a diversity to be observed, that albeit regularly no laches shall be accounted in infants, or feme coverts, as is atresaid, for not entry or clayme to avoid discents, yet laches shall be accounted in them for no performance of a condition annexed to the state of the land. For if a feme be infeoffed either before or after marriage, reserving a rent, and for default of payment a re-entry; in that case, the laches of the baron shall disherit the wife for ever. And so it is [u] of an infant; his laches, for not performing of a condition annexed to a state, either made to his ancestor or to himselfe, shall barre him of the right of the land for ever.

If a man make a feoffment in fee to another reserving a rent, and if he pay not the rent within a moneth, that he shall double the rent, and the feoffee dieth, his heire within age, the infant payeth not the rent, he shall not by this laches forfeit any thing. But otherwise it is of a feme covert; and the reason and cause of this diversity is, for that the infant is provided for by the statute, [o] *non current usura contra aliquem infra etatem existentem* &c. But that statute doth not extend to a feme covert, neither doth that statute extend to a condition of a re-entry; which an infant ought to performe, for the forfeiture thereof cannot bee called *usura*.

* Sect 404.

MES la court tient, lou tiel title est done al feme seile, que puis prent baron que n'entra pas, eins suffer un discent, &c. la auter est, car serra dit la folly le feme de prendre tiel baron que n'entre en temps, &c.

BUT the court holdeth, where such title is given to a fem sole, who after taketh husband which doth not enter, but suffer a discent, &c. there otherwise it is, for it shall be said the folly of the wife to take such a husband which entered not in time, &c.

9. H. 7. 24.

THIS is added, and therefore, as formerly I have done, I meddle not withall; howbeit the opinion is holden for law, as it appeareth in the section next precedent.

Sect. 405.

HERE Littleton explaineth a man of no sound memorie to be *non compos mentis*. Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like, for *non compos mentis* is most sure and legall. (1)

Non compos mentis is

ITEM, *si home que est de non sane memorie, que est a dire en Latin, qui non est compos mentis, ad cause d'entre en ascuns tiels tenements, si tiel discent, ut supra, soit ewe en sa vie durant le temps que il fuit de*

ALSO, if a man which is of non sane memory, that is to say in Latine, *qui non est compos mentis*, hath cause to enter into any such tenements, if such discent, *ut supra*, bee had in his life during the time that hee was not of sound

non

* This Section is not in L. and M. nor Roll.

Pl. Com. fo. 368. b. per Sanders. lib. 4. fo. 127. 182. Beverley's case. Mirror cap. 1. sect. 9. ca. 5. f. 1. Bract. fo. 165. and 420. Britton fo. 167. b. 217. 66. Fleta li. 6. c. 39. Fitz. N. B. 222. b. Stanf. Prior. 13. 31. (Hob. 96. Sid. 112.)

(1) *Scotch Pleading, anno C. 1. case 5. pages 69 and 70, and Sir Thomas Stewart's case.* Fatui five idiotae sunt illi tantum, qui omni ratiocinatione et judicio carent, truci, tardi, moriones, macarones, qui inopia calor et spirituum laborant. Furor est dementia cum ferocia, et horrenda actionum vehementia. Fromanus de jure furiosorum, p. 6. Furor dividitur in continuum; ubi anomus continua mentis agitatione semper accenditur; et interpolatum seu intervallatum; qui dilucida habent intervalla; quorum furor habet inducias, et quos morbus non sine laxamento aggreditur; qui testamentum facere possunt; & quos furor stimulis suis variatis vicibus accendit. In these fury and madness is but an ague or a distase; in the others, it is temperant and complexion. Again, among those who have lucid intervals, it may be fit to distinguish between those who have only remissionem seu adumbatam quietem, and those who have intermissione seu resipiscientiam integram. *Intermittentes deposing sane menti, are preferred and believed before an hundred touching fury and madness.* Melancholy and hypochondriac vapours are like storms at sea, which, though they disturb for a while, yet they do not hinder the returning to the former calm; semel furibundus, semper furibundus presumitur; and therefore where the question is of a fact done lucido intervallo, which may be either by remission or intermission, it is not enough to shew the act was actus sapienti conveniens, for that may happen many ways; but it must be proved to be actus sapientis, and to proceed from judgment and deliberation, else the presumption continues. Lord Nott. MS.

*non sane memorie, et puis devia, son heire bien poit enter sur luy que est eins per discent. Et en cest case poyes veier un cas, que l'heire poit enter, et uncore son ancesster que avoit mesme le tittle ne puis- soit enter. Car celui que fuit hors de sa memorie al temps de tiel discent, s'il voile enter apres tiel discent, si action sur ceo soit sue envers luy, il n'ad riens pur luy a pleder, ou de luy ayder, mes a dire, que il fuit de non sane memorie al temps de tiel discent, &c. Et acco ne serra il reservee a dire, pur ceo que nul bome de pleine age serra reservee en aucun plee per la ley a * disabler le person demesne, mes le heire bien poit disabler le person son ancesster pur son advantage † demesne en tiel cas, pur ceo que nul laches poit estre adjudge per la ley en celui que ad nul discretion en tiel case.*

memorie, and after dieth, his heire may well enter upon him which is in by discent. And in this case you may see a case, where the heire may enter, and yet his ancestor which had the same title could not enter. For hee which was out of his memorie at the time of such discent, if hee will enter after such a discent, if an action upon this be sued against him, he hath nothing to plead for himselfe, or to helpe him, but to say, that hee was not of sane memorie at the time of such discent, &c. And he shall not bee received to say this, for that no man of full age shall bee received in any plea by the law to disable his owne person, but the heire may well disable the person of his ancestor for his owne advantage in such case, for that no laches may bee adjudged by the law in him which hath no discretion in such case.

of foure sorts: 1. *Ideota*, which from his nativite, by a perpetuall infirmitie, is *non compos mentis*. (2. Inst. 14.)

2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding.

Lib. 4. 124. 125. Beverley's case.

3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he hath not understanding. Lastly, hee that by his owne vicious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken. But that kinde of *non compos mentis* shall give no privilege or benefit to him or to his heires. And a discent shall (1) take away the entrie of an ideot, albeit the want of understanding was perpetuall; for Littleton speaketh generally of a man of non sane memorie. So likewise if a man that becomes *non compos mentis* by accident, as is aforesaid, be diseased and suffer a discent, albeit he recover his memorie and understanding againe, yet hee shall never avoid the discent; and so it is *a fortiori* of one that hath *lucida intervalla*. As for a drunkard, who is *voluntarius demon*, he hath (as hath beene said) no privilege thereby, but what hurt or ill soever he doth, his drunkennesse doth aggravate it: *Omne crimen ebrietas & incendit, & detegit*.

(8. Rep. 170.)

(Flo. Com. 19.)

(4. Rep. 123. b. F. N. B. 232.)
39. H. 6. 42. b. Abb. Aff. 89. b.
F. N. B. 202. 5 E. 3. 70. Brit-
ton, cap. 28. fol. 66. 25. Aff.
pl. 4. 35. Aff. pl. 10.

32. E. 3. tit. Scire fac. 160.
Stanf. Pr. 34. F. N. B. 202. 2.
Beverley's case, lib. 4. 126.
127. 128.

If an ideot make a feoffment in fee, he shall in pleading never avoid it, by saying that hee was an ideot at the time of his feoffment, and so had beene from his nativite. But upon an office found for the king, the king shall avoid the feoffment, for the benefit of the ideot, whose custodie the law giveth to the king.

So it is of a *non compos mentis* by accident, and of him *qui gaudet lucidis intervallis*, if an estate be made during his lunacie: for albeit the parties themselves cannot bee received to disable themselves, yet twelve men upon their oathes may finde the truth of the matter. But if any of them alien by fine or recoverie, this shall not onely binde himselfe, but his heires also. (2) As amongst other things requisite to be knownen, these cases you shall finde at large in my Commentaries, whereunto, for brevite, I referre the reader; upon all which bookes there have beene foure severall opinions concerning the alienation, or other act of a man

* *desluiser et*, added L. and M. and Roh.

† *demesne—del heire*, L. and M. and Roh.

(1) In all the editions except the first, the word *not* is here erroneously inserted.

(2) Lord Hobart observes in the case of Needler v. Bishop of Winchester, that in these cases "the law finds these persons not so disabled, nor admits the averment of such disablement, because it is certified by invincible and indisputable credit of the judge, that they were perfect and able persons. And so here is a law of policy that doth not cancel the law of nature, but doth only bound it in point of form and circumstance; it being better to admit a mischief in particular, even against the law of nature, than an inconvenience in general: and it is not the law of nature to admit any improbable surmise against authentic record or evidence." Hob. 224.—Sir Ed. Coke observes, post. 380. b. that the only mode by which an infant can reverse a fine levied by him, is by appearance in court during his infancy, and being inspected by the judges; *non testium testimonio, aut jur. aorum veredicto, sed judicis inspectione solammodo*; the judges may, however, inform themselves in cases of this kind by means of witnesses, church books, or any other kind of evidence. It appears a great hardship that infants should not be permitted to reverse their fines after they attain their full age; and it seems unaccountable that the law, which will not permit them to do it after they attain their full age, should permit them to do it before that age. The objection, that no averment can be made against any fact which is now upon record, applies as much to them before their attaining their full age as after. But the contrary has been too often established to be now called in question. See Ann Hungate's case, 12 Rep. 122. Warcomb v. Carrill, ib. 124. Herbert Parrat's case, 2 Vent. 30. Hutchison's case, 3 Lev. 36. Requisite v. Requisite, Bullstr. p. 2. 320. Sarah Gufforth's case, 12 Mod. 444. With respect to the fines levied by ideots and lunatics, see 12. Rep. 124. Hugh Lewis's case. 10. Rep. 42. b. But infant trustees within the stat. 7. Ann. c. 19. may both levy fines, and suffer common recoveries. See 3. Atk. 479. 559. Com. Rep. 615. Barnes's Case of Pract. 217. See also Fitz. Nat. Bre. 202. where much argument is used to shew, that a *non compos* may plead his disability to avoid his own acts as well as an infant; and 2. Blac. Com. ed. 5. p. 291. But in Stroud v. Marshall, Cro. Eliz. 398, debt upon obligation, the defendant pleaded, that at the time of the obligation made, he was *de non sane memory*; and it was thereupon demurred, and adjudged to be no plea; for he cannot save himself by such a plea, and the opinion of Fitzherbert was held to be no law.

Vide Rr. tit. Dum fuit infra
ætatem 3.

Tr. Lib. 4. fol. 126, 127.
(Flo. 19. a. F. N. B. 232.)

26. Aff. 27. 21. H. 7. 31. Stan-
ford 16. b. 8. E. 2. Coron. 412.
414. 251. 22. E. 3. ibid. 224.
Beverley's case, ubi supra.
F. N. B. 202. D. 2. H. 7. 2. Vide
3. E. 3. tit. Entry Cong. Statham.
12. E. 4. 8. 39. H. 6. 4. Abbr.
Aff. 89. 39. H. 6. 43.
(Poll. 265.)

15. E. 4. tit. Discent 30.

(Ant. 53. b. 200. b.)

man that is *non compos mentis*, &c. For, first, some are of opinion, that hee may avoid his owne act by entrie, or plea. Secondly, others are of opinion, that he may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea, or by writ, and of this opinion is *Pitchebert* in his *Natura Brevium, ubi supra*. And *Littleton* here is of opinion, that neither by plea, nor by writ, nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was *non compos mentis*) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so was it resolved with *Littleton* in *Beverley's* case; [r] where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe. But this holdeth only in civil causes; for in criminall causes, as felonie, &c. the act and wrong of a madman shall not bee imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens (id est) sine mente*, without his minde or discretion; and *furiosus solo furore punitur*, a madman is only punished by his madnesse. And so it is of an infant, untill he be of the age of fourteene, which in law is accounted the age of discretion.

Et en cest case poyes veir un case, &c. And though *Littleton* saith (one case), yet other cases may be found to the same end. For if there be grandfather, father, and son, and the father disseise the grandfather, and make a feoffment in fee, without warrantie, the grandfather dieth, albeit the right descend to the father, he cannot by this right descended, enter against his owne feoffment; but if he die, the sonne shall enter, and avoid the estate of the feoffee.

So if the grandfather be tenant in taile, and the father disseise him, *ut supra, mutatis mutandis*.

If lands be given to two and to the heires of one of them, he that hath the fee simple shall not have an action of waste upon the statute of *Gloucester*, against the joyntenant for life, but his heire shall maintaine an action of waste against him, upon the statute of *Gloucester*; so the heire shall maintaine that action, which the ancestor could not.

Sect. 406.

*ET si tiel home de non sane
memorie fait feoffment, &c.
il * mesme ne poit enter, ne aver
briefe appell' Dum non fuit com-
pos mentis, &c. causâ quâ supra:
mes apres † la mort son heire bien
poit enter, ou aver le dit briefe
Dum non fuit compos mentis a
son election. ‡ Mesme la ley est
lou enfant deins age fait feoffe-
ment, et devie, son heire poit en-
ter, ou aver un briefe de Dum
fuit infra ætatem, &c.*

AND if such a man of non sane
memorie make a feoffment,
&c. hee himselfe cannot enter, nor
have a writ called *Dum non fuit
compos mentis, &c. causâ quâ supra*:
but after his death his heire may
well enter, or have the said writ of
Dum non fuit compos mentis at his
choice. The same law is where
an infant within age maketh a
feoffment, and dieth, his heire may
enter, or have a writ of *Dum fuit
infra ætatem, &c.*

FAIT feoffment, &c. Or any other like conveyance *in pais*; but fines and other assurances of record are not implied in this (&c.)

Mesme la ley d'un enfant. This is true, as to the bringing of a *Dum fuit infra ætatem, &c.* but without question the infant in that case might have entred, as it appeareth in the next Section.

Briefe Dum non fuit compos mentis. This writ (as it appeareth by our author) lieth for the heire of him that was *non compos mentis*, and not for himselfe; but a *Dum fuit infra ætatem* lieth as well for the ancestor himself after his full age, as for his heire.

Sect.

* *mesme* not in L. and M. nor Roh.
† this Section not in L. and M. nor Roh.

† *la*—*sa* L. and M. and Roh.

‡ *&c.* added L. and M. and Roh. The rest

Sect. 407.

ITEM, si jco sue • disseis per un enfant deins age, lequel aliena a un autre en fee, et l'alienee devie seisie, et les tenements descendont a son heire, † esleant l'enfant deins age, mon entry est tolle &c †.

ALSO, if I be disseised by an infant within age, who alieneth to another in fee, and the alienee dieth seised, and the lands descend to his heire, being an infant within age, my entrie is taken away, &c.

Sect. 408.

MES si l'enfant deins age enter sur l'heire que est § eins per discent, come il bien poit, pur ceo que || mesme le discent fuit durant son nonage, donque jco bien puisse enter sur le disseisor, pur ceo que per son entrie il ad defeat et anient le discent.

BUT if the infant within age enter upon the heire which is in by discent, as he well may, for that the same discent was during his nonage, then I may well enter upon the disseisor, because by his entrie hee hath defeated and taken away the discent.

H E R E it appeareth, that the entrie of the infant is lawfull, and giveth advantage to the disseisee to enter also, because the discent, which was the impediment, is avoided. And it is to be observed, that if the discent be cast, the infant being within age, he may enter at any time, either within age, or after his full age.

And so it is if an infant make a feoffment &c. he may enter either within age, or at any time after his full age, and so in both cases may his heire.

Vide the next Sect. following.

43. E. 3. tit. Entr. Cong.
Vet. N. B. 126. b.
F. N. B. 192.
45. E. 3. 21.

Sect. 409.

EN mesme le manner est, lou jco sue disseisie, et le disseisor fait feoffment en fee sur condition, et le feoffee morust de tiel estate seisie, ¶ jco ne purroy ** my enter sur †† l'heire le feoffee: mes si le condition soit enfreint, issint que pur cel cause le feoffor enter sur l'heire, ore jco bien puisse enter, pur ceo que quant le feoffor ou ses heires entrent pur le condition enfreint, le discent est ousterment defeat, &c. ††

I N the same manner it is, where I am disseised, and the disseisor make a feoffment in fee upon condition, and the feoffee die of such estate seised, I may not enter upon the heire of the feoffee: but if the condition bee broken, so as for this cause the feoffor enter upon the heire, now I may well enter, for that when the feoffor or his heires enter for the condition broken, the discent is utterly defeated, &c.

T H E reason hereof is apparent, for cessante causa, cessat causatum. Tenant in capite maketh a feoffment in fee to the use of the feoffee and his heires, untill the feoffor pay an hundred pounds to him or his heires, the feoffee dieth his heire within age, now hath the king the wardship of the bodie, and is intruded to the gard of the land. But if the feoffor pay the hundred pounds according to the limitation, the wardship is devested, both for the body and the land, and so it is in case of a condition: for, as Littleton here saith, the discent, which is the cause of wardship, is utterly defeated. And by these two last cases which Littleton hath here put, it appeareth, that there is no difference, where the discent is disaffirmed by a right paramount, as where the state was never law-

Vide the Sect. next precedent.
Dyer 13. El. fol. 298. 299.
(Ant. 5. 395.)

(Ant. 76. b.)

* disseisie not in Roh. but in L. and M.

§ eins—heire, L. and M. and Roh.

** my not in L. and M. nor Roh.

† et added L. and M. and Roh.

|| mesme not in L. and M. but in Roh.

†† l'heire—la terre, L. and M. and Roh.

† &c. not in L. and M. nor Roh.

¶ &c. added L. and M. and Roh.

†† &c. not in L. and M. nor Roh.

lawfull, (as in the case of an infant,) and where the discent is affirmed for a time, the estate being lawfull, and being after defeated by matter *ex post facto*, by a title of re-entry.

Sect. 410.

Vid. Sect. 200.
(Ant. 132.)

ENTREN RELIGION, &c.

Here is implied profession. This discent shall not barre the entry of the disseisee, for that the discent commeth by the deed of the father, because he entred into religion, wherein there is an excellent point worthy of observation: for albeit the entry into religion make not the discent, but the profession, whereof you have read before, Sect. 200. yet here you may learne by *Littleton*, that the law respects the originall act, and that is, his entry into religion, which is his owne act, whereupon the profession followed: whereby the discent hapned; for, *Cujusque rei partissima pars, principium est*. And againe, *Origo rei inspicit debet*, whereof you shall make great use in reading of our bookes. * Here *Littleton* attributeth the cause of the discent to his entry into religion, which was his owne act, whereas a discent doth not take away an entry unlessse it commeth by death, which, as *Littleton* saith, is the act of God, and no glorious pretext of an act (no, though it bee of religion) shall work a wrong to a stranger, that hath right, to barre him of his entrie. But it is said, that in the case of the bastard cigne, and *mulier pueri*, such a discent shall bind the *mulier*, as before hath bene said, and such an heire that commeth in by such a discent, shall have his age.

Car si jco arraigne un assise, &c.

Nota, if a man be tenant or defendant in a reall or personall action, and hanging the writ the tenant or defendant entred into religion, by this the writ is not abated, because it is by his owne act. And so it is of a resignation; but otherwise it is of a deposition, or deprivation, because he is expelled by judgment, and yet his offence, &c. was the cause thereof, *sed in presumptione legis, judicium redditur in incertum*.

Moy de mon entry, &c. Here is implied, or any of my heires.

ITEM, si jco soy disseise, et le disseisor ad issue et enter en religion, per force de quel les tenements descendent a son issue, en cest case jco bien puisse enter sur l'issue, et uncore la fuit un discent. Mes pur ceo que tiel discent vient al issue per fait le pier, scilicet, pur ceo que il enter en religion, &c. et le discent ne vient a luy per fait de Dieu, scilicet, per mort, &c. mon entree est congeable. Car si jco arraigne un assise de novel disseisin envers mon disseisor, comment que il puit enter en religion, ceo ne abatera my mon briefe, mes mon briefe (ceo non obstant) esloyera en sa force, et mon recovre vers luy sera bonne. † Et per mesme le reason le discent que araigne a son issue per son fait demesne, ne tollera moy de mon entree, &c.

ALSO, if I be disseised, and the disseisor hath issue and entred into religion, by force whereof the lands descend to his issue, in this case I may well enter upon the issue, and yet there was a discent. But for that such discent commeth to the issue by the act of the father, *scilicet*, for that he entred into religion, &c. and the discent came not unto him by the act of God, (*scilicet*) by death, &c. my entry is congeable. For if I arraigne an assise of novel disseisin against my disseisor, albeit he after enter into religion, this shall not abate my writ, but my writ (notwithstanding this) shall stand in his force, and my recovery against him shall bee good. And by the same reason the discent which commeth to his issue by his own act, shall not take from me my entry, &c.

Sect.

(Ant. 126. b. 23. b. 3. Rep. 61.)

* Vid. Pl. Com. Dame Hale's Case.
6. E. 3. 41. &c.

10. E. 3. 55.
(Ant. 211.)

3. H. 6. 41. 10. H. 6. 10. b.
18. E. 4. 19. 9. E. 4. 25. 52.
7. E. 4. 15. 18. E. 3. 24. 25. E.
3. 29. 46. E. 3. 25. 30. E. 1.
Briefe 885. Bracton lib. 4. fo.
183. & lib. 5. fo. 414. 22. R. 2.
Briefe 936. 15. Aff. pl. 8.

* *non recovre* not in L. and M. nor Roh.

† *et* not in L. and M. nor Roh.

Sect. 411.

ITEM, si jeo leſſe a un home certaine terres pur terme de 20 ans, et un autre moy diſſeiſiſt, et ouſta le termor, et devie ſeiſie, et les tenements diſcendent a ſon heire, jeo ne purroy enter; et uncore le leſſee pur terme d'ans bien puit enter, pur ceo que il per ſon entry ne ouſta l'heire que eſt eins per diſcent de le franktenement que eſt a luy diſcendus, mes ſolement * clame d'aver les tenements pur terme d'ans, lequel n'eſt † pas expulſement de le franktenement del heire que eſt eins per diſcent. Mes autrement eſt ou mon tenant a terme de vie eſt ‡ diſſeiſie, cauſa patet, &c. ||

ALSO, if I let unto a man certain lands for the terme of twenty yeares, and another diſſeiſeth me, and ouſt the termor, and diſſeiſed, and the lands deſcend to his heire, I may not enter; and yet the leſſee for yeares may well enter, becauſe that by his entry hee doth not ouſte the heire who is in by diſcent of the freehold which is deſcended unto him, but only claymeth to have the lands for terme of yeares, which is no expulſion from the freehold of the heire who is in by diſcent. But otherwiſe it is where my tenant for terme of life is diſſeiſed, *cauſa patet, &c.* (1)

PUR terme de 20 ans.

It is cleere that a diſcent ſhall not take away the entry of a leſſee for yeares, as our author here ſaith, nor of a tenant by *elegit*, or tenant by ſtatute merchant, or ſuch like, as have but a chattle and no freehold; and the reaſon is, for that by their entry upon the heire by diſcent, they take no freehold (which, as often hath bin obſerved, is ſo much reſpected in law) from him; but otherwiſe it is of an eſtate for life, or any higher eſtate. And as a diſcent of a freehold and inheritance ſhall take away the entry of him that right hath to a freehold, or inheritance, ſo a diſcent of a freehold and inheritance cannot take away the entry of him that hath but a chattle, for that no diſcent or dying ſeiſed can be of the ſame.

(2) A man ſeiſed of an advowſon in fee, grants three avoydances one after another, and after the church becommeth void, and the grantor preſents, and his clark is admitted and inſtituted, and after the church becomes void againe, the grantee may preſent to the ſecond avoydance, for that he was not put out of

(See 2. Roll. Abr. 371. Hob. 322. 323. 5. Rep. 57. 102.)

the poſſeſſion thereof; for as the leſſor having the freehold and inheritance cannot diſſeiſe his leſſee for yeares, having but a chattle, that any diſcent may be caſt, to take away his entry (as *Littleton* here ſaith); ſo in the ſaid caſe, the grantor hath the franktenement and fee of the advowſon rightfully, ſo as he cannot make any uſurpation, to gaine any eſtate, or to put the grantee ſo out of poſſeſſion as that he ſhould not preſent, no more than the leſſee for yeares in this caſe, to enter. Alſo in reſpect of the privitie that is betweene them, the uſurpation of the grantor ſhall not put the grantee out of poſſeſſion for the two latter avoydances. And this was reſolved [a] by all the judges of the court of common pleas, which I myſelfe heard and obſerved.

[a] Hill. 18. Eliz. in communi banco.

Sect. 412.

ITEM, il eſt dit, que ſi home eſt ſeiſie de tenements en fee per occupation en temps de guerre, et ent moruſt ſeiſie en

ALSO, it is ſaid, that if a man be ſeiſed of lands in fee by occupation in time of warre, and thereof dieth ſeiſed in the

PER occupation en temps de guerre.

Fiſt, it is neceſſarie to be knowne, what ſhall bee ſaid time of peace, *tempus pacis*; (4. Inſt. 125.) and what ſhall be ſaid *tempus belli*, ſive guerra, time of warre. *Tempus pacis eſt quando*

* clame not in L. and M. nor Roh.
|| &c. not in L. and M. nor Roh.

† pas not in L. and M. nor Roh.

‡ diſſeiſie—ſeiſie, &c. L. and M. and Roh.

(1) A leaſe is conſidered as a covenant real, that binds the poſſeſſion of lands into whoſe hands ſoever it comes, if the lands be not evicted by a ſuperior title; yet the termor has not the freehold in him, but holds the poſſeſſion as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Now then, if the termor enters before the deſcent, he reverts the freehold in the diſſeiſee, who has the right of poſſeſſion; but if he enters after the deſcent, then he can only hold in the name of the freeholder, who has the preſent right of poſſeſſion, which is the heir of the diſſeiſor. *Gilb. Ten. 35.*

(2) *Hob. 322. 323. ſir William Elwis's caſe.* This very caſe was the principal point; and there, by *Hobart, Warburton, and Winch*, it was adjudged contra, that uſurpation by the grantor puts the grantee out of poſſeſſion, and gets all that was granted out, *Hutton diſſentiente*. But it appears that this place is good law, and that *Hobart erravit*. *Hil. 12. Car. C. B. Legge v. Archer.* A man leaſed an advowſon for yeares, and then preſented; this was ruled to be no uſurpation, but plenarily pro hac vice: this place is cited l. 8. uſurpation 5. idque ratione privitiae, ut inter coparceners, and becauſe it is againſt his own act. 3. Rep. *Dampford's caſe.* Lord Nott. MS.

Inter brevia de anno 1. E. 3. parte 1. & pasch. 28. E. 3. inter adjudicata coram rege. lib. 2. fol. 37. in thesaur. Pasch. 29. E. 3. inter adjudicata coram rege in thesaur. lib. 2. fol. 92. (Cro. Car. 71.)

14. E. 3. tit. seire facias 122. but more fully in the record at large.

Bracton lib. 4. fol. 240.

Logham cap. de novel disseisin.

Lib. 4. fol. 49. 50. Ogenel's case.

6. E. 3. 41. 7. E. 3. darr. pref. 2.
13. E. 2. quar. imp. 175.
F. N. B. 31.

do cancellaria, & alia curia regis sunt aperta, quibus lex fiebat cuicunque prout fieri consuevit. And so it was adjudged in the case of Roger Mortimer, and of Thomas earle of Lancaster. Unum terra sit guerrina necne, naturaliter debet iudicari per recorda regis, & eorum, qui curias regis per legem terræ custodiunt, & gubernant, sed non alio modo.

And therefore when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be as it were shut up, et filant leges inter arma, then it is said to be time of warre. And the triall hereof is by the records, and judges of the court of justice; for by them it will appeare, whether justice had her equall course of proceeding at that time or no, and this shall not be tried by jury.

If a man be disseised in time of peace, and the descent is cast in time of warre, this shall not take away the entry of the disseisee.

Item tempore pacis, quod dicitur ad differentiam eorum quæ fuerunt tempore belli, quod idem est, quod tempore guerrino, quod nihil differt a tempore juris. & injuriæ; est enim tempus injuriæ, cum fuerunt oppressiones violentæ, quibus resisti non potest. & disseisinæ injustæ.

So as hereby it also appeareth, that time of peace is the time of law and right, and time of warre is the time of violent oppression, which cannot be resisted by the equall course of law. And therefore in all reall actions, the expleas, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law. (1)

Per occupation. Occupation is a word of art, and signifieth a putting out of a man's freehold in time of warre; and it is all one with a disseisin in time of peace, saving that it is not so dangerous as it appeareth here by *Littleton*; and therefore the law gave a writ in that case of *occupavit*, so called, by reason of that word in the writ, in stead of *disseisavit*, in the assise of novel disseisin, if the disseisin had beene done in time of peace; whereby it appeareth, how aptly both in this, and in all other places, *Littleton* thorow his whole booke speaketh. But albeit *occupatio*, wherof *Littleton* here speaketh, is used only in the said writ, and in none other, (that I can finde or remember) yet hath it beene used commonly in conveyances and leases, to limit, or make certaine precedent words, as *ad tunc in tenurâ & occupatione*. But *occupatio* is applied to the possession, be it lawfull or unlawfull; it hath also crept into some acts of parliament, as 4. H. 7. cap. 19. 39. Eliz. cap. 1. and others; and *occupare* is sometimes taken to conquer.

Et de ceo home poit vrier en un plea sur briefe de aiel, anno 7. E. 2.

Hereby it appeares, that ancient termes or yeares, after the example of *Littleton*, are to be cited and vouched, for confirmation of the law, albeit they were never printed; and that of those yeares, those especially of E. 1. H. 3. &c. are worthy of the reading and observation; a great number of which I have scene and observed, which in mine opinion doe give a great light, not onely to the understanding and reason of the common law, (which *Fitzherbert* either saw not, or were by him omitted) but also to the true exposition of the ancient statutes made in those times. Yet mine advice is, that they be read in their time. For after our student is enabled and armed to set on our yeare bookes, or reports of the law, let him reade first the latter reports, for two causes. First, for that for the most part the latter judgments and resolutions are the surest, and therefore it is best to season him with them in the beginning, both for the setting of his judgment, and for the retaining of them in memorie. Secondly, for that the latter are more facile and easier to be understood, than the more ancient: but after the reading of them, then to reade these others before mentioned, and all the ancient authors that have written of our law; for I would wish our student to be a compleat lawyer. But now to returne. As it is in case of descent, so it is in case of presentation, for so usurpation in time of warre putteth the right patron out of possession, albeit the incumbent come in by institution and induction: and time of warre doth not onely give privilege to them that be in warre, but to all others within the kingdome; and although the admission and institution be in time of peace, yet if the presentment were in time of warre, it putteth not the right patron out of possession.

Sect.

(1) If tenant by elegit is interrupted in taking the profits of the land, by reason of war, he shall not hold over, but it shall be in disadvantage of the tenant by elegit. 19. E. 1. Execution 246. 4. Rep. 82. b. — In Lib. Rub. Scacc. fol. 241. tempus guerra duravit à quarto die Apl. 48. H. 3. usque ad 17. Sep. an. 49. apud Winter post bellum de Evesham pax proclamata fuit. Nota H. 3. 19. die Oct. anno eiusdem 16. fuit apud Wall. An. 40. fuit apud Oxon. 48. apud Dudl. 14. Maii, an. 49. fuit apud Evesham. Et tamen sunt placita de Rich. 16. H. 3. de banco. Tr. 16. H. 3. Et assisa magna 40. H. 3. 48. H. 3. M. 40. H. 3. P. 48. H. 3. P. 49. H. 3. Et placita coram rege à 32. usque 40. H. 3. Tr. 4. H. 3. 26. et 27. E. 1. Ent. R. T. Rot. 5. Goods were seized for debt to the king; the sheriff returned, that the Scots entered hostiliter, by reason of which they could not be taken: Rule, Fiat inde inquisitio, & interim pacem habeat de demandâ. Noy MS. 384. — 1. Infl. 52. See the case of the earl of Lancaster put at large. Nota, that in 14. E. 3. F. seire facias 122. there is no intimation at all of the matter; but on the record of this case, as is to be seen in the manuscript Rep. of Coke 428. the case was thus: Henry Lancaster granted to the abbot of Ramsey and his successors, quod si ex tunc aliquo tempore vel aliquâ occasione guerra in regno Angliæ feriam suam amitterent, ita quod nihil inde percipere possunt, quieti essent ejusdem anno et tempore de formâ suâ prædictâ sol. And upon seire facias for the arrears of that rent, which was in court for three years, viz. 11. 12. and 13. E. 3. the abbot pleaded these charters, and said, that guerra fuit tam super mare quam super terram inter dominum regem et illos de Franciâ, ita quod mercatores ad dictas nundinas nec venerunt ut solebant, nec ipse abbas aliquod proficuum de iisdem nundinis per idem tempus percepit nec percipere possit, quod paratus fuit verificare juxta tenorem chartæ prædictæ; and it was resolved, quod utrum terra sit guerrina, &c. prout hic notatur. Then it follows in the said manuscript: Nota, quod guerra dicitur in hoc regno esse, quando exercitum justitiæ in curiis et placitis regis impeditur. And Coke adds a short note: Ceo trival de guerre in cest realm; et ex hoc semble que ne fuit guerre inter E. 4. et H. 6. car exercitum justitiæ non impeditum fuit, come appiert per les reports de 10. E. 3. et 49. H. 6. nec temps H. 3. hic supra, nec temps Car. 1. Lord Nott. MS.

* The Editor has not been able to discover what is the manuscript to which lord Nottingham alludes in this place.

Sect. 413.

ITEM, * que nul morant seisie (ou les tenements viendront a un auter per succession) † tollera l'entree d'ascun person, &c. ‡ Come de prelates, abbots, priors, deans, ou parson d'esglise, || ou d'autres corps politike, &c. coment que ils fueront xx. morants seisie, et xx. successors, ceo ne tolle jammes ascun home de son entree §.

Plus serra dit de discents en le prochain chapter.

ALSO, that no dying seised (where the tenements come to another by succession) shall take away the entree of any person, &c. As of prelates, abbots, priors, deanes, or of the parson of a church, or of other bodies politike, &c. albeit there were xx. dyings seised, and xx. successors, this shall not put any man from his entree (¶).

More shall be said of discents in the next chapter.

take and grant, &c. And this body politike, or incorporate, may commence, and be established three manner of ways, viz. by prescription, by letters patents, or by act of parliament. Every body politike, or corporate, is either ecclesiasticall or lay: ecclesiasticall, either regular, as abbots, priors, &c. or secular, as bishops, deanes, archdeacons, parsons, vicars, &c. lay, as maior and communaltie, baylives and burgeses, &c. Also every body politike, or corporate, is either elective, presentative, collative, or donative. And againe it is either sole, or aggregate of many; as you may reade in the Third Part of my Commentaries. And this body politike, or corporate, aggregate of many, is by the civilians called *collegium*, or *universitas*.

PER succession.

This in the common law is applied only to bodies politike, or corporate, which have succession perpetuall, and not to naturall men; as to a bishop and his successors, or to an abbot, deane, archdeacon, prebend, parson, &c. and their successors, and not to *J. S.* or any other naturall body and his successors, but to him and his heires. And the successor of any of these is in the *post*, and the heire of the naturall man is in the *per*; and *succedere* is derived of *sub* and *cedere*.

Vid. Sect. 1.

7. E. 3. 25. 2. 8. E. 3. 13. & 34.

Corps politique, &c.

This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by *Littleton* a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to

Lib. 3. fo. 73. in the case of the Deane and Chapter of Norwich. (1. Sid. 162. 14. Rep. 77. 2.)

CHAP. 7. Continuall Claime. Sect. 414.

CONTINUAL claime est † la lou home ad droit et title d'entrer en ascuns terres ou tenements dont ** auter est seisie en fee, ou en fee taile, si cesty que ad title d'entrer fait con-

CONTINUAL claim is where a man hath right and title to enter into any lands or tenements whereof another is seised in fee, or in fee tail, if hee which hath title to enter makes continuall claime to the lands

HERE our Author first describeth what a continuall claime is. It is called *continuum clameum*, because at the common law it must have beene made within every yeare and day, as *Littleton* here teacheth. And yet if hee that right hath, maketh claime, and the tenant dieth within the yeare and the day, this claime though it bee but

tinuall

Mirror cap. 1. §. 15. & §. 18. Bracton li. 5. fo. 435. 436. Britton 107. b. 126. 4. Fleta lib. 6. cap. 53. 53. Vid. Sect. 424.

Vid. Sect. 385. 22. H. 8. c. 23.

* que not in L. and M. nor Roh.

† ne added in L. and M. and Roh.

‡ come—quor. L. and M. and Roh.

|| ou d'autres corps politike, not in L. and M. nor Roh.

§ &c. added L. and M. and Roh.

¶ prochain chapitre—chapitre de continuelle claime, L. and M. and Roh.

† per added L. and M.

** un added L. and M.

(1) By the statute of limitations, 21. Jac. 1. c. 16. it is enacted, that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. — By the 4th and 5th Ann. c. 16. it is enacted, that no entry shall be of force to satisfy the statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

* Vid. Sect. 414.

once * made (as hath beene said) shall preserve the entry of him that maketh the claime (1).

Ad droit et title d'enter. And yet in some cases, a continuall claime may be made by him that hath right, and cannot enter.

If tenant for years, tenant by statute staple, merchant, or *cogit*, be ousted, and he in the reversion disseised, the lessor, or he in reversion, may enter to the intent to make his claime, and yet his entry as to take any profits, is not lawfull during the terme. And in the same manner, the lessor or he in the reversion in that case may enter to avoid a collateral warranty, or the lessor in that case may recover in an assise. And so (as some have holden) may the lessor enter in case of a lease for life, to this intent, to avoid a discent, or a warranty.

If the disseisee make continuall claime, and the disseisor die seised within the yeare, his heire within age, and by office the king is intitled to the wardship, albeit the entry of the disseisee bee not lawfull, yet may he make continuall claime to avoid a discent, and so in the like.

Uncore poit celuy que fait tiel clayme ou son heire enter. This is to be understood in this manner: that if the father make claime,

and the disseisor dieth, and then the father dieth, that his heire may enter, because the discent was cast in the father's time, and the right of entry which the father gained by his claime, shall descend to his heire. But if the father make continuall claime, and dieth, and the sonne make no continuall claime, and within the yeare and day after the claime made by the father, the disseisor dieth, this shall take away the entry of the sonne, for that the discent was cast in his time, and the claime made by the father shall not availe him, that might have claimed himselfe. And of this opinion was *Littleton* himselfe in our bookes, where he holdeth, that no continuall claime can avoid a discent, unlesse it be made by him that hath title to enter, and in whose life the dying seised was. See more of this matter hereafter, in this chapter, Sect. 416.

And as here *Littleton* putteth his case of the ancestor and heire, so it holdeth in all respects, of the predecessor and successor.

*tinuall claime a les terres ou tenements devant le morant seisi de celuy que tient les tenements, donques coment que tiel tenant morust ent seisi, et les terres ou tenements descendront a son heire, uncore poit celuy que avoit fait tiel claime, ou son heire, enter en les terres ou tenements issint descendus, per cause de le continual claime fait, nient contristiant le discent. Sicome en case que home soit disseise, et le disseisee fait continual claime a les tenements en la vie le disseisor, coment que le disseisor devie seise en fee, et la terre descendist a son heire, uncore poit le disseisee enter sur la possession le heire, nient obstant le discent *.*

or tenements before the dying seised of him which holdeth the tenements, then albeit that such tenant dieth therof seised, and the lands or tenements descend to his heire, yet may he who hath made such continual claime, or his heire, enter into the lands or tenements so descended, by reason of the continuall claime made, notwithstanding the discent. As in case that a man bee disseised, and the disseisee makes continuall claime to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heire, yet may the disseisee enter upon the possession of the heire, notwithstanding the discent.

Dyer 19. El. Pl. Com. 374.
15. H. 7. 3. 4. Jacobin's case.
28. H. 6. 28.

Vid. Sect. 442. 45. E. 3. 21.

7. H. 6. 49. Contin. Claime 1.
Downer's case. 5. E. 4. 4.
(Pl. 191. a.)
(9. Rep. 106.)
(1. Rep. 67. a.)

(1. Roll. Abr. 630.)

Bracton lib. 5. fo. 436.
Fleta lib. 5. cap. 52. 53.
22. H. 6. 37. 9. H. 4. 5. 2.
15. E. 4. 22. a.

23. H. 6. 37.

* &c. added in L. and M. and Roh.

Sect.

(1) It has been observed in the notes to the chapter of Discents, that the reasons for which the law protected the possession of the heir of the disseisor from the entry of the disseisee, were, the notoriety and presumptive right of possession which the disseisor acquired by his being permitted to live and die in the peaceable possession of the lands; the necessity that there should be a tenant to do the feudal duties; and by way of a punishment on the tenant for his neglect in not asserting his right. But none of these reasons could exist, where the tenant entered upon the lands, and made his claim for them; as by doing so he prevented the presumption in favour of the title of the disseisor; made a tender to the lord of his feudal services; and did all that was in his power to restore his possession. But to entitle the disseisee to enter on the heir of the disseisor, notwithstanding the discent upon him, this claim must have been made within a year and a day next preceding the descent. Lord chief baron Gilbert, in his commentary upon this chapter, observes, that the notion of laches, in not claiming for a year and a day, is taken out of the feudal law, it being the period of time within which the feudal services must be required. It is a space of time which is prescribed for the performance of different acts in our law, and in all laws derived from the feudal institutions. It seems only to import the space of a complete year. --- In Pl. Com. 359. a. lord chief justice Dyer is said to have defined claim to be a challenge of the ownership, or propriety, that he hath not in possession, but is detained from him by wrong.

Sect. 415.

EN mesme le maner est, si tenant a terme de vie alien en fee, celuy en le reversion ou celuy en le remainder poit enter sur l'alienee. Et si tiel alienee devie seise de tiel estate sans continual claime fait a les tenements, devant le morant seisi del alienee, et les tenements per cause del morant seisi del alienee discendent * a son heire, donques ne poit celuy en le reversion ne celuy en le remainder enter. Mes † si celuy en le reversion ou celuy en le remainder, que ad cause d'entre sur l'alienee, fait continual claime a les tenements devant le morant seisi del alienee, donques tiel home poit enter apres la mort l'alienee, auxy bien come il pouvoit ‡ en sa vie §.

IN the same manner it is, if tenant for life alien in fee, hee in the reversion or he in the remainder may enter upon the alienee. And if such alienee dieth seised of such estate without continuall claime made to the tenements, before the dying seised of the alienee, and the lands by reason of the dying seised of the alienee descend to his heire, then cannot he in the reversion nor hee in the remainder enter. But if hee in the reversion or in the remainder, who hath cause to enter upon the alienee, make continuall claime to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time. (1. Rep. 14. a.)

BY this it appeareth, that a continuall claime may be made as well where the lands are in the hands of a feoffee, &c. by title, as in the hands of a disseisor, abator, or intruder, by wrong, as before hath beene noted.

Sect. 416.

ITEM, si terre soit lessé a un home pur terme de sa vie, le remainder a un autre a terme de vie, le remainder a la tierce en fee, si le tenant a terme de vie aliena a un autre en fee, et celuy en le remainder pur terme de vie fait continual claime a la terre devant le morant seise d'alienee,

ALSO, if land be let to a man for terme of his life, the remainder to another for terme of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continual claime to the land before the dying seised of the alienee, and after the

ALIEN a un autre (1. Roll. Abr. 630.)

en fee. It is to be observed, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record.

In pais, of lands and tenements which lie in livery (whereof *Littleton* intendeth his case) where a greater estate passeth by livery, than the particular tenant may lawfully make, whereby the reversion or remainder is divested, as here in the example that *Littleton* putteth when tenant for life alieneth in

Vid. Sect. 581. 609. 610. 611.

* a son heire, — al heire del aliene, L. and M. and Roh. M. and Roh. § &c. L. and M.

† si not in L. and M. nor Roh.

‡ pouvoit en post a, L. and

(1. Rep. 14.)

17. El. Dy. 119.
16. El. Dy. 324.31. E. 3. Devisé 11. 15. E. 4. 9.
Vide Sect. 608. 609. 610.
(1. Roll. Abr. 854.)

(1. Rep. 76. b.)

35. H. 6. 62. Tr. 32. El. in
Informat. de intrusion vers Ro-
binson par le Manor de Drayton
Basset, so resolved by the court
of exchequer.7 Post. 322. b. 1. Leo. 40. 1. Roll.
Abr. 855.)* 15. E. 4. 0. 21. E. 3. Cr. 62.
14. E. 3. 3. Avow. 117.15. E. 2. Judg. 237. 6. E. 3. 29.
9. E. 3. 4. 18. E. 2. Fines 120.
15. E. 4. 29. 36. H. 6. 29.
2. H. 6. 9. 4. El. Dy. 9. H. 5. 14.
22. Aff. 31. 18. E. 3. 28. 16. Aff.
16.
(Mo. 77. 212. 1. Rep. 16.)* &c. added L. and M. and Roh.
added in L. and M. and Roh.
peut faire continual claim), not in L. and M. nor Roh.

in fee, which must bee under-
stood of a feoffment, fine, or
recoverie by consent.

If tenant for life, and hee
in the remainder for life in
Littleton's case, hath joyned in
a feoffment in fee, this had
beene a forfeiture of both their
estates, because hee in the re-
mainder is *particeps injuria*.
And so it is if hee in the re-
mainder for life had entred,
and disseised tenant for life,
and made a feoffment in fee,
this had beene a forfeiture of
the right of his remainder. (1)

A particular estate of any
thing that lies in grant, can-
not be forfeited by any grant
in fee by deed. As if tenant
for life or yeares of an ad-
vowson, rent, common, or
of a reversion or remainder of
land, by deed grant the same
in fee, this is no forfeiture of
their estates, for that nothing
passes thereby, but that which
lawfully may passe; and of
that opinion is *Littleton* in
our bookes.

But if tenant for life or
yeares of land, the reversion
or remainder being in the
king, make a feoffment in
fee, this is a forfeiture, and yet
no reversion or remainder is
divested out of the king; and
the reason is, in respect of the
solemnitie of the feoffment by
liverie, tending to the king's
disherison. (2)

By matter of record, and
that by three manner of
wayes. First, by alienation.
Secondly, by claiming a
greater estate than he ought.

First, by alienation; and that of two sorts, *viz.* by alienation divesting, or not divesting, the reversion or remainder. Divesting, as by levying of a fine, or suffering a common recoverie of lands, whereby the reversion or remainder is divested: not divesting, as by levying of a fine in fee, of an advowson, rent, common, or any other thing that lieth in grant: and of this opinion is *Littleton* in our bookes. * And so note two diversities: first, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree, that the reversion or remainder in neither case is divested: secondly, between a matter of record, as a fine, &c. and a deed recorded, as a deed inrolled, for that worketh no forfeiture, because the deed is the originall.

Secondly, by claime; and that may be in two sorts, either expresse or implied. Expresse, as if tenant for life will in court of record claime fee, or if lessee for yeares be ousted, and he will bring an assise *ut de libero tenemento*. Implied, as if in a writ of right brought against him, he will take upon him to joine the mise upon the meere right, which none but tenant in fee simple ought to doe. So if lessee for yeares doe lose in a *præcipe*, and will bring a writ of error, for error in proceffe, this is a forfeiture. (3)

Thirdly,

*et puis l'alienee mor-
rust seisie, * et puis
apres celuy en le re-
mainder pur terme de
vie morust devaunt
ascun entrie fait per
luy, en ceo cas celuy en
le remainder en fee
poit enter † sur heire
l'alienee, per cause de
continual claime fait
per luy que avoit le
remainder pur terme
de sa vie, pur ceo que
tiel droit que il ave-
roit d'entre, ‡ alera et
remaindra a celuy en
le remainder apres
luy, entant que celuy
en le remainder en fee
§ ne puisse pas enter
sur l'alienee en fee du-
rant la vie celuy en
le remainder pur terme
de sa vie, et pur ceo **
que il ne puisse adon-
ques faire continual
claim. †† (Car nul poit
faire continual claim
mes quant il ad title
d'entrie, &c.)*

alienee dieth seised,
and after he in the re-
mainder for life die be-
fore any entrie made
by him, in this case
he in the remainder
in fee may enter upon
the heire of the alie-
nee, by reason of
the continuall claime
made by him which
had the remainder for
life, because that such
right as hee had of en-
trie, shall goe and re-
maine to him in the
remainder after him,
insomuch as hee in
the remainder in fee
could not enter upon
the alienee in fee du-
ring the life of him in
the remainder for life,
and for that hee could
not then make conti-
nuall claim. (For
none can make conti-
nuall claime but when
hee hath title to en-
ter, &c.)

Thirdly, by affirming the reversion or remainder to be in a

† no in L. and M. and Roh.

§ que
†† (Car nul

(1) See the observations on feoffments introduced in the notes to the next chapter.

(2) See ant. 233. b. note.

(3) So in the case of a lease for life, the tenant may plead it in bar; but in the case of a lease for years, or an estate by tenant by statute or *elegit*, the defendant shall not plead in bar, as to say, *assisa non*, but justify by force of the lease; and conclude, *issint sans tort*; and if the tenant of the freehold be not named, he shall plead, *nul tenant de franc tenement noimé en le bref*; and in the case of a feoffment with a warranty, he must rely on the warranty. See ant. 238. b. 239. a.

Thirdly, By affirming the reversion or remainder to be in a stranger, and that either actively or passively. Actively, by five manner of wayes. As first, if tenant for life pray in aid of a stranger, whereby he affirms the reversion to be in him. Secondly, if he attorne to the grant of a stranger; and there note also a diversitie betweene an attournement of record to a stranger, and an attournement *in pais*, for an attournement *in pais* worketh no forfeiture. Thirdly, if a stranger bring a writ of entrie *in casu proviso*, and suppose the reversion to be in him, if the tenant for life confesse the action, this is a forfeiture. Fourthly, if tenant for life plead covinously, to the disherison of him in the reversion, this is a forfeiture. Fifthly, if a stranger bring an action of waste against lessee for life, and he plead *nul wast fait*, this is a forfeiture; or the like.

Passively, as if tenant for life accept a fine of a stranger, *sur confans de droit come cco*, &c. 3. Mar. Dy. 148. for hereby he affirms of record, the reversion to be in a stranger.

Littleton here speaketh of the forfeiture of an estate; and here it is to be known, that the right of a particular estate may be forfeited also, and that he that hath but a right of a remainder or reversion, shall take benefit of the forfeiture. As if tenant for life be disseised, and hee levie a fine to the disseisor, he in the reversion or remainder shall presently enter upon the disseisor for the forfeiture. And so it is if the lessee after the disseisin had levied a fine to a stranger, though to some respects, *partes finis nihil habuerunt*, yet it is a forfeiture of his right.

Littleton here speaketh of an alienation in fee absolutely, but so it is if the lessee for life make a lease for any other man's life, or a gift in taile. If *A.* be tenant for life, and make a lease to *B.* for his life, and *B.* dieth, and the lessee re-entred, yet the forfeiture remaineth.

If tenant for life make a lease for life, or a gift in taile, or a feoffment in fee, upon condition, and entreth for the condition broken, yet the forfeiture remaineth. *Littleton* speaketh of an estate for life; so it is of tenant in taile *apres possibilite*, tenant by the courtlesie, tenant in dower, or of him that hath an estate to him and his heires, during the life of *I. S.* &c. and so of tenant for yeares, tenant by statute merchant, statute staple, or *elegit*.

Littleton saith, that where the alienation in fee is made to another, which must be intended a stranger, for if it be made to him in reversion or remainder, it amounts to a surrender of his estate, as at large hath bene spoken in the chapter of tenant for life.

By *Littleton* it appeareth, that tenant for life in remainder may enter for the forfeiture of the first tenant for life, and that if the tenant for life in remainder make continuall claime, and the alienee die seised, then may he in the remainder for life enter; and if he die before he do enter, then he in the remainder in fee shall enter, because he in the remainder in fee could not make any claime; and therefore the right of entrie, which tenant for life in remainder gained by his entrie, shall goe to him in the remainder in fee, in respect of the privie of estate: and so it is of him in the reversion in fee in like case, for he is also privie in estate.

If two joyntenants be disseised, and the one of them make continuall claime and dieth, the survivor shall take benefit of his continuall claime in respect of the privie of their estate.

But if tenant for life make continuall claime, this shall not give any benefit to him in the remainder, unlesse the disseisor died in the life of tenant for life, for the cause abovesaid, *See Note 414.*

If tenant in taile, the remainder in fee with garrantie, have judgement to recover in value, and dieth before execution without issue, he in the remainder shall sue execution, for he hath right thereunto, and is privie in estate.

In the same manner, if a feignorie be granted by fine to one for life, the remainder in fee, the grantee for life dieth, he in the remainder shall have a *per quæ servitia*, for he hath right to the remainder, and is privie in estate. Here also it appeareth, that none can make continuall claime, but he that hath right to enter.

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MES est a veier a toy (mon fils) coment et en quel manner tiel continuall claime serra fait: et ceo bien apprender, trois choses sont a intender. La 1. chose

BUT it is to be seene of thee (my son) how and in what manner such continuall claime shall be made: and to learne this wel, three things are to be understood. The first

SI bome ad cause d'entrer en ascuns terres outenements, &c.

It is not sufficient to tell one generally what he should doe, but to direct him how, and in what manner he shall doe it, as *Littleton* doth in this place. And here, the generall rules of our author are to bee understood,

21. E. 3. 14. a. 5. E. 4. a. 24. H. 8. For. Br. 87. li. a. fol. 55. 56. Buckler's case. 27. E. 3. 77. 17. E. 3. 7. a. 39. E. 3. 16. 29. E. 3. 24. 5. Aff. 5. 5. E. 3. contr. cong. 42. 14. E. 3. receit 135. 3. E. 3. 32. 24. E. 3. 68. 1. H. 7. (1. Roll. Abr. 852. 3. Rep. 4. b. 1. Leo. 264. 9. Rep. 106.)

3. Mar. Dy. 148.

Lib. 2. fol. 55. Buckler's case.

13. E. 4. 4.

(Ant. 202. b.)

39. Aff. 15. 43. E. 3. contr. cong. 30.

2. H. 5. 7. 39. E. 3. 16. 45. E. 3.

25.

(Ant. 28. a. 42. a.)

(1. Roll. Abr. 630.)

(Pl. 355. b. 359. a. 2. Infl. 513. 3. Rep. 91. a.)

(Post. 263. b.)

This hath bene adjudged,
Mich. 14. & 15. Eliz. Rot. 1453.
in the Earl of Arundell's case.

(4. Leo. 8.)
(1. Leo. 36.)

(1. Roll. Abr. 793.)
(1. Leo. 51.)

7. Aff. 18. 12. E. 4. 10.
35. H. 6. 27. 32. Aff. pl. 1.

11. H. 7. 25. Dyer. 16. El.
337.

5. H. 7. 7. 4. E. 4. 19.
12. E. 4. 11. 2.
(Ant. 32. 180. b.)
(10. Rep. Lampet's case.)
(Flo. Com. 91.)

stood, that the entrie of a man, to recontinue his inheritance or freehold, must ensue his action for recoverie of the same. As if three men disseise me severally, of three severall acres of land, being all in one countie, and I enter in one acre, in the name of all the three acres, this is good for no more but for that acre which I entered into, because each disseisor is a severall tenant of the freehold, and as I must have severall actions against them, for the recoverie of the land, so mine entrie must be severall.

And so it is if one man disseise mee of three acres of ground, and letteth the same severally to three persons for their lives, &c. there the entrie upon one lessee, in the name of the whole, is good for no more than that acre that he hath in his possession. But if the disseisor had lettten severally the said three acres to three persons for yeares, there the entrie upon one of the lessees, in the name of all the three acres, shall recontinue and revest all the three acres in the disseisee, for that the disseisee might have had one assise against the disseisor, because he remained tenant of the freehold for all the three acres, and therefore one entrie shall serve for the whole.

If one disseise me of one acre at one time, and after disseise me of another acre in the same countie at another time, in this case mine entrie into one of them in the name of both is good; for that one assise might be brought against him for both disseisins.

But if I infeoffe one of one acre of ground upon condition, and at another time I infeoffe the same man of another acre in the same countie upon condition also, and both the conditions are broken, an entrie into one acre in the name of both is not sufficient, for that I have no right to the land, nor action to recover the same, but a bare title, and therefore severall entries must be made into the same, in respect of the severall conditions. But an entrie in one part of the land, in the name of all the land subject to one condition, is good, although the parcels be severall, and in severall townes. And so note a diversitie betweene severall rights of entrie, and severall titles of entrie, by force of a condition (1).

Deins mesme la countie. For if the lands lye in severall counties, there must be severall actions, and consequently severall entries, as hath bene said.

En nosme de tout, &c. If one disseise me of two severall acres in one countie, and I enter into one of them generally, without saying, In the name of both; this shall revest only that acre wherein entrie is made, as hath bene said; and that is proved by our bookes, which say, that if I bring an assise of two acres, if I enter into one hanging the writ, albeit it shall revest that only acre, yet the writ shall abate.

Dont il ad title d'entrie. Here in a large sence, title of entrie is taken for a right of entrie.

Sect.

* et added in L. and M. and Roh.

† tous ---- tiels, L. and M. and Roh.

‡ en fait not in L. and M. nor Roh.

(1) The entry for a condition broken has been discussed in the preceding chapter, and the commentary and notes upon it. In the notes to the chapter of Discontinuances, some observations will be made on entries of feoffees, or releasees, for the purpose of revesting uses.--- With respect to entries for avoiding fines, there were four modes of avoiding a fine at the common law; two by matter of record, and two by acts *in pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied, and an entry of a claim on the record at the foot of the fine itself, in this manner, *talis venit et apponit clamorem suum*. Those by acts *in pais* were a lawful entry upon the land by the person who had a right; and if that could not be done, a continual claim. But by the statute of 4. H. 7. all those who are affected by a fine must pursue their title by way of action, or lawful entry: so that a claim entered on the record of a fine would now be ineffectual. The actual entry must be made by the person who has a right to the lands, or some one appointed by him, either by preceding command or subsequent assent, within five years. See Plowd. 355. 359. 2. Inst. 518. 3. Rep. 91. 2. Inst. 518. 2. Bla. Rep. 994. --- By the statute of 4. Ann. c. 16. Sect. 16. it is enacted, "That no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be of any force or effect to avoid any fine levied, or to be levied, with proclamations, according to the form of the statute in that case made and provided, in the court of common pleas; or in the courts of sessions in any of the counties palatine, or in the courts of great sessions in Wales, shall be a sufficient entry or claim within the statute of limitations, unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

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CAR si home voile enseoffer un auter sans fait de certaine terres ou tenements que il ad deins plusours villes en un countie, et il voile liverer seisin al feoffee de parcel de tenements deins un ville en nosme de tous les terres ou tenements que il ad en mesme le ville, et en les auters villes, &c. tous les dits tenements, &c. passent per force de le dit livery de seisin a celui a que tiel feoffement en tiel maner est fait, et uncore celui a que tiel livery de seisin fuit fait, n'avoit droit * en tous les terres ou tenements en tous les villes, mes per cause de livery de seisin fait de parcel de les terres ou tenements en un ville : à multò fortiori, il semble bone reason que quant home ad title d'enter en les terres ou tenements en divers villes deins un mesme county, devant ascun entry per luy fait, que per l'entry fait per luy en parcel de les terres en un ville, en le nosme de tous les terres et tenements as queux il ad title d'enter deins mesme le countie, ceo † vest un seisin de tous en luy, et per tiel entry il ad possession et seisin en fait, sicome il avoit enter en chescun parcel, &c.

FOR if a man will enseoffe another without deed of certain lands or tenements which he hath in many townes in one countie, and he will deliver seisin to the feoffee of parcell of the tenements within one towne in the name of all the lands or tenements which he hath in the same towne, and in other townes, &c. all the said tenements, &c. passe by force of the said livery of seisin to him to whom such feoffment in such manner is made, and yet hee to whom such livery of seisin was made, hath no right in all the lands or tenements in all the townes, but by reason of the livery of seisin made of parcell of the lands or tenements in one towne : à multò fortiori, it seemeth good reason that when a man hath title to enter into the lands or tenements in divers townes in one same county, before entry by him made, that by the entry made by him into parcell of the lands in one towne, in the name of all the lands and tenements to which he hath title to enter within the same county, this shall vest a seisin of all in him, and by such entry hee hath possession and seisin in deed, as if he had entred into every parcell.

(9. Rep. 136. b.)

(Ant. 48. 49. 50. Post. 253. a.)

(2. Rep. 31.)

THIS is evident, but here is a diversity between a feoffment and an entry ; for a man may make a feoffment of lands in another county, and make livery of seisin within the view, albeit he might peaceably enter and make actuall livery ; and so may he shew the recognitors in an assise, the view of lands in another county ; but a man cannot make an entry into lands within the view where he may enter without any feare (for it is (*) one thing to invest, and another to devert), as hereafter shall be said in the Section next following.

38. E. 3. 11. 38. Aff. 23.

(*) Vid. Sect. next following.

A multò fortiori. Or à minore ad majus, is an argument frequent in our author, and in our bookes, the force of argument in this place standing thus : if it be so in a feoffment passing a new right, much more it is for the restitution of an ancient right, as the worthier and more respected in law, which holderth affirmatively, as our author here teacheth us.

Vid. Sect. 438.

The three (&c.) in this Section need no explication.

Sect.

* ex—a, L. and M. and Roh.

† vest—est, L. and M. and Roh.

Sect. 419.

Vide the Sect. preceding.
(2. Roll. Abr. 124. 2. Infl. 483.)

7. E. 4. 21. 39. H. 6. 5.

(3. Rep. 13.)
39. E. 3. 18. 11. R. 2. tit. dures 2.
12. H. 4. 19. 20.

Bract. lib. 2. fol. 16. b. Britton
fol. 19. 66. Fleta lib. 3. cap. 7.
and lib. 2. cap. 54. 49. E. 3. 14.
14. H. 4. 13. 39. Aff. 11.
11. H. 6. 51. 38. H. 6. 27.
39. H. 6. 36. 5. 20. H. 6. 28.
4. E. 4. 17. 12. E. 4. 7. 28. H. 6. 8.
41. E. 3. 9. 11. H. 4. 6.
8. Aff. 25. Vid. Sect. 424.
W. 2. cap. 49. 13. H. 4. dures 20.

Vid. Sect. 378.

11. H. 6. 51.
(Post. 256. b.)

Vid. Sect. 412. Pl. Com. 97. in
Aff. de-trethforce. The parson
of Honylanc's case.

HERE is to be observed, that every doubt or feare is not sufficient, for it must concerne the safety of the person of a man, and not his houses or goods; for if hee feare the burning of his houses, or the taking away or spoiling of his goods, this is not sufficient, because hee may recover the same, or damages to the value without any corporall hurt.

Again, if the feare doe concern the person, yet it must not bee a vaine feare, but such as may befall a constant man; as if the adverse partie lie in wait in the way with weapons, or by words menace to beat, mayhem, or kill him; that would enter; and so in pleading must hee shew some just cause of feare, for feare of it selfe is internall and feccret. But in a speciall verdict, if the jurors doe finde that the disseisee did not enter for feare of corporall hurt, this is sufficient, and shall be intended that they had evidence to prove the same. *Talis enim debet esse metus qui cadere potest in virum constantem, et qui in se continet mortis periculum, et corporis cruciatum. Et nemo tenetur se infortuniis et periculis exponere.*

And it seemeth that feare of imprisonment is also sufficient, for such a feare sufficeth to avoid a bond or a deed; for the law hath a speciall regard to the safety and liberty of a man. And imprisonment is a corporall damage, a restraint of liberty, and a kind of captivity. But see in the Second Part of the Institutes, *H. 2. cap. 49.* a notable diversity betwene a claime or an entry into land, and the avoidance of an act or deed for feare of battery.

Per tiel claime il ad un possession et seisin, &c. Here is to be observed, that there be two manner of entries, *viz.* an entry in deed, and an entry in law. An entry in deed is sufficiently knowne. An entry in law is when such a claime is made as is here expressed, which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon such an entry in law an assise doth lie, as well as upon an entry in deed, and such an entry in law shall avoid a warranty, &c.

But here is a diversity to be observed betwene an entry in law and an entry in deed, for that a continuall claime of the disseisee being an entry in law, shall vest the possession and seisin in him for his advantage, but not for his disadvantage. And therefore if the disseisee bring an assise, and hanging the assise he make continuall claime, this shall not abate the assise, but he shall recover damages from the beginning; but otherwise it is of an entry in deed. See more of this matter after in this chapter, Sect. 422.

LE second chose est a entendre, que si home ad title d'enter en ascuns terres ou tenements, s'il ne oFAST enter en mesmes les terres ou tenements, ne en ascun parcel de ceo per doubt de battery, ou per doubt de mayhem, ou per doubt de mort, s'il alast et approch auxy pres les tenements come il oFAST pur tiel doubt, et claime per parol les tenements estre les soens, maintenant per tiel claime il ad un possession et seisin en les tenements, auxy bien come * s'il uST enter en fait, coment que il n'avoit unque possession ou seisin de mesme les + terres ou tenements devant le dit claime.

THE second thing to be understood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of mayming, or for doubt of death, if he goeth and approach as neere to the tenements as hee dare for such doubt, and by word claime the lands to bee his, presently by such claime he hath a possession and seisin in the lands, as well as if hee had entered in deed, although hee never had possession or seisin of the same lands or tenements before the said claime.

Sect.

* Not in L. and M. nor Roh.

+ terres ou not in L. and M. nor Roh.

Sect. 420.

ET que la ley est tiel, il est bien prove per un plee d'un assise en le liver d'assise, an. 38. E. 3. p. * 32. le tenor de quel ensuiet en tiel forme. En le county de Dorset, devant les justices, trouve fuit per verdict d'assise, que le plaintiffe que avoit droit per discent de heritage d'aver les tenements mis en plaint, al temps del morant son ancester fuit demurrant en le ville ou les tenements fueront, † et per parolx claime les tenements enter ses vicines, mes pur doubt de mort il n'osa approcher les tenements, mes port l'assise, et sur cest matter trouve, agard fuit que il recovers, &c.

AND that the law is so, it is well proved by a plea of an assise in the booke of assises, an. 38. E. 3. p. 32. the tenor whereof followeth in this manner. In the county of Dorset, before the justices, it was found by verdict of assise, that the plaintiff which had right by discent of inheritance to have the tenements put in plaint, at the decease of his ancestor was abiding in the towne where the tenements were, and by paroll claimed the tenements amongst his neighbours, but for feare of death hee durst not approach the tenements, but bringeth his assise, and upon this matter found, it was awarded that he should recover, &c.

HERE it appeareth that our booke cases are the best proofes what the law is, *Argumentum ab autoritate est fortissimum in lege.* And for proofe of the law in this particular case, *Littleton* here citeth a case in 38. E. 3. but it is misprinted, for the original, according to the truth, is in the Booke of *Assises*, 38. E. 3. p. 23. and not *placito* 32. for there be not so many pleas in that yeare. And after the example of *Littleton*, booke cases are principally to be cited for deciding of cases in question, and not any private opinion, *teste meipso*. More shall be said of the matter implied in this Section in the next following. 38. Ass. p. 23.

Sect. 421.

LA tierce chose est a entendre deins quel temps ‡ et per quel temps le claime que est dit continual claime servira et aidera celui que fist le claime, et ses heires. Et quant a ceo est ascavoir, que celui que ad tite d'enter, quant il voiet faire son claime, si il osast approcher la

THE third thing is to know within what time and by what time the claim which is said continual claime shall serve and aid him that maketh the claime, and his heires. And as to this it is to be understood, that hee which hath title to enter, when he will make his claime, if hee dare approach the land, then

*CO*vient a luy d'aller et approcher auxipres, &c. By this it should seeme, that by the authority of our author, if the disseise cometh as neere to the land as he dare, &c. and maketh his claime, this should be sufficient, albeit he be not within the view.

And the great authoritie of the booke * in 9. H. 4. (*) 9. H. 4. 5. (being by the whole court) is not against this; for that case is put where there is no such feare, as here our author mentioneth, in him that makes the continual claime, and

* p. 32. not in L. and M. nor Roh.

† &c. added L. and M. and Roh.

‡ et per quel temps not in L. and M. nor Roh.

and then he that makes the continuall claime ought to bee within the view of the land; and therefore the authoritie of this booke, as it is commonly conceived, is not against the opinion of our author in the point aforesaid. But then it is further objected, that the said booke is against another opinion of our author in this Section, viz. that where there is no feare, &c. hee that maketh a continuall claime * ought to go to the land or to parcell thereof to make his claime, and therefore in that case he cannot make a claime within the view of the land.

* 11. H. 6. 51. agreeth with our author in this point.

(3. Rep. 25. Ant. 15. Ant. 245.)

Vid. Sect. 477.

*terre, donques il covient aler a la terre, ou a parcel de ceo, * et faire son claime; et s'il n'osast approcher la terre pur doubt ou pavor de batterie, ou maybem, ou mort, donques covient a luy d'aler et approcher auxypres come il osast vers laterre, ou † parcel de ceo, ‡ a faire son claime.*

he ought to goe to the land, or to parcell of it, and make his claime; and if hee dare not approach the land for doubt or feare of beating, or maiming, or death, then ought hee to goe and approach as neere as hee dare towards the land, or parcell of it, to make his claime.

To this it is answered, that where a continuall claime shall devest any estate in any other person in any lands or tenements, there, as it hath beene said, he that maketh the claime ought to enter into the land, or some part thereof, according to the opinion of our author: but where the claime is not to devest any estate, but to bring him that maketh it into actuall possession, there a claime within the view sufficeth; as upon a discent, the heire having the freehold in law may claime land within the view to bring himselfe into actuall possession, and in that sense is the opinion of *Hall* and the court to be intended. *Et sic in similibus.* But yet the entry into some parcell in the name of the residue is the surest way. (1)

Sect. 422.

Vid. Sect. 383. 426. 9. H. 4. 5. 14. H. 4. 36. 7. E. 3. 37. Pl. Com. 356. 357. 367. Mirror, cap. 2. 18. Britton, fol. 45. b. & 126.

DEINS l'an et le jour. It is to bee

observed, that the law in many cases hath limited a yeare and a day to be a legall and convenient time for many purposes. As at the common law, upon a fine or finall judgement given in a writ of right, the party grieved had a yeare and a day to make his claime. So the wife or heire hath a yeare and a day to bring an appeale of death. If a villeine remained in antient demesne a yeare and a day, he is privileged. If a man be wounded or poysoned, &c. and dieth thereof within the yeare and the day, it is felony. By the antient law if the feoffee of a disseisor had continued a yeare and a day, the entry of the disseisor for his negligence had beene taken away. After judgement given in a reall action, the plaintife within the yeare and the day may have a *habere facias seisinam*, and in an action of debt, &c. a *capias fieri facias*, or a *levari facias*. A protection shall be allowed but for a yeare and a day, and no longer, and in many other cases.

(Post. 262. a.)

(Ant. 120. b.)

Vi. Sect. 385.

ET si son adversarie que occupia le terre, morust seisie en fee, ou en fee taile, deins l'an et le jour apres tiel claim, per que les tenemens descendont a son fits come heire a luy, uncore poit celuy que fist le claime entrer sur le possession le heire, † &c.

AND if his adversary who occupieth the land, dieth seised in fee, or in fee taile, within the yeare and a day after such claime, whereby the lands descend to his sonne as heire to him, yet may hee which make the claime enter upon the possession of the heire, &c.

But this time of a yeare and a day in case of continuall claime is, since our author wrote, altered by the said statute of 32. H. 8. ca. 33. as before it appeareth.

Sect.

* a added in L. and M. and Roh.

† a—et, L. and M. and Roh.

‡ &c. not in L. and M. nor Roh.

(1) Even where a declaration in ejectment is delivered, though the defendant appears to it, and confesses lease, entry, and ouster, yet, to avoid a fine, there must be an actual entry. This was very solemnly determined in the king's bench, in the case of *Berrington v. Packhurst*; and by the lords on appeal in 1738. See 2. Stra. 1086. 4. Bro. Par. Cal. 353. This doctrine has been twice very expressly recognized;—first, in the case of *Wigfall v. Brydon*, 3. Burr. 1895; and since in the case of *Goodright v. Cator*, Doug. 460. In that case, lord Mansfield states the distinction to be, that where entry is necessary to complete the landlord's title, there the confession of lease, entry, and ouster, is sufficient; but that where it is requisite in order to rebut the defendant's title, actual entry must be made. The latter is the case where a fine is to be avoided.

Sect. 423.

MES en cest cas apres l'an et le jour que tiel claime fuit fait, * si le pere donques morust seisi ademaine procheine apres l'an et le jour, ou † un auter jour apres, &c. donques ne poit celuy que fist le claime entrer: et pur ceo si celuy que fist le claime voit estre sure a tous temps que son entre ne serra toll per tiel discent, &c. il covient a luy que deins l'an et le jour apres le primer claime ‡ fait, de faire un auter claime en le forme avantdit, et deins l'an et le jour apres le second claime || fait, de faire le tierce claime en mesme le maner, et deins l'an et le jour de le tierce claime de faire un auter claime, et issint ouster, cest asca-voir, de faire un claime deins chescun an et jour procheine apres chescun claime fait durant la vie son adversarie, et donques a que-
cunques temps que son adversarie morust seisi, son entrie ne serra tolle per nul tiel discent. Et tiel claime en tiel maner § fait, est pluis communement prise et nosme Continual Claime de luy que fist le claime.

BUT in this case after the yeare and the day that such claime was made, if the father then died seised the morrow next after the yeare and the day, or any other day after, &c. then cannot hee which made the claime enter: and therefore if hee which made the claime will be sure at all times that his entrie shall not be taken away by such discent, &c. it behoveth him that within the yeare and the day after the first claime made, to make another claime in forme aforesaid, and within the yeare and the day after the second claime made, to make the third claime in the same man-ner, and within the yeare and the day after the third claime to make another claime, and so over, that is to say, to make a claime within e-
verie yeare and day next after everie claime made during the life of his adversarie, and then at what time soever his adversarie dieth seised, his entrie shall not be taken away by any discent. And such claime in such maner made, is most commonly taken and named Con-
tinuall Claime of him which ma-
keth the claime, &c.

IT is to be observed, that the yeare and the day shall be so accounted, as the day where-
on the claime was made shall be accounted one: as for example, if the claime were made
2. die Martii, that day shall be accounted for one; for *Littleton* saith in the Section next
before (after the claime made) and then the yeare must end the first day of *March*, and the
day after is the second day of *March*.

See for the computation of the yeare, *de anno bisextili*, and of the day naturall and arti-
ficiall, and other parts of the yeare, [a] *Bracton*, [b] *Britton*, and [c] *Fleta* excellent matter.

Vid. Sect. 385.
(Ant. 46. b.)

[a] *Bract.* fol. 264. 344. 359
(2. Roll. Abr. 1521.)
[b] *Britton*, fol. 209.
[c] *Fleta*, lib. 6. cap. 11.
Statute de anno Bisextili.
21. H. 3. Dier 17. Eliz. 345.

Sect. 424.

MES uncore en le cas a-
vantdit, lou son adver-

BUT yet in the case aforesaid,
where his adversarie dieth
sarie

* si nul auter clayme fust fait, added in L. and M. and Roh.
‡ fait not in L. and M. nor Roh.

|| fait not in L. and M. nor Roh.

† a added in L. and M. and Roh.

§ d'estre added in L. and M. and Roh.

sarie morust deins l'an et la jour within the yeare and the day next
*procheine apres le * claime, ceo est* after the claime, this is in law a
en ley un continuall claime, en- continuall claime, insomuch as
tant que l'adversarie deins l'an et his adversarie within the yeare and
le jour procheine apres mesme the day next after the same claime
la claime morust. Car il ne be- dieth. For hee which made his
soigne a celuy que fist son claime claime needeth not to make any
de faire ascun auter claime, mes other claime, but at what time hee
a quel temps que il † voit deins will within the same yeare and
mesme l'an et jour, &c. day, &c.

Vid. Sect. 414.

This is evident.

Sect. 425.

Vid. Stat. 32. H. 8. c. 33.)

ITEM, si l'adversarie soit dis-
seisie deins l'an et le jour a-
pres tiel claime, et le dissei-
for ent morust seisie deins l'an et
le jour, &c. tiel morant seisie ne
grievera my celuy que fist le claime,
mes que il poit enter, &c. Car
quecunque soit que morust seisie
deins l'an et le jour procheine a-
pres tiel claime fait, ceo ne grie-
vera my celuy que fist le claime,
mes que il poit enter, &c. coment
que fueront plusors morant seisie,
et plusors discents deins mesme l'an
et le jour, &c.

ALSO, if the adversarie be dis-
 seised within the yeare and
 the day after such claime, and the
 disseisor thereof dieth seised with-
 in the yeare and the day, &c. such
 dying seised shall not grieve him
 which made the claime, but that he
 may enter, &c. For whosoever hee
 be that dieth seised within the yeare
 and the day after such claim made,
 this shall not hurt him that made
 the claime, but that hee may enter,
 &c. albeit there were many dyings
 seised, and many discents within
 the same yeare and day, &c.

HERE it appeareth, that the continuall claime doth not only extend to the first dis-
 seisor, in whose possession it was made, but to any other disseisor, that dieth seised
 within the yeare and day after the continuall claime made. And whereas our author
 speaketh of a second disseisor, &c. herein is likewise implied not only abators and intru-
 ders, but the feoffees or donees of the disseisors, abators, or intruders, and any other
 feoffee or donee immediate or mediate, dying seised within the yeare and day, of such
 continuall claime made.

Sect. 426.

ITEM, si home soit disseisie,
et le disseisor morust seisie
deins l'an et le jour prochain
apres le disseisin fait, per que les
tenements descendent a son

ALSO, if a man be disseised, and
 the disseisor dieth seised with-
 in the yeare and day next after the
 disseisin made, whereby the tene-
 ments descend to his heire, in this
 heire,

* primer added L. and M. and Roh,

† voit not in L. and M. nor Roh.

*heire, en cest case l'entrie le dissei-
see est toll, car l'an et le jour que
aidroit le disseisee en tiel case*,
ne serra pris de temps de title
d'entre a luy accrue, mes tantsele-
ment de temps del claime per luy
fait en le manner avantdit. Et pur
cel cause il serroit bone pur tiel dis-
seisee pur faire son claime † en
auxy breve temps que il puissoit
apres le disseisin, &c.*

case the entrie of the disseisee is
taken away, for the yeare and day
which should aid the disseisee in
such case, shall not bee taken from
the time of title of entrie accrued
unto him, but only from the time
of the claime made by him in man-
ner afore said. And for this cause it
shall be good for such disseisee to
make his claime in as short time
as he can after the disseisin, &c.

THIS in case of a disseisor is now holpen by the statute made since *Littleton* wrote; as hath beene said; for if the disseisor die seised within five yeares after the disseisin, though there be no continuall claime made, it shall not take away the entrie of the disseisee, but after the five yeares there must be such continuall claime as was at the common law: but that statute extendeth not to any feoffee or donee of the disseisor immediate or me-
diate, but they remaine still at the common law, as hath beene said.

32. H. 8. cap. 33.
Vide Sect. 383. 424.
(Ant. 238. a.)

Sect. 427.

*ITEM, si tiel disseisor occupia
la terre per xl. ans, ou per †
plusors ans, sans ascun claime fait
per le disseisee, &c. § et le dissei-
see per petit space devaunt le mort
del disseisor fait un claime en
le forme avantdit, si issint fortu-
nast que deins l'an et le jour apres
tiel claime le disseisor morust,
&c. l'entrie le disseisee est congea-
ble, &c. Et pur ceo il serroit bone
pur tiel home que ne fist claime,
que ad bone title d'entrie ||, quant
il oyet que son adversarie gist
languishment, de faire son claime,
&c.*

ALSO, if such disseisor occupi-
eth the lands fortie yeares, or
more yeares, without any claime
made by the disseisee, &c. and the
disseisee a little before the death
of the disseisor makes a claime in
the forme afore said, if so it fortu-
neth that within the yeare and the
day after such claime the dissei-
sor die, &c. the entrie of the dis-
seisee is congeable, &c. And
therefore it shall bee good for
such a man which hath not made
claime, and which hath good
title of entrie, when hee heareth
that his adversarie lieth languish-
ing, to make his claime, &c.

THIS is evident enough, and in respect of that which hath beene said, needeth not to be explained.

Sect. 428.

*ITEM, sicome est
dit en les cases
mises, lou home*

ALSO, as it is said
in the cases put,
where a man hath

HERE title is taken in
his large sense to in-
clude a right.
*Ascun auter title,
&c.*

* &c. added L. and M. † &c. added L. and M. ‡ plus added L. and M. § et not in L. and M. || &c. added L. and M.

Ec. Here is implied abators or intruders, and not only their disseisors, but the feoffees or donees of disseisors, abators, or intruders, or any other so long as the entrie is congeable.

ad title d'entre pur of entrie by cause of
cause d'un disseisin, a disseisin, &c. the
Ec. mesme la ley same law is where a
est lou home ad droit man hath right to en-
d'entre per cause de ter by cause of an-
ascun auter title, Ec. other title, &c.

Sect. 429.

ITEM, de les dits * *presidents*
poies scarver (mon fits) deux
choses. Un est, lou home ad title
d'entre sur un tenant en le taile,
s'il fist un tiel claime a la terre,
donques est l'estate taile defeat,
car cel claime est come entre fait
per luy, et est de mesme l'effect en
ley, sicome il fuisset sur mesmes
tenements, et ust entrer en mesmes
les tenements, come devant est
dit. † Et donques quant le te-
nant en le taile immediate puis
tiel claime continua son occupa-
tion en les tenements, ceo est un
disseisin fait de mesmes les tene-
ments a celui que fist tiel claime,
et sic per consequens, le tenant
adonques ad fee simple.

ALSO, of the said foresaying
thou mayst know (my sonne)
two things. One is, where a man
hath title to enter upon a tenant in
taile, if he maketh such a claime
to the land, then is the estate taile
defeated, for this claime is as an
entrie made by him, and is of the
same effect in law, as if he had bin
upon the same tenements, and had
entred into the same, as before is
said. And then when the tenant
in taile immediately after such
claime continue his occupation in
the lands, this is a disseisin made
of the same tenements to him
which made such claime, and so
by consequent, the tenant then
hath a fee simple.

Presidents. This should be *precedents*, and so is the originall, and this agreeth with
the right sence of *Littleton*.

(Ant. 233.)

And here it appeareth, that a continuall claime, which is an entrie in law, is as strong as
an entrie in deed.

Vide Sect. 630. and 639, &c.

Title de entrie. Here *title de entrie* is taken in the large sence for right of entrie.

Sect. 430.

LE *second chose est, que auxy*
sovent que il que ad droit
d'entre fait tiel claime, † et ceo
nient contristeant son adversary
continua son occupation, § auxy
sovent l'adversary fait tort et dis-
seisin a celui que fist le claime. Et

THE second thing is, that as of-
ten as hee which hath right of
entrie maketh such claime, and this
notwithstanding his adversary con-
tinue his occupation, so often the
adversary doth wrong and dissei-
sin to him which made the claime.

pur

* *dites precedents* L. and M.

† Et not in L. and M. nor Roh.
§ *Ec.* added L. and M. and Roh.

‡ *et ceo—Ec.* L. and M. and Roh.

*pur cel cause auxy souvent poit ce-
luy que fist * mesme le claime pur
chescun tiel tort et disseisin fait a
luy, aver un brieve de trespasse, †
Quare clausum fregit, &c. et re-
covera ses damages, &c.*

And for this cause so often may hee
which makes the same claime for
every such wrong and disseisin done
unto him, have a writ of trespasse,
Quare clausum fregit, &c. and re-
cover his dammages, &c.

HEREBY also it appeareth, that an entry in law is equivalent to an entry in deed.
*Avera breve de trespasse, quare clausum fregit, et recoversa ses
damages.* The disseisee shall have an action of trespasse against the disseisor, and recover
his dammages for the first entry without any regresse, but after regresse he may have an ac-
tion of trespasse with a *continuando*, and recover as well for all the meane occupation as for
the first entry. And here note, that *Littleton* doth here include costs within dammages.

(2. Roll. Abr. 550. 1. Rep. 98.
1. Leo. 302. 20. H. 6. 15.
38. H. 6. 27.)

Sect. 431.

OU il poit aver un
brieve sur le sta-
tute le roy Richard le
second, fait l'an de son
raigne 5. supposant per
son brieve que son ad-
versary avoit entrer
en les terres † ou tene-
ments celuy que fist
le claime, ou son en-
try ne fuit pas done
per la ley, &c. et per
tiel action il recove-
ra ses dammages,
&c. Et si le case fuit
tiel, que l'adversary
occupiast les tene-
ments ove force et
armes, ou ove multi-
tude de gents a temps
de tiel claime, &c. ||
immediate apres mes-
me le claime poit ce-
luy que fist le claime
pur chescun tiel fait
aver un brieve de for-
cible entry, et reco-
vera ses treble dam-
mages, &c.

OR he may have a
writ upon the
statute of R. 2. made in
the fifth yeare of his
reigne, supposing by
his writ that his ad-
versarie had entred in-
to the lands or tene-
ments of him that
made the claime,
where his entry was
not given by the law,
&c. and by this ac-
tion he shall recover his
dammages, &c. And
if the case were such,
that the adversarie oc-
cupied the tenements
with force and armes,
or with a multitude of
people at the time of
such claime, &c. im-
mediately after the
same claime may hee
which made the claim
for every such act have
a writ of forcible en-
try, and shall recover
his treble dammages,
&c. (1)

Un brieve de forcible entrie, et recoversa ses treble dammages. This writ
is

THIS is the statute of
5. R. 2. cap. 7.

(Dec. Pla. 381.)

37. H. 6. 35. 34. H. 6. 30.
13. H. 7. 15. 10. H. 6. 14.
2. E. 4. 18. 21. E. 4. 5. 74.
13. E. 2. 3. 27. Aff. 64.
38. Aff. 9. 44. E. 3. 20.
10. H. 7. 27. Keylwey 1. b.
5. R. 2. cap. 7.
(F. N. B. 248. 249.)

*Per tiel action il
recoversa ses dammages.*

This is to be understood,
that he shall recover damma-
ges for the first torcious en-
try, but not for the meane
profits in this action, though
he made a regresse. And here
note, that also he shall recover
his costs of suit, *expense litis*,
which *Littleton* doth include
within these words (damma-
ges, &c.)

2. E. 4. 24. b. 9. E. 4. 4. b.
16. H. 7. 6. a.

Dammages. *Damna*
in the common law hath a
speciall signification for the
recompence that is given by
the jury to the plaintife or
defendant, for the wrong the
defendant hath done unto
him. (2)

(2. Infl. 28). Post. 355. b.
10. Rep. 115. 116. 11. Rep. 56.)

Multitude. One or
more may commit a force,
three or more may commit an
unlawfull assembly, a riot or
a rout. A multitude here
spoken of (as some have said)
must be ten or more. *Mul-
titudinem decem faciunt.* And so
(say they) it is said *de grege
hominum*. But I could never
read it restrained by the com-
mon law to any certaine num-
ber, but left to the discretion
of the judges. (3)

(3. Infl. 176. Hale's Pl. C. 127.

(See stat. 1. Geo. 1. c. 4.)

* *mesme* not in L. and M. nor Roh.

† *Quare clausum fregit, &c. et recoversa ses damages, &c. ou il poit aver un brieve,*
(the beginning of the next Section) not in L. and M. nor Roh. nor in MSS. before mentioned. It may be here observed, that the older
copies of *Littleton* are not divided into Sections, which seem to have been first injudiciously marked by West in the edition 1585,
though his divisions have been since retained for the convenience of citation. † *ou—et*, L. and M. and Roh. || *immediate*
apres mesme le claime—donques, L. and M. and Roh.

(1) Perhaps this passage is now quite accurate. Till the reign of Richard II. the party disseised, if his attempt were made soon
after the disseisin, might recover his possession by force; but by a statute passed in the fifth year of that reign, it was enacted, that
none from thenceforth should make any entry into lands and tenements, but in cases where entry was given by the law; and in that
case, not with a strong hand, nor with a multitude of people, but only in a peaceable and easy manner; and that persons convicted
of doing the contrary should be punished by imprisonment, to be ransomed at the king's pleasure. By a statute passed in the fifteenth
year of the same reign, it was enacted, that upon complaint of any such forcible entries to the justices of peace, they should take suf-
ficient power of the county, and go to the place where such force was made; and if they found any that held such place forcibly, after
such entry made, they should be taken and put into the next gaol, there to abide convicted by the record of the same justices, until they
had made fine and ransom to the king. By this it appears, that *Littleton* is equally wrong in his account of the punishment inflicted
by that statute, and the offence it intended to correct. These statutes of the reign of Richard II. have been confirmed, explained, and
in some respects extended by the stat. 4. H. 4. ch. 8. 8. H. 6. ch. 9. 23. H. 8. ch. 14. 31. Eliz. ch. 11. and 21. Jac. 1. ch. 15. See
Burn. Just. vol. II. 181. It should be observed, that in case an action is brought on these statutes, if the defendant make himself a
title, which is found for him, he shall be dismissed without any enquiry concerning the force; for howsoever he may be punishable
at the king's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable
to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. See 1. Haw. 141.
3. Burr. 1698. 1731.

(2) Some observations on the progress of our law, with respect to damages, costs, and mesne profits, will be offered in a subsequent
part of this work.

(3) By the common law there must be three persons at least to constitute a riot. By the 1. Geo. 1. c. 5. twelve persons at least must
be unlawfully assembled, to be within that act. By the 13. Car. 2. st. 1. c. 1. not more than twenty names are to be signed to a petition
to the king, or either house of parliament, for any alteration of matters established by law in church or state; and no petition is to be
delivered by a company of more than ten persons. By the bill of rights, or declaration delivered by the lords and commons to the
prince and princess of Orange, Feb. 13, 1688, and afterwards enacted in parliament, when they became king and queen, the fifth
article is, "That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are
illegal." Sir William Blackstone expressly says, that the right of the subject to petition, as declared by this statute, is under the re-
gulations of the 13. Car. 2. But a question may be made, whether the declaration contained in the bill of rights was not, in this parti-
cular, a repeal of the 13. Car. 2.

Lib. 3. Cap. 7. Of Continuall Claime, Sect. 432, 433.

8. H. 6. cap. 9. 3. E. 4. 19. 24.
F. N. B. 218. 11. E. 4. 11. b.
6. H. 7. 12. b. 22. H. 6. 37.
19. H. 6. Register 97.
22. H. 6. 57. F. N. B. 249. a.
(2. Cro. 17. 19. 31. 148. 151.
199. 214. 633. 639. 1 Roll.
Rep. 406. Sid. 97. 149.
Noy 136. 1. Cro. 561.
2. Infl. 289. 4. Infl. 176. c. 15.
1. Leo. 317.)
(15. R. 2. c. 2. 8. H. 6. c. 9.
23. H. 8. c. 15. 31. El. c. 11.
21. Jac. c. 15.)

10. H. 7. 12.
33. H. 6. 20.

is grounded upon the statute of 8. H. 6. and lieth either where one entreth with force, or where he entreth peaceably and detaineth it with force, or where he entreth by force, and detaineth it by force. And in this action without any regresse the plaintife shall recover treble dammages, as well for the meane occupation as for the first entry by force of the statute. And albeit he shall recover treble dammages, yet shall he recover costs which shall be trebled also.

One may commit a forcible entry, as hath beene said, in respect of the armour or weapons which he hath that are not usually borne, or if he doe use violence, and threats to the terrour of another. And if three or foure goe to make a forcible entry, albeit one alone use the violence, all are guilty of force. If the master commeth with a greater number of servants than usually attend on him, it is a forcible entrie.

It is to be understood, that there is a force implied in law, as every trespassse and rescous and disseisin implieth a force, and is *vi et armis*; and there is an actuall force, as with weapons, number of persons, &c. and when an entry is made with such actuall force, an action doth lie upon the said statute. See before more of force and armes, Sect. 240.

Sect. 432.

ITEM, * *il est a veier, si le servant d'un home que ad title d'enter, poit per le commandement son master faire continual claime pur son master ou non.*

ALSO, it is to bee seene, if the servant of a man who hath title to enter, may by the commandement of his master make continuall claime for his master or not.

This needeth no explication.

Sect. 433.

ET *il semble que en ascuns cases il poit ceo faire; car s'il per son commandement vient a ascun parcel de la terre, et la fait claime, &c. en le nosme son master, cest claime est assets bone pur son master, pur ceo que il fait tout ceo que son master covient faire † ou devoit faire en tiel cas, &c. ‡ Auxy si le master dit a son servant, que il ne oFAST vener a la terre, ne ascun parcel de la terre, pur faire son claime, &c. et que il ne oFAST approcher plus prochein a la terre forsque a tiel lieu appell Dale, et commanda son servant d'aler a mesme le lieu de Dale, et la faire un claime pur luy, &c. si le servant issint fait, &c. ceo semble auxy bone claime pur son master, sicome*

AND it seemeth that in some cases he may doe this: for if he by his commandement commeth to any parcell of the land, and there maketh claime, &c. in the name of his master, this claime is good enough for his master, for that he doth all that which his master should or ought to doe in such case, &c. Also if the master faith to his servant, that hee dares not come to the land, nor to any parcell of it, to make his claime, &c. and that he dare approach no neerer to the land then to such a place called Dale, and command his servant to goe to the same place of Dale, and there make a claime for him, &c. if the servant doth this, &c. this also seemeth a good claime for his master, as if his master were there

* *il-icy*, L. and M. and Roh.

† *ou devoit faire* not in L. and M. nor Roh.

‡ *Auxy* not in L. and M. nor Roh.

son master la fuit en proper per-* there in his proper person, for that
son, pur ceo que le servant fist the servant did all that which his
tout ceo que son master ofast et master durst and ought to doe by
devoit faire per la ley en tiel the law in such a case, &c.
case, &c.

HERE it appeareth that where the servant doth all that which he is commanded, and which his master ought to doe, there it is as sufficient as if his master did it himselfe; for the rule is, *Qui per alium facit, per seipsum facere videtur.*

Per commandement. If an infant or any man of full age have any right of entrie into any lands, any stranger in the name and to the use of the infant or man of full age may enter into the lands, and this regularly shall vest the lands in them without any commandement, precedent, or agreement subsequent. (*) But if a disseisor levy a fine, with proclamation according to the statute, an estranger without a commandement precedent, or an agreement subsequent within the five yeares cannot enter in the name of the disseisor to avoid the fine. And that resolution was grounded upon the construction of the statute of 4. H. 7. cap. 24. But an assent subsequent within the five yeares should be sufficient. *Omnia enumeratio retrotrahitur, et mandato equiparatur*, as hath beene said.

Auxi si le master dit a son servant que il ne ofast, &c. Here it appeareth, that where the servant pursueth the commandement of his master, and doth all that which his master durst and ought to doe by the law, this is sufficient. And although the master feareth more than the servant, or admit that the servant hath no feare at all, yet if he goeth as farre as his master durst, and as he commanded, it is sufficient. And this is implied in this Section.

Sect. 434.

AUXY, si home
soit cy lan-
guissant, ou cy de-
crepyte, que il ne poit
per nul maner venter
a le terre, ne a ascun
† parcel d'ycel, ou si
un recluse soit, que ne
poit per cause de son
order aler hors de sa
meason, ‡ si tiel ma-
ner || de person com-
maunda son servant
d'aler et faire claime
pur luy, et tiel servant
ne ofast aler a le terre,
§ ne a ascun parcel de
ceo, pur doubt de ba-
tery, mayhem, ou
mort, ¶ &c. et pur cel
cause tiel servant vi-
ent auxy pres a la terre
come il ofast pur tiel

ALSO, if a man be
 so languishing, or
 so decrepite, that he
 cannot by any meanes
 come to the land, nor
 to any parcell of it, or
 if there bee a recluse,
 which may not by rea-
 son of his order goe
 out of his house, if
 such manner of per-
 son command his ser-
 vant to goe and make
 claime for him, and
 such servant dare not
 goe to the land, nor to
 any parcell of it, for
 doubt of beating,
 mayhem, or death, &c.
 and for this cause the
 servant commeth as
 nere to the land as he
 dareth for such doubt

REGULARLY it is true, (Ant. 52. a.)
 that where a man doth
 lesse than the commande-
 ment or authority committed
 unto him, there (the com-
 mandement or authority be-
 ing not pursued) the act is
 void. And where a man doth
 that which he is authorized
 to doe and more, there it is
 good for that which is war-
 ranted, and void for the rest;
 yet both these rules have di-
 vers exceptions and limita-
 tions. (1)

For the first, *Littleton* here
 putteth a case where the ser-
 vant doth lesse than he is com-
 manded, and yet it sufficeth;
 for that *Impotentia excusat le-
 gem*; for seeing the master can-
 not, and the servant dare not,
 enter into the land, it sufficeth
 that he come as neere to the
 land as he dare.

If a man makes a letter of
 attorney to deliver seisin to
 J. S. upon condition, and the
 attorney delivereth it abso-
 lute, this is void: and so
 some hold if the warrant bee
 absolute, and hee delivereth
 seisin

* son added in L. and M. and Roh.
 || de not in L. and M.

† parcel not in L. and M. nor Roh.
 § ne — ou, L. and M. and Roh.

¶ &c. added in L. and M. and Roh.
 ¶ &c. not in L. and M. nor Roh.

(1) Where there is a complete execution of a power, and something, *ex abundanti*, added, which is improper, there the execu-
 tion shall be good, and only the excess void; but where there is not a complete execution of a power, or where the boundaries be-
 tween the excess and execution are not distinguishable, it will be bad. See *Alexander v. Alexander*, 2. Vez. 644.

7. E. 3. 69. a. b.
 45. E. 3. Release. 28.
 45. E. 3. tit. Briefe 289.
 20. E. 3. 62. per Thoup.
 11. Aff. p. 11. 39. Aff. p. 18.
 10. H. 7. 12. a.
 31. H. 8. tit. entr. Cong. et tit.
 Fawceter recovery 29.
 (*) Lib. 9. fo. 106. a. the Lord
 Awdleye's case.

(Hob. 154.)
 (1. Leo. 289.)

11. H. 4. 3.
 12. Aff. 24. 26. Aff. 19.
 (Perk. 38. b. Mo. 280.)

See before Sect. 419.

(a. Inst. 483.)
(Ant. 243. b.)

feisin upon condition, the liverie is void.

Pur battery, mayhem, ou mort. See the Second Part of the Institutes, W. 2. cap. 49. a diversity between the making of an entry or claime, and the avoidance of an act or deed.*Auterment le master serroit en tresgrand mischiese.* *Argumentum ab inconvenienti est validum in lege, quia lex non permittit aliquod inconveniens.* And as hath beene often observed before, *Nilil quod est inconveniens est licitum.**Recluse, Reclusus, Heremita, seu Anchorita,* so called by the order of his religion; he is so mured or shut up, *quod solus semper sit.* *et in clausura sua sedet;* and can never come out of his place. *Scorsim enim et extra conversationem civilem hoc professionis genus semper habitat.* Note here, albeit the recluse or anchorite be shut up himseife, so as he by his order is not to come out in person, yet to avoid a discent, he must command one to make claime, and such a recluse shall always appeare by attorney in such cases where others must appeare in proper person, *Impotentia enim excusat legem.** *doubt, et fait † le* and maketh the claime, *claime, &c. Jurson master, il semble que tiel* &c. for his master, it seemeth that such *claime pur son master* claime for his master *est assés fort, et bon en* is strong enough, and *ley.* Car auterment good in law. For otherwise his master *son master serroit en* should bee in a very *tresgrand mischiese;* great mischiese; for it *car il bien poit estre* may well be that such *que tiel person que est* person which is sicke, *languissant, decre-* decrepit, or recluse, *pite, ou recluse, ne* cannot finde any ser- *poit trover ascun ser-* vant which dare go to *vant que oïst aler a* the land, or to any par- *la terre, ne ‡ ascun* cell of it, to make the *parcel de cel, pur faire* claime for him, &c. *le claime pur luy, &c.*46. E. 3. Petition 18.
33. H. 6. 8.
43. E. 3. 8. b. 30. a.

Sect. 435.

*MES si le master de tiel servant soit de bone sane, et poit et oïst bien aler a les tene-ments, ou a parcel de ceo, de faire son elaime, &c. si tiel master com-manda son servant d'aler a ascun parcel de la terre a faire claime pur luy, || et quant le servant est en alant de faire le commandement de son master, il oye per le voy tielx choses que il ne oïst vener a ascun parcel de la terre pur faire le claime pur son master, et pur cel cause il vient auxy pres la terre come il oïst pur doubt de mort, et la fait claime pur son master, et en le nosme de son master, &c. il semble que le doubt en le ley en tiel case serroit, si tiel claime availera son master ou nemy,**BUT* if the master of such servant bee in good health, and can and dare well goe to the lands, or to parcell of it, to make his claime, &c. if such master command his servant to goe to any parcell of the land to make claime for him, and when the servant is in going to doe the commandement of his master, he heareth by the way such things as he dare not come to any parcell of the land to make the claime for his master, and therefore he commeth as neere to the land as he dare for doubt of death, and there maketh claime for his master, and in the name of his master, &c. it seemeth that the doubt in law in such case shall be, whether such claime shall availe his master
*pur** *doubt* --- *parvour*, in L. and M. and Roh.
† *&c.* added in L. and M. and Roh.† *le---tiel*, in L. and M. and Roh.‡ *a* added in L. and M. and Roh.

pur ceo que le servant ne fist tout or not, for that the servant did not
ceo que son master al temps de all that which his master at the
son commandement oſast faire, &c. time of his commandement durst
Quære. have done, &c. *Quære.*

THIS continuall claime is void, for that the servant doth lesse than that which is ex- (9. Rep. 79.)
 precisely commanded, and there is no impotencie or feare in the master.

Sect. 436.

ITEM, *ascuns ont*
dit, que lou home
est en prison et est
disseise, et le disseisor
morust seise durant
le temps que le disseisee
est en prison, per que
les tenements descen-
dont al beire del dis-
seisor, ils ont dit,
que ceo ne noiera my
le disseisee que est en
prison, mes que il bien
poit enter, nient ob-
stant tiel descent, pur
ceo que il ne puissoit
faire continual claime
quant il fuit en pri-
son.

AL SO, some have
 said, that where
 a man is in prison and
 is disseised, and the
 disseisor dieth seised
 during the time that
 the disseisee is in pri-
 son, whereby the tene-
 ments descend to the
 heire of the disseisor,
 they have said, that
 this shall not hurt the
 disseisee which is in
 prison, but that he well
 may enter, notwith-
 standing such a di-
 scent, because hee
 could not make con-
 tinuall claim when
 he was in prison.

QUANT *home est en* (1. Roll. Abr. 687.)
prison et est dissei-

ſie. For if hee bee disseised
 when he is at large, and the
 descent is cast during the time
 of his imprisonment, this di-
 scent shall binde him. *Excusa-*
tor autem quis quod clameum
ſuum non appoſuerit, ſi tempo-
re litigii in prifonâ detentus fu-
erit, ita quod venire non poſſit,
nec mittere, quia nulli vertitur
in dubium, et ubi eadem ratio et
idem juſerit, ideo videtur quod
excusari debet quis ſi per vim
majorem, vel per fraudem, ex-
tra prifonam detentus fuerit, ita
quod venire non poſſit nec mit-
tere, dum tamen hoc per certa
judicia probari poterit.

9. H. 7. 24. Pl. Com. 360.

Bracton, lib. 5. fol. 436.
 Britton, fol. 116. b.
 Fleta, lib. 6. cap. 52. 53. & lib.
 6. cap. 7. & 14.

Pur ceo que il ne poit
faire continual claime
quant il fuit en prison.

Here it is to bee observed by
 the authoritie of Littleton, that

he is not enforced in this case by law to doe it by his servant or any other by his warrant or
 commandement, for things done by deputie are seldome well done, but everie man will see
 his owne buſineſſe moſt effectually ſpeeded and performed: and that it may be once ſpoken
 for all, the reaſon that a man imprifoned ſhall not be bound in this and the like caſes is,
 for that by the intendment of law he is kept (as it is preſumed in law) without intelligence
 of things abroad, and alſo that he hath not libertie to goe at large to make entrie or claime,
 or ſeeke counſell. And ſo note a diverſitie betweene a recluſe who might have intelligence,
 and a man in priſon.

Pl. Com. 360. in Stowel's caſe,

* Sect. 437.

MES *l'opinion de tous les*
juſtices, p. 11. H. 7. fuit,
que ſi le diſſeiſin ſoit avant l'enpri-
ſonnement, coment que le morant
ſeiſie ſoit il eſteant en le priſon,
ſon entrie eſt tolle.

BUT the opinion of all the juſ-
 tices, p. 11. H. 7. was, that
 if the diſſeiſin bee before the im-
 priſonnement, although the dying
 ſeiſed be he being in the priſon,
 his entrie is taken away.

THIS is of a new addition, and miſtaken, for there is no ſuch opinion, p. 11. H. 7.
 but it is, 9. H. 7. fol. 24. b.

II

* This Section is not in L. and M. nor Roh. nor in the edit. 1577. which is eſteemed more correct than the common copies.

Lib. 3. Cap. 7. Of Continuall Claime. Sect. 437, 438.

(Post. 269. a. Ant. 128. b.)
(F. N. B. 236. 11. Rep. 8.)
(2. Roll. Atr. 803. 814. 2. Inf. 665. 1. Leo. 22. 186.)
Mirror cap. 3. Britton, fol. 21.
Fleta, lib. 1. cap. 28. & lib. 2. cap. 59. Bracton, lib. 2.
2. E. 4. 1. 4. E. 4. 10. 21. E. 4. 73. 11. H. 7. 5. 21. H. 6. 50.
9. H. 4. 3. 21. H. 6. Utlary 36.
7. H. 6. 27. 21. E. 4. 88. 22. E. 4. 37. 18. E. 3. Villenage 47.
21. E. 4. 37. 33. H. 6. 45. 46.
44. E. 3. Villeine 41. 4. H. 4. 19. 11. H. 4. 34. 3. Eliz. Dyer 192. 2. Fliz. 176. 5. Fliz. ibid. 223. 19. H. 6. 2. 8. H. 6. 37. 37. H. 6. 19.
(Doc. Pl. 230. 398.)
(Ant. 248. b.)
8. H. 4. 7. 21. H. 7. 13. 10. H. 6. 53. 20. H. 6. 20. 21. H. 6. 53. 22. H. 6. 18. 39. H. 6. 1.
33. H. 6. 51. 45. 38. H. 6. 33. 21. E. 4. 91. 21. H. 7. 33. 5. H. 7. 1. 12. H. 6. 8. 11. H. 6. 67. 19. 1. E. 4. 2. 27. H. 8. 2. 38. Alf. pl. 17. Vide Sect. 439.

IL reversera tiel utlagarie. Nota, the originall is, *reversera tiel utlagarie per briefe de error* (1), and so it would bee amended: for outlawries may bee reversed two manner of wayes, viz. by plea, or by writ of error. By plea, when the defendant commeth in upon the *capias utlagatum*, &c. hee may by plea reverse the same for matters apparent, as in respect of a *superfideat*, omission of proceffe, variance, or other matter apparent in the record; and yet in these cases some hold, that in another terme the defendant is driven to his writ of error.

But for any matters in fact, as death, imprisonment, service of the king, &c. he is driven to his writ of error, unlesse it be in case of felonie, and there *in favorem vite* he may plead it.

But albeit imprisonment be a good cause to reverse an outlawrie, yet it must be by proceffe of law *in invitum*, and not by consent or covin, for such imprisonment shall not avoid the outlawrie, because upon the matter it is his owne act.

ET auxy, si tiel que est en prison soit utlage in action de debt ou trespasse, ou en appeale de robberie, &c. il reversera tiel utlagarie* envers luy pronounce, &c.

AND also, if hee which is in prison be outlawed in an action of debt or trespasse, or in an appeale of robberie, &c. hee shall reverse this outlawry pronounced against him, &c.

Sect. 438.

5. E. 3. 50. b. 7. H. 6. 38.

Fleta, lib. 6. cap. 67. & 24. Vide W. 2. cap. 48. and the exposition thereof, 2. part Instit. 4. E. 2. Discent 51.

THIS is evident enough.

Per briefe d'error.

For hee shall have no writ of discent, because the summons was according to the law of the land, by summoners and veiors, and the land taken into the king's hand by the pernor.

Per default.

Default is a French word, and *desaltia* is legally taken for non-appearance in court. There bee divers causes allowed by law for saving a man's default; as, first, by imprisonment, whereof *Littleton* here speaketh. 2. *Per inundationem aquarum*. 3. *Per tempestatem*. 4. *Per pontem fractum*. 5. *Per navigium substractum per fraudem petentis, non enim debet quis se periculis et infortuniis gratis exponere, vel subiacere*. 6. *Per minorem etatem*. 7. *Per defensionem summotionis per legem*. 8. *Per mortem attornati si tenens in tempore non novit*. 9. *Si petens effonarius sit*. 10. *Si placitum mittatur sine die*. 11. *Per breve de sarrantia diei*. But sicknesse (as one holds) is no cause of saving a default, because it may be so artificially counterfeited, that it cannot be knowne.

Bracton, lib. 5. tract. 3. Fleta, lib. 6. cap. 7. 14. 3. H. 6. 46. 38. E. 3. 51. H. 6. Barre. 66. 12. H. 4. 13. 50. E. 3. 9. 3. H. 6. 48. 2. H. 4. 8. 5. H. 7. 3. F. N. B. 17. Bract. lib. 4. fol. 367. 269. Glan. lib. 1. cap. 8. 28. H. 6. 11. 4. H. 5. Chalenge 153. Br. Saver. Def. 45.

(Cro. Eliz. 506.)

AUXY, si un recovery soit + per default vers tiel que est en prison, il avoidera le judgement per briefe de error, pur ceo que il fuit en prison al temps de le default fait, &c. Et pur ceo que tiels matters de record ne noyeront celuy que est en prison, mes que ils serront reversees, &c. a multo fortiori, il semble que un matter en fait, scilicet, tiel discent ewe quant il fuit en prison ne luy noyera, &c. specialment pur ceo que il ne puisse aler hors de prison pur faire continuall claime, &c.

ALSO, if a recovery bee by default against such a one as is in prison, he shal avoid the judgement by a writ of error, because he was in prison at the time of the default made, &c. And for that such matters of record shal not hurt him which is in prison, but that they shall bee reversed, &c. *a multo fortiori*, it seemeth that a matter in fact, scilicet, such discent had when hee was in prison shall not hurt him, &c. especially seeing he could not goe out of prison to make continuall claime, &c.

Record,

* *per brief d'error*, &c. *pur ceo qu'il fuit en prison al temps d'utlagarie*, added L. and M. and Roh. and in MSS.
+ *ewe* added L. and M. and Roh.

(1) A writ of error properly lies, where false judgment is given in any court which is a court of record. It was formerly held, that, by the common law, no amendment could be permitted, unless within the very term in which the judicial act so recorded was done. But the courts now allow of amendments at any time while the suit is depending.—After the termination of the suit the judgment can only be reversed by writ of error. From the inferior courts it lies to the king's bench and common pleas;—from the common pleas to the king's bench;—from the king's bench to the house of lords. To amend errors in a base court, not of record, a writ of false judgment lies.—A writ of error only lies upon *matter of law*. There is no method of reversing an error on the determination of facts but by an attainr or a new trial. See Bla. Com. 3. vol. c. 25. f. 3. F. N. B. 20. 4. Inf. 21.

Record, (1) *Recordum*, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or damage amounts to fortie shillings or above, which wee call Courts of Record, and are created by parliament, letters patents, or prescription.

It is aptly derived of *recordari*, which is to keepe in memorie or record, as it is said, *quod dicere nihil aliud est quam recordari*; and in the same sense the poet useth it, *si ritè audita recordor*. But legally records are restrained to the rolles of such only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legem et consuetudinem Angliæ*. And the rolles being the records or memorialls of the judges of the courts of record, import in them such incontrollable credit and veritie, as they admit no averment, plea, or prooffe to the contrarie. And if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by it selfe: and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient. Of courts of record you may read in my Reports; but yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll, and admitteth no alteration, averment, or prooffe to the contrarie.

If a grant by letters patents under the great seale be pleaded and shewed forth, the adverse partie cannot plead *nul tiel record*, for that it appears to the court that there is such a record; but inasmuch as it is in nature of a conveyance, the partie may denie the operation thereof, therefore he may plead *non concessit*, and prove in evidence that the king had nothing in the thing granted, or the like, and so it was adjudged. But to returne to *Littleton*: What then? shall a man that is in prison be privileged from suits or outlawries? Nothing lesse; for if the tenant or defendant be in prison, he shall upon motion, by order of the court, be brought to the barre, and either answer according to law, or else the same being recorded, the law shall proceed against him, and he shall take no advantage of his imprisonment.

A multò fortiori. Here is an argument, *à minori ad majus*, and the force of our author's argument is this: If a man in prison shall not be bound by a recoverie by default for want of answer in court of record in a reall action, which is matter of record (the height and strength whereof hath beene somewhat touched) *à multò fortiori*, a discent in the countrey, which is matter of deed, shall not for want of claime binde him that is in prison. And as the argument *à minori ad majus* doth ever hold (as our author hath already told us) affirmatively, so the argument *à majori ad minus* doth ever hold negatively, as our author here teacheth us: and the reason hereof is this, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori*.

Pur ceo que il ne poit aler hors de prison, &c. By this it appeareth, that a man in prison by processe of law ought to be kept *in salvâ et arctâ custodia*, and by the law ought not to goe out, though it be with a keeper, and with the leave and sufferance of the gaoler: but yet imprisonment must be, *custodia, et non pœna*; for *carcer ad homines custodiendos, non ad puniendos dari debet*.

Glanvil. lib. 8. cap. 8. Brañon lib. 3. fol. 156. Britton in proemio & cap. 27.

Cicero, Virgil.

Pl. Com. 79. b. Mich. 7. & 8. Eliz. Dier 212.

17. E. 3. 49. 37. H. 6. 21. b. 11. H. 4. 26. b. 21. H. 6. 34. Error. Br. 73. 7. H. 7. 4. 19. Aff. 7. lib. 4. fol. 52. in Rawlin's case. Glanvil. lib. 8. cap. 8. Brañon lib. 3. fol. 156. Britton cap. 27. lib. 6. fol. 11. Gentleman's case. and 30. 45. lib. 7. fol. 30. lib. 8. fol. 60. b. and 67. a. 7. H. 6. 28. 19. H. 6. 9.

(Doc. Pl. 307. 308. 1. Len. 65.) 18. Eliz. Dier 3: 33. Mar. Di. 129. Pl. Com. 232. Seignior Berkeley's case. 16. H. 7. 11. b. 22. H. 8. Record. Br. 65. 19. H. 6. 4. 3. Eliz. Dier 187. lib. 6. fol. 15. Eden's case. Mich. 31. & 32. El. Rot. 365. In Banke le Roy, inter Eden, & Franklyn, & Browne. (4. Rep. Hind's case.) 7. H. 6. 38. 8. H. 6. 16. Vide Sect. 418.

Sect. 439.

**EN mesme le man-
ner il semble,
lou home est hors
du royaume en ser-
vice le roy, pur be-
soigne del royaume, si
tiel * home soit disseise
quant il est en service
le roy, † et le disseisor
morust seise, le disseisee**

**IN the same maner
it seemeth, where a
man is out of the
realme in the king's
service, for the busi-
nesse of the realme,
if such a one be dissei-
sed when hee is in
service of the king,
and the disseisor dieth**

HORS du royaume,
(*id est*) *extra regnum*; as
much to say, as out of the
power of the king of En-
gland, as of his crowne of En-
gland: for if a man be upon
the sea of England, he is with-
in the kingdom or realme of
England, and within the li-
geance of the king of England,
as of his crowne of England.
And yet *altum mare* is out of
the jurisdiction of the common
law, and within the jurisdic-
tion

6. R. 2. Proct. 46.
Vide Sect. 198. 440. 441.
(Cro. Car. 365. 5. Rep. Con-
stable's case. 1. Roll. Abr. 528.)

* home not in L. and M.

† et le disseisor morust seise, le disseisee estant en le service le roy, not in L. and M.

(1) The public records of the kingdom are considered to relate to the proceedings of the houses of parliament, the court of chancery the courts of common law, or the revenue. A general table of them, distinguished under these different heads, is to be found in the appendix to the report from the committee appointed to view the Cottonian library. See the report and appendix, page 183. The rolls or records of parliament have been published in the course of his present majesty's reign, in six volumes folio, under the immediate auspices of the house of peers. This extensive and laborious undertaking is executed with the greatest accuracy: it pre-supposes no common share of antiquarian and diplomatic learning in the gentlemen concerned in it. A part of it was the work of the late Mr. Morant; all the rest was completed by Mr. Astle, the keeper of the records in the Tower, and Mr. Topham, of Lincoln's-Inn. It should be observed, that the proceedings of the legislature till the reign of Edward I. were exceedingly irregular, and greatly defective in point of form. They are sometimes penned so as to appear to come from the king alone; sometimes as issued jointly by the king and lords; sometimes the assent of the commons is, and sometimes it is not, expressed; sometimes the authority for passing

Lib. 3. Cap. 7. Of Continual Claime. Sect. 440.

Rot. Pat. { 8. H. 3.
9. H. 3.
13. H. 3.
Temps E. 1. Avowrie 193. Rot.
Vafcon. 22. E. 1. m. 8. Pat.
23. E. 1. 1. pars Pat. 10. E. 2.
8. E. 2. Coron. 399. Stanf. Pl.
Coron. 51.

Vide Sect. 677.

(Hob. 212.)

3. R. 3. Cont. Claime 13.
4. E. 3. 46.

Brañ. lib. 5. fol. 436.

tion of the lord admirall, whose jurisdiction is verie antient, and long before the reign of Edward the third, as some have supposed, as may appeare by the lawes of Oleron, (so called, for that they were made by king Richard the first when he was there) that there had beene then an admirall time out of minde, and by many other antient records in the reignes of Henrie the third, Edward the first, and Edward the second, is most manifest.

See hereafter in another case, which Littleton put in his chapter of Remitter; there he saith, *ouster le mere*, beyond the sea. This great officer in the Saxon language is called *Au mere al*, (i.e.) over all the sea, *praefectus maris*, *five classis*, *archiballastus*: and in antient time the office of the admiraltie was called *custodia marinae Angliae*, or *maritima Angliae*.

And note Littleton saith not, beyond the sea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by construction to be within the realme of England, or the dominions of the same.

But here a question may be demanded, What if a man be out of the realme, and a recoverie is had against him in a *praecipe* by default, whether shall he avoid it in a writ of error, as well as he should doe the outlawrie, or if he had beene imprisoned at the time of such recoverie by default? And it seemeth that he shall not avoid the recoverie, for by that meanes a man might be infinitely delayed of his freehold and inheritance, whereof the law hath so great a regard. And few or none goe over, but it is either of their owne free will, or by suit, for what cause soever; and he is not in that case without his ordinarie remedie, either by his writ of higher nature, or by a *quod ei de forceat*. But outlawrie in a personall action shall be avoided in that case, *quia de minimis non curat lex*, and otherwise he should be without remedie. See Section 437. and note the diversitie betweene that case of the imprisonment, and this of being beyond sea. And Littleton putteth the case of imprisonment, and omitteth the being beyond sea here: neither have I seene any booke to warrant, that he that is beyond sea shall in this case avoid the recoverie by default.

En service le roy. Brañon sheweth, that the exception of being beyond sea is, *quia fuit in servitio domini regis ultra mare*, viz. *apud talem locum*, and that case is cleere: but you shall heare the opinion of Brañon in the next Section, where hee is not in the service of the king.

Sect. 440.

Brañ. lib. 5. fol. 436. b. & 163.
Brit. lib. 21. 216. 217. Flet.
lib. 6. cap. 52. 53. 13. H. 4.
Triall 6. 9. H. 4. 3. 21. H. 6.
Error 27. 33. H. 6. 1. 21. H. 6. 31.
26. H. 8. cap. 18. 5. & 6. E. 6.
cap. 11.

AND herewith the ancient law of England is agreeable with Littleton, and the law at this day. So as it is *vetus & constans opinio*. Excusatur etiam quis quod clameum

ITEM, auters ont dit, que si ascun soit hors du royaume, coment que il ne soit en service le roy, si feised, &c. the disseisee being in the king's service, that such discent shall not hurt the disseisee; but for that hee could not make continual claime, it seemes to them, that when hee cometh into England, he may enter upon the heire of the disseisor, &c. For such a man shal reverse an outlawrie pronounced against him during the time that hee was in the king's service, &c. therefore à multo fortiori, he shall have aid and indemnity by the law in the other case, &c.

* &c. added in L. and M. and Roh.

† revient, L. and M.

‡ que est added L. and M.

the acts is mentioned; and sometimes the acts are in the form of charters.—The first summons of the knights of shires to parliament, extant on record, is in the 49th year of Henry III.—The first regular summons directed to the sheriff for the election of citizens and burgesses, is in the 23d of Edward I.—In that reign the proceedings of the legislature assumed a more regular form; but far removed from that in which they appear at present. The consent of the commons to the levying of taxes for the king gave them great weight. They took advantage of this circumstance to obtain a remedy for the grievances they had to complain of.—In the reign of Edward III. the mode of presenting their petitions, and of receiving their answers, was regularly practised. If the petition and the answer to it were of such a nature as to require an express and new provision to be made for it, the king, with the assistance of his council and of the judges, framed, from such petition and answer, an act, which was usually entered on the statute roll; but if an express and new provision were not required, the petition itself and the king's answer to it were entered on the parliament roll, and then usually filed an ordinance.—Alterations and improvements gradually took place; but it was not till the reign of Henry VI. that these petitions of the commons were reduced, in the first instance, into the body of the bill.

tiel home escant hors de le royaume est disseisee en terres ou tenements deins le royaume, et le disseisor devy seise, &c. le disseisee esteant hors du royaume, il semble a eux, que quant le disseisee vient deins le royaume, que il poit * enter sur l'heire le disseisor, et ceo semble a eux per deux causes. Un est, que celui que est hors du royaume ne poit aver conusans del disseisin fait a luy per entendement de ley, nient plus que chose fait hors du royaume poit estre try deins le royaume per le serement de 12. † et de compeller tiel home per la ley de faire continuall claime, lequel per l'entendement de le ley ne puit aver aucun notice ou conusance de tiel disseisin, ceo serra inconvenient, et nosmement quant tiel disseisin est fait a luy quant il est hors du royaume, et auxy le morant seise fuit quant il fuit hors du royaume: car en tiel case il ne poit per nul possibility selonque common presumption faire continuall claime; mes aster-

non appesuerit, ut si toto tempore litigii fuit ultra mare quacunque occasione. And this is also agreeable with our yeare bookes. (1)

Nient plus que chose fait hors del royaume poit estre trie deins le royaume per le serement de 12.

And in this rule of law there is warily and truly put by Littleton, these words (*by the oath of twelve men*) meaning by a jury. For by certificate a thing done beyond sea may be tried, as Littleton himselfe, *Sect. 102.* hath set downe. And all matters done out of the realme of England concerning war, combat, or deeds of armes, shall bee tried and termined before the countable and marshall of England, before whom the triall is by witness, or by combat, and their proceeding is according to the civill law, and not by the oath of twelve men, as Littleton here speaketh.

This rule here rehearsed by Littleton, is worthy of explanation. If an alien (for example borne in France) bring a reall action, and the tenant plead that the demandant is an alien borne under the obedience of the French king, and out of the leigeance of the king of England; shall this case want triall, because the matter alleged is out of the realme? then by the fiction of this plea, no demandant shall recover; therefore in this case, the demandant shall reply, that hee was borne at such a place in England, within the king's leigeance, and hereupon a jury of 12. shall be charged, and if they have sufficient evidence that hee was borne in France, or in any other place out of the realme, then shall they finde, that hee was borne out of the king's allegiance, and if they have sufficient evidence that he was borne in England, or Ireland, or Jersey, or Jersey, or elsewhere within the king's obedience,

42. E. 3. 2. & 3. Vide Sect. 102.

(Ant. 74. 2.)

(4. Inst. 123.)

1. H. 4. cap. 12. 13. H. 4. l. 4. 48. E. 3. 2. & 3.

(Doc. pla. 209.)

22. E. 3. averment. 21. 27. Aff. 24. 32. H. 6. 25. 15. E. 4. 15. 7. H. 6. 15. 1. R. 3. 4. 6. H. 7. 6. 7. H. 7. 8. F. N. B. 156. 29. Aff. 11. 13. E. 1. m. 10. 47. 12. H. 3. Ibid. 55. Lib. 7. fol. 26. 27. Calvin's case Li. 6. f. 47. Dowdale's case.

* Lien added in L. and M. and Roh.

† &c. added in L. and M. and Roh.

(1) A reference was made in a former part of this work to this place for some observations on the different points of law arising on the doctrine of the *Four Seas*. So far as it leads to an enquiry into our *dominion of the sea*, circumstances of a public nature now exist which make it a matter of too much importance and delicacy to be treated of here. In the note referring to this passage, sir Philip Meadows's treatise on the dominion and sovereignty of the seas is mentioned with great commendation. A copy of this work, which formerly belonged to lord chief baron Parker, has this note in his lordship's own hand-writing. "This is a most curious and excellent treatise; and though Mr. Selden's *Mare Clausum* is a learned and ingenious work, and will be ever popular with Englishmen, yet sir Philip Meadows's rules for ascertaining the limits of the sea seem to me to be founded on more solid and prudential reasons than Mr. Selden has offered in his book. T. Parker, 14th Sept. 1744." It has been a complaint among the learned, that in the treaties which have been written on the laws of war and peace, no regard is had to the *intermediate time between the commencement of hostilities and actual war*. Those whose studies may lead them to consider that subject, will hear with pleasure that the late sir Hans Bland, whose erudition and classic taste are well known, left behind him in manuscript, an elegant and accurate treatise upon it, entitled, *De Jure Imperfecti Belli*.

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dience, they shall finde that he was born within the king's leigeance. And this hath ever bene the pleading and manner of triall in that case. And so it is in the case that *Littleton* here putteth, if a man, in avoydance of a fine or a discent, alleage that hee was out of this realme in Spaine, at the time of levying of the fine and at the time of the disseisin and discent, the adverse party may alleage that he was at such a place in England, &c. whereupon issue shall be taken, and then in evidence he may prove that he was out of the realme, &c. which, upon sufficient evidence, the jurie ought to finde. And in both these cases and the like, in a special verdict the jury may finde that he was borne beyond sea, or was beyond sea at that time, &c.

ment serroit si tiel disseisee fuit deins le royaume al temps de le disseisin, ou al temps del morant del disseisour. possibilitie after the common presumption make continuall claime; but otherwise it should be if the disseisee were within the realme at the time of the disseisin, or at the time of the dying seised of the disseisour.

[7. Rep. 26. 27. Calv. case.]

5. R. 2. triall. 34.

[*] 35. H. 8. cap. 2.
Stamford. pl. cor. 90.
(Cro. Car. 332.)

[a] 33. Eliz. case Orurke.
[b] 34. Eliz. case de Sir John Perots.
[c] Mich. 19. & 20. Eliz. Dier 360.
(20. H. 6. 8.)
48. E. 3. 11. H. 7. 16.
2. R. 3. 4.

(1. Roll. 532. Hob. 11.
4. Inf. 138. 140. 141. 7. Rep. 2. a.
Sid. 367. Lut. 700. 710. 950.)
Pach. 28. Eliz. in action de covenant inter Evangelist Constatine pl. & Hughgyn defendant in the king's bench. Li. 6. f. 47.
Dowdale's case. Vid. 32. H. 6. 25.
48. E. 3. 11. H. 7. 16. 2. E. 2. obligation 15.
(2. Cro. 76. Sid. 228. Hob. 11.)

Entendement de le ley.

Wide Sect. 269.

The statute of 25. E. 3. *de prodicionibus* doth declare, that it is treason by the common law to adhere to the enemies of the king within the realme, or without, if hee bee thereof proveablement attaint of overt fact, and that he shall forfeit all his lands, &c. A man must not imagine that seeing by the common law declared by authority of parliament, that adhering to the king's enemies without the realme, is high treason, and that the delinquent may be attainted thereof, &c. that this should want triall, for then the judgement of the common law, and declaration of the parliament, should be illusory, which no well advised man will thinke in a matter of so great consequence. But certaine it is, that for necessitie sake, the adherencie without the realme must be alleaged in some place within England. And if upon evidence they shall finde any adherencie out of the realme, they shall finde the delinquent guilty. But most commonly they indicted him (if he had lands) in some county where his lands did lie, that were to be forfeited; and this, as appeareth in our bookes, was the common use. And so it is declared by the statute (*) of 35. H. 8. and that it shall be tried by twelve men of the countie, where the king's bench shall sit, and be determined before the justices of that bench, or else before such commissioners, and in such shire of the realme, as shall be assigned by the king's majestie's commission, and this statute for this point remains in force at this day, and so it is resolved [a] by all the judges in my time, viz. in 33. Eliz. in the case of Orurke. And also [b] 34. Eliz. in sir John Perot's case done in Ireland, for that is out of the realme of England, and the case [c] in Mich. 19. & 20. Eliz. was utterly denied, and sir Christopher Wray himselfe (who is supposed to give his opinion in that case) protested that he never gave any such opinion, but did hold the contrary. When part of the act, especially the originall, is done in England, and part out of the realme, that part that is to be performed out of the realme, if issue be taken thereupon, shall be tried here by 12. men; and those twelve men shall come out of the place where the writ is brought. For example, (which ever doth illustrate) it was covenanted by indenture, by charter party, that a ship should sayle from *Blackney* haven in Norfolk, to *Muttrell* in Spaine, and there remaine by certaine dayes.

In an action of covenant brought upon this charter party, the indenture was alleaged to be made at *Thetford* in the county of Norfolk, and upon pleading, the issue was joyned, whether the said ship remained at *Muttrell* in Spaine by the said certaine dayes. And it was adjudged that this issue should be tried at *Thetford*, where the action was brought, because there the contract tooke his originall by making of the charter partie, and so hath it bene often adjudged in such like case.

An obligation made beyond the seas may be sued here in England, in what place the plaintiffe will. What then if it beare date at *Bordeaux* in France, where shall it be sued? And answer is made, that it may be alleaged to be made in *quodam loco vocat' Burdeaux* in France, in *Ullington* in the county of *Middlesex*, and there it shall be tried, for whether there be such a place in *Ullington* or no, is not traversable in that case. These points are necessary to be knowne in respect of the variety of opinions in our bookes. And of these thus much shall suffice, and now is *Littleton* worthy to be heard.

Per entendement de le ley. Vide, for intendement of law, Sect. 99, 100. 110. 293. 377. 393. 406. 367. 462. 463. &c. 439.

Ceo serra inconvenient. Here also, as hath bene often said, appeareth, that *argumentum ab inconvenienti*, is strong in law.

Auterment est si le disseisee fuit deins le royaume al temps del disseisin, &c. So as if a man be disseised before he goeth over sea, or cometh into the realme againe before the discent, the discent shall take away his entrie.

Sect.

Sect 441.

UN autre mat-
ter ils allegent
ont pur prover que
devant le statute fait
en le temps de roy E. 3.
an. * 34. cap. 16.
de son raigne, per
quel estatute non-
clame est ouste, &c.
le ley fuit tiel, que si
un fine soit levy de
certaine terres ou te-
nements, si aucun
que fuit estrange al
fine avoit droit d'aver
et recover mesmes
les terres ou tene-
ments, s'il ne venust
et fist son clame a ceo
deins l'an et le jour
procheine apres le fine
levie, il serra barre
a tous jours, quia
dicebatur, finis finem
litibus imponebat.
Et que la ley fuit tiel,
il est prove per l'esta-
tute de Westminster
2. De donis conditio-
nalibus, lou il est parle
que si fine soit levie de
les tenements en taile,
&c. quod finis ipso ju-
resit nullus, nec habe-
ant hæredes, aut illi
ad quos spectat rever-
sio, licet fuerint plenæ
ætatis in Angliâ, et ex-
tra prisonam) neces-
sitat apponere clameum
suum, † &c. *Issint ceo*

ANOTHER matter
they alleage for a
prooffe that before
the statute of king
Edward the Third,
made the 34th yeare
of his reigne, by
which statute non-
claim is ousted, &c. the
law was such, that if a
fine were levied of
certaine lands or te-
nements, if any that
was a stranger to the
fine had right to have
and to recover the
same lands or tene-
ments, if he came not
and made his clame
thereof within a yeare
and a day next after the
fine levied, he shall be
barred for ever, quia
dicebatur quod finis fi-
nem litibus imponebat.
And that law was
such, it is proved by
the statute of West.
the 2. *De donis condi-*
tionalibus, where it is
spoken if the fine bee
levied of tenements
given in the taile, &c.
quod finis ipso jure sit
nullus, nec habeant hæ-
redes, aut illi ad quos
spectat reversio (licet ple-
næ ætatis fuerint in An-
gliâ, et extra prisonam)
necessitat apponere clame-
um suum. Soe it is proved

HERE it appeareth, 84 E. 3. cap. 16.
what the common
law was before the said sta-
tute, for non-clayme upon
a fine levied. But now since
Littleton wrote, by the sta-
tute of 4. H. 7. five yeares
after proclamations made
upon the fine are given to
him that right hath to make
his clame, or pursue his
action, where the common
law gave him but a yeare
and a day. But this sta-
tute of 4. H. 7. extends only
to fines, and not to non-
clame upon a judgement
in a writ of right, and there-
fore the said statute of
34. E. 3. here cited by *Li-*
tleton, which ousteth non-
clame only to fines levied,
extendeth not to a judge-
ment in a writ of right at
this day, and therefore the
common law in that case
remaineth to this day, viz.
that clame must bee made
within a yeare and a day
after judgement. Also if a
fine be levied without pro-
clamations, or without so
many as the law requireth,
then the statute of non-
clame doth extend to such
a fine.

Dicebatur finis,
quia finem litibus impo-
nebat. (1) Here you may
observe the etymologie of
a fine. And herewith a-
greeth [a] antiquity: *Finis*
ilico dicitur finalis concor-
dia, quia imponit finem liti-
bis. And after the exam-
ple [b] of *Littleton*, it is
good to search out the ety-
mologie or right derivation
of words; for *ignoratis termi-*
nis ignoratur et ars, as hath
beene often observed in other
places. And the civilians
call this judiciall concord,
transactionem judicialem de
re immobili.

Licet

* 34. cap. 16. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

(1) Every part of the law relating to fines and common recoveries has been stated and explained by Mr. Cruise, in his Essays upon those subjects, in a manner that equally recommends them to the student, and the most learned and experienced practi- tioners. Besides the obligations which the Editor has to him upon this account in common with the rest of the profession, he ac- knowledges with equal pleasure and gratitude the particular obligations he has to him for the assistance he has derived from them in the course of this work.

Stat. de anno. 13. E. 1.

[c] Pl. Com. Stowel's case, 359.

Braſton, lib. 5. fo. 436.
Britton, fo. 216. b.
Fleta, lib. 6. ca. 53.44. H. 7. c. 24.
32. H. 8. c. 26.
2. Inst. 516.)

*Licet fuerit plenæ prove, que si un e- that if a stranger that
tatis in Angliâ, et ex- strange home que a-
tra prisonam.* In this act hath right unto the te-
of 13. E. 1. *De donis condition- nements, if he were
nals* is one omitted, who is out of the realme at
added in the statute *De mo- the time of the fine le-
do levandi fines, viz. et sanæ me- vied, &c. shall have no
morie.* [c] But a fem-covert dammage, though that
had no privilege of non- hee made not his
claime at the common law, claim, &c. though that
as some have said, because she such fine was matter
had a husband that might of record: by greater
make claime for her. But reason it seemeth unto
yet Braſton saith, *Item excu- them, that a disseisin
satur uxor quæ sub potestate viri and discent that is mat-
supposita, quod clamcum non ter in deed, shall not so
apposuerit licet mittere possit,* grieve him that was
and citeth a judgement in the disseised when he was
point, Trin. 4. H. 3. in Cu- out of the realme at
ſin's case. But Fleta saith, *Ex- the time of that dissei-
cusatur si fuerit uxor alicujus, si fin, and also at the
fuerit per virum impedita, quod time that the disseisor
non potuit apponere clamcum.* died seised, &c. but
Also they in reversion or that he may well enter,
remainder expectant upon any notwithstanding such
estate of freehold were barred discent.
by the common law; and yet
they could make no claime,
because, as hath beene said, it
belonged to the particular te-
nant, and not to them. because
their entry was not lawfull;
which was one of the princi-
pall causes of making of the
said statute of 34. E. 3. which
ousted non-claime. But these
now without question holpen,
titles, by the said statute of 4.

cases of coverture, and of them in reversion and remainder, are
and just provision made for the saving of their rights and
titles, by the said statute of 4. H. 7. as by the said act appeareth.

Sect. 442.

ARRAIGNE un af-

ſiſe. To arraigne the
aſſiſe is to cauſe the tenant
to be called to make the
plaint, and to ſet the cauſe
in ſuch order as the tenant
may bee enforced to anſwer
thereunto; and is derived of
the French word *arraigner*,
which ſignifieth to order or
ſet in right place. An ar-
raignment is ſometime cal-
led an aſſitution, of the verbe
aſſituo, compounded of *ad*
and *ſtuo*, that is, to place
or ſet in order one by ano-
ther. In the ſame ſenſe that
Littleton here uſeth it, it is
uſed when an appeale is

IT E M, *quære ſi
home ſoit diſſei-
ſiſe, et il arraigne un
aſſiſe envers le diſſei-
ſor, et les recognitors
de le aſſiſe † chaun-
ta pur le plaintiſe, et
les juſtices d'aſſiſe voyle
eſtre adviſes de leur
judgment, tanques al
prochein aſſiſe, &c.
et en ‡ le dementiers
le diſſeiſor moruſt ſei-
ſiſe, &c. ſi le dit ſuit*

A I S O, inquire if a
man be diſſeiſed,
and he arraigne an af-
ſiſe againſt the diſſei-
ſor, and the recog-
nitors of the aſſiſe
chante for the plain-
tiſe, and the juſtices of
aſſiſe will bee adviſed
of their judgements
untill the next aſſiſe,
&c. and in the meane
ſeaſon the diſſeiſor di-
eth ſeiſed, &c. yet the

del

* &c., added in L. and M. and Roh.

† chaunta—chaunteront, in L. and M. and chanteront in Roh.

‡ le not in L. and M.

*del affise serra * pris en ley pur le dit disseisee un continuall claime, entant que nul default fuit en luy †, &c.*

said suit of the affise shall bee taken in law for the disseisee a continuall claime, in so much that no default was in him, &c.

arraigned, both which are arraigned in French, but entred in Latin. And it is to bee observed, that *Littleton* saith here *arraigne un affise*, and saith not that the tenant is arraigned; and so of the appeal; for these are the suits of the subject, and no man is

said to be arraigned, but merely at the suit of the king, upon an enditement found against him, or other record wherewith he is charged. And there the arraignment of the prisoner is to take order that he appeare, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the enditement or other record, whereupon they which follow for the king may orderly proceed.

Justices d'affise. Justices of affise are assigned and constituted by the king of the judges and sages of the law, and are called justices of affise, for that the writs of affise of *novel disseisin*, (which in former times were accounted *sestina remedia*, and very frequent and common) were returnable before them to be taken in their proper counties twice every yeare at the least, whereupon they had authority to give judgment and award seisin and execution: and therefore both for the number of them in times past, and for the greater authority they had then as justices of *nisi prius* (which was to trie issues only, except in *quare impedit*, and *affises de darrein presentment*, in which cases the justices of *nisi prius* might give judgment) they were denominated justices of affises: and divers acts of parliament have given to them great authority both in criminall causes and common pleas. These justices of affise have also commissions of *oyer and terminer*, of gaole delivery and of the peace, of association, and *si non omnes* throughout their whole circuits, so as they are armed with ample, provident, but yet ordinary jurisdiction; for all their commissions are bounded with this expresse limitation, *faciuri quod ad justitiam pertinet secundum legem et consuetudinem Angliæ*. And in former time, according to the originall institution and their commission, both the justices joined both in common pleas and pleas of the crowne.

Si le dit suit del affise serra prise en ley, &c. un continual claime.

And it is holden at this day that it shall amount to a claime, for that there was no default in him, as *Littleton* saith. (d) Some have objected, that if the bringing of an affise should amount to continuall claime, and every continuall claime made by the disseisee vest the possession and freehold in him, therefore if bringing the affise, &c. should amount to a continuall claime, that then the writ should abate. But hereunto it hath bene answered in this chapter, that a continuall claime is an entry by construction of law for the advantage of the disseisee, but not for his disadvantage.

In a writ of entry *sur disseisin* against one, supposing that he had not entred but by S. who disseised him, the tenant said that S. died seised, and the land descended to him, and prayed his age; the plaintife counterpleaded his age, for that he arraigned an affise against S. who died hanging the affise, and he was ousted of his age, for that the bringing of the affise amounted to a claime.

If tenant in dower alien in fee with warranty, and the heire in the reversion bring a writ of entry *in casu proviso*, &c. and hanging the plea the tenant dieth, the heire shall not be rebutted or barred by this warranty, for that the *præcipe* did amount to a continuall claime. And herewith agreeth (e) antiquity: *Et si clameum non apposuerit, sufficit tamen si ille vel antecessor suus faciat quod tantundem valeat, ut si placitum moverit tenentem vel fecerit rem litigiosam; quia sicut plus est facto appellare quàm verbo, ita plus est clameum apponere facto quàm verbo: et ad hoc facit de termino Sanctæ Trinitatis, anno regni regis H. 3. 15. in com. Hunt. de quâdam Guldeburgâ, cui obiectum fuit, quòd clameum non apposuit, et ipsa respondit, quòd fecit quod tantundem valet, quia tempore finis facti implacitavit tenentem per aliud breve, &c.*

If the goods of a villeine (before any seisure made by the lord) be distreined, the lord may have a replevyn; and notwithstanding before the bringing of the writ he had no property, yet the very bringing of the writ doth amount to a claime of the goods, and vesteth the property in the lord.

Entant que nul default fuit en luy, &c. Hereby it is implied, that our author inclined to this opinion, that it should amount to a claime, for that no default was in him; *et nemo debet rem suam sine facto aut defectu suo amittere*, as the rule is,

2. & 3. E. 6. c. 24. towards the end. Stanf. pl. cor. 105. C. 3. H. 7. ca. 1.

Vid. Sect. 514. 233. 234. Magna Charta, 30. W. 2. ca. 3. 30. 39. Stat. de Ebor. ca. 7. 4. Artic. Sup. Cart. ca. 10. 4. E. 3. ca. 11. 7. R. 2. ca. 4. 27. E. 1. de finibus ca. 4. 28. E. 1. de appellatis. 4. E. 3. ca. 2. 2. H. 5. ca. 8. 3. H. 5. ca. 7. 13. H. 4. ca. 7. North. 2. E. 3. ca. 3. 2. E. 3. ca. 5. 14. H. 6. ca. 1. 21. H. 6. ca. 10. 3. H. 7. c. 1. 33. H. 8. c. 9. 34. & 35. H. 8. ca. 14. 2. & 3. E. 6. ca. 24. 1. E. 6. ca. 7. 2. Mar. Dier 99. 3. & 4. Eliz. Dier 205. (F. N. B. 240. c. 4. Inf. 161.)

(d) See before in this chapter, Sect. 419. Vide Sect. 416. (2. Ed. 3. 8. 14. Ed. 3. 14.) (Ant. 253. b.)

24. E. 3. 25. 9. E. 2. 2ge. 141. 15. E. 3. Counterplea de gar. 5.

3. E. 3. tit. garrantie 6a.

* Fleta, lib. 6. ca. 52. Bract. lib. 5. fo. 436.

33. E. 3. Replevin. 43. 4a. E. 3. 18. b. 9. H. 6. 25.

Sect.

* pris not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

Sect. 443.

(Post. 331. a. 341. b. 345. a.)
(Dyer 71. a.)
(2. Roll. Abr. 339.)

Merleb. cap. 28.

(5. Rep. 21.)

(1. N. B. 34. m. W. 2. cap. 5.)

(8. Rep. 88. Ant. 252. b.)

HERE, first, it is to be observed, that albeit the freehold and inheritance is in this case in no person, but in abeyance or in consideration of law, yet an entrie and claime by one that hath no right shall gaine the inheritance by wrong. For here *Littleton* saith, and of such estate died seised, &c. And so it is in case of a bishop, parson, vicar, prebend, or any other sole corporation. And in the statute of *Merlebridge* it is called an intrusion.

Secondly, that seeing by the death of the abbot (which is the act of God) no person is able to make continuall claime, therefore a discent during that time shall not prejudice the successor; for, as hath beene said, *Impotentia excusat legem*. If an usurpation bee had to a church in time of vacation, this shall not prejudice the successor, to put him out of possession, but that at the next avoidance hee shall present.

Nient plus que ils sont able de suer action,

Ec. Here that which hath in this chapter beene said is confirmed, *viz.* That the entrie or continuall claime must pursue the action.

Car le covent n'est forsque un mort person,

Ec. This is *ratio una*, but not *unica*: for though the rest of the corporation be no mort persons, as the chapter in case of deane and chapter, or the commonaltie in case of mayor and commonaltie; yet cannot they when there is no deane or maior make claime, because they have neither ability nor capacitie to take or to sue any action, as our author here saith.

Car en temps de

ITEM, quære si un abbe de un monasterie morust, et durant le temps de vacation un home torciousement enter en certaine parcel de terre del monastery, claymant la terre a luy et a ses heires, et de tiel estate morust seisie, et la terre descendist a son heire, et puis apres un * est elect, et fait abbe de mesme la monasterie, si † mesme l'abbe poit enter sur le heire ou nemy. Et il semble a ascuns, que l'abbe bien poit enter en ceo cas, pur ceo que le covent en temps de vacance ne fuit ascun person able de faire continual claime; car nient plus que ils sont personable de ‡ suer action, nient plus ils sont able de faire continual claime, car le covent § n'est forsque || un mort corps sans teste; car en temps de vacation un graunt fait a eux, ou per eux, est void; et en cest case l'abbe ne poit aver brieve d'entre sur dissein envers

ALSO, inquire if an abbot of a monasterie die, and during the time of vacation a man wrongfully entred in certaine parcels of land of the monasterie, claiming the land unto him and his heires, and of that estate dieth seised, and the land descendeth unto his heires, and after that an abbot is chosen, and made abbot of the monasterie, a question is, if the abbot may enter upon the heire or not. And it seemeth to some, that the abbot may well enter in this case, for this, that the covent in time of vacation was no person able to make continuall claime; for no more than they be personable to sue an action, no more be they able to make continuall claime, for the covent is but a dead bodie without head; for in time of vacation a grant made unto them is void; and in this case an abbot may not have a writ of entrie upon dissein against the heire, for
le

* abbe added L. and M. and Roh.
§ n'est—est, L. and M. and Roh.

† mesme not in L. and M. nor Roh.
|| come added L. and M. and Roh.

‡ suer—faire, L. and M. and Roh.

THE latter pages of the Chapter on Releases relate almost entirely to the useful, but abstruse and complicated, learning of *Special Pleading*. The Editor's professional studies having been directed to those branches of the law which relate to conveyancing, he finds himself unable to write any annotations either on the text or the commentary contained in those pages. He might fill them with notes; but he thinks it more honourable to confess his total ignorance of the subject, than, knowingly, to present the public with observations which must be uninteresting, and which might be of a nature to deceive and mislead the Student.

Lincoln's-Inn, Nov. 9, 1785.

Erratum, page 241, note 4, line 8, instead of *grantor* read *grantee*.

le beire, pur ceo que il ne fuit unques disfeise. Et si l'abbe ne pouvoit enter en ceo case, donques il ferra mis a son brieve de droit, * &c. lequel ferra trop dure pur le meason: per que semble a eux, que l'abbe bien poit enter, &c.

Quæras de dubiis, legem benediscere si vis:

Quærere dat sapere, quæ sunt legitima verè†.

life be made, the remainder to the maior and commonaltie of *D.* the remainder is good, if there be a maior elected during the particular estate.

Poit enter, &c. Here by this (&c.) is implied, or make his continuall claime in such sort as hath beene before expressed.

this, that hee was never disseised. And if the abbot may not enter in this case, then hee shall bee put into his writ of right, &c. which shall bee hard for the house: by which it seemeth to them, that the abbot may well enter, &c.

Quæras de dubijs, legem bene discere si vis:

Quærere dat sapere, quæ sunt legitima verè.

vacation ungraunt fait a eux ou pereux, est void,

&c. And the reason is, because the body politique which is capable, is not complete, but wanteth the head. But this is to be understood of an immediate grant; for if during the vacation of the abathie of Dale, a lease for life, or a gift in taile be made, the remainder to the abbot of Dale and his successors, this remainder is good, if there be an abbot made during the particular estate.

If there be maior and commonaltie of *D.* and the maior dieth, a graunt made to the maior and commonaltie of *D.* is void for the cause aforesaid; but in that case, if a lease for

2. H. 7. 13. 40. Aff. 26. 34. E. 3. Garrantie 69.

(Post. 378.)

(Ant. 239. a.)

(10. Rep. 1. Ant. 85. 250. a. 3. a. lib. 10. Lampett's case. lib. 6. Bishop of Wells's case. lib. 1. Rector of Caeddington's case.)

Quæras de dubiis, legem bene discere si vis:
Quærere dat sapere, quæ sunt legitima verè.

Here *Littleton* expresseth an excellent meanes to attaine to the reason of the law, by enquiring of, and conference had with, learned men, of doubtfull cases:

Inter cuncta leges, & per cunctabere doctos.

Horace.

For as *collatio peperit artes*, so *collatio perficit artes*: and this must bee continuall; for as knowledge increaseth, so doubts therewith increase also; *Crescente scientiâ, cresunt simul et dubitationes.*

And here *Littleton* citeth verie aptly two verses; for it is truly said, that *Authoritates philosophorum medicorum et poetarum sunt in causis allegandæ et tenendæ*: and our author doth cite a verse for memorie, but it is worthy of memorie.

CHAP. 8.

Of Releases. (1)

Sect. 444.

RELEASES

*sont en divers man-
ners, cestascavoir, re-
leases de tout le droit
que home ad en terres
ou tenements, † et re-
leases de actions per-
sonals et reals, et
autres choses. Re-*

RELEASES are

in divers man-
ners, viz. releases
of all the right which
a man hath in lands
or tenements, and
releases of actions
personalls and realls,
and other things.

HERE our author be-
ginneeth with a division
of releases.

These words must be referred thus: releases are of two sorts, viz. a release of all the right which a man hath either in lands and tenements, or in goods and chattels: or there is a release of actions reall, of or in lands or tenements: or personall, of or in goods or chattels: or mixt, partly

Vide Mir. cap. 2. sect. 17.
Vide Br. l. 101. Br. l. li. 5.
Tract. de Except. & lib. 4.
fol. 318. b.
Fleta, lib. cap. 14.

* &c. not in L. and M.
in L. and M.

† verè not in L. and M. nor is any part of these two verses in the Camb. MSS.

‡ &c. added

(1) At common law, lands could not be transferred by one person to another but by feoffment, with livery of the seisin. This produced a notoriety of the transmutation of the possession. This notoriety was in some measure effected by a disseisin; but that was only a tortious possession, liable to be defeated by the disseisee. Thus the disseisor had the possession; the disseisee the right. To complete the title of the disseisor, it was necessary he should acquire the right. This could not be done by a feoffment, as that was a transfer of the possession; but it was effected by a release, which in some respects operates as an actual transfer of the right; in others, as an acquittal or discharge from it. The different degrees of title in the disseisor, his heir, or feoffee, and the different natures of the rights of the disseisee, make it necessary that releases should be adapted to the different situation of the parties, and give them, as the circumstances of the parties vary, a different effect and operation.

Vide Sect. 439.

[a] Fleta, ubi supra.

partly in the realty, and partly in the personalty.

Release, Relaxatio. Of the etymologie of this word you have heard before. *Fleta* [a] calleth it *charta de quieta clamantia*.

leases de tout le droit releases of all the right which men have in lands and tenements, &c. are commonly made in this forme, or of this effect:

Sect. 445.

NO verint universi per presentes, &c.

Here *Littleton* sheweth presidents of releases of right: and presidents doe both teach and illustrate, and therefore our student is to be well stored with presidents of all kinds.

Remissione, relaxatio, et quietum clamatio. Here *Littleton* sheweth, that there be three proper words of release, and bee much of one effect: besides, there is *renunciare, acquietare*, and there bee many other words of release; as if the lessor grants to the lessee for life, that he shall be discharged of the rent, this is a good release. *Vide Sect. 532.*

And it is to bee understood, that there bee releases in deed, or expresse releases, whereof *Littleton* heere hath shewed an example. These expresse releases must of necessity be by deed. There be also releases in law, and they are sometime by deed, and sometime without deed. As if the lord disseise the tenant, and maketh a feoffment in fee by deed or without deed, this is a release of the feignorie. And so it is if the disseisee disseise the heir of the disseisor, and make a feoffment in fee by deed or without deed, this is a release in law of the right. And the same law it is of a right in action. (1)

If the obligor make the obligee his executor, this is a release in law of the action, but the duty remains, for the which the executor may retaine so much goods of the testator. If the feme obligee take the obligor to husband, this is a release in law. The like law is, if there be two femes obligees, and the one take the debtor to husband. (2)

If an infant of the age of seventene yeares release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of the action. (3)

But if a feme executrix take the debtor to husband, this is no release in law, for that should be a wrong to the dead, and in law worke a *devastavit*, which an act in law shall never worke. And so it was adjudged in the king's bench, *Mich. 30. & 31. Eliz.* in which case I was of counsell.

But it is to be observed, that there is a diversitie betweene a release in deed, and a release in law; for if the heir of the disseisor make a lease for life, and the disseisee release his right to the lessee for his life, his right is gone for ever. But if the disseisee doth disseise the heir of the disseisor, and make a lease for life, by this release in law the right is released but during the life of the lessee; for a release in law shall be expounded more favourable, according to the intent and meaning of the parties, than a release in deed, which is the act of the parties, and shall

NO verint universi per presentes, me A.

de B. remisisse, relaxatio, et omnino de me et hæredibus meis quietum clamasse: vel sic, quiet claimed: or thus, pro me et hæredibus meis quietum clamasse

C de D. totum jus, titulum, et clameum quæ habui, habeo, vel quovismodo in futurum habere potero, de et suage in uno messuagio cum pertinentiis in F. &c. And it is to bee understood, that these

ceux verbs remisisse, words, remisisse, et et quietum clamasse, quietum clamasse, are sont de un tiel effect of the same effect as *scome tiels verbs, re-laxatio.*

Now all men by these presents, that I A.

of B. have remised, released, and altogether from me and my heires

quiet claimed to C. of D. all the right, title, and claim which I have, or by any meanes may have, of and in one messuage with the appurtenances in F. &c.

And it is to bee understood, that these words, *remisisse, et et quietum clamasse, quietum clamasse, are* of the same effect as these words, *relaxatio.*

Bract. lib. 4. fol. 308. Fleta, ubi sup. 9. H. 6. 35. 24. E. 3. 27. 13. H. 4. entr. congrab. 57.

(1. Roll. Abr. 400. 403. 9. Rep. 52.)

27. H. 8. 29. of an use.
34. H. 6. 41. of an attain.
3. E. 3. 38. 21. E. 4. 81.
Pl. Com. Delamere's case.
(8. Rep. 136. Plo. 183. 186.
Hob. 10. 1. Sid. 79. 1. Roll.
Abr. 934. Plo. 36. 5. Rep. 29.)

8. E. 4. 3. 21. E. 4. 2.

11. H. 7. 4. 20. H. 7. 29.
8. E. 4. 3.

30. E. 3. 24. 32. E. 3. tit. seire fac. 102.
(Mo. 2. 6. 1. Leo. 320. 8. Rep. 152.
Plo. 183. 4. Finch. 294.)

(1) What sir Edward Coke observes respecting obligors and obligees holds equally between all other creditors and debtors; but it must be attended with the following observations. A debt is only a right to recover the amount of the debt by way of action; and as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt, and therefore, like other legacies, it is not to be paid or retained till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself; but if there are not assets, he may sue the heir, where the heir is bound. See *Wankford v. Wankford*, 1. Salk. 299. *Selwin v. Brown*, Bro. Cas. in Par. 179. *Forr. 243. Vin. vol. 8. p. 198. 2. Eq. Cas. Abr. 46. 1. note at (Q).*

(2) In the case of *Smith v. Stafford*, Hob. 216. the husband promised the wife before marriage that he would leave her worth 100l. The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hobart were of opinion, that as the action could not rise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of *Gage v. Acton*, 1. Salk. 325. 12. Mod. 290. The case there arose upon a bond executed by the husband to the wife before the marriage, with a condition making it void if she survived him, and he left her 1000l. Two of the judges were of opinion, that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But lord chief justice Holt differed from them: he admitted that a covenant or promise by the husband to the wife to leave her so much in case she survives him is good, because it is only a future debt on a contingency which cannot happen during the marriage, and that is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent, but subsequent, that made it a present duty, and the marriage was consequently a release of it. The case afterwards went into chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. 2. Vern. 481. A like decree was made in the case of *Carnel v. Buckle*, 2. P. W. 243.

(3) If the obligor make the obligee his executor, the obligee may retain; but that is not applicable to the case put here. Therefore he may make an executor at 17; tamen supra 89. b. it is said that it is at 18. It should seem that the case here is understood of 17 complete, et supra 89. of 18 beginning; and thus the passages agree. D'Avila Hist. King of France is major at 14 beginning. Thus it seems that puberty, which by the civil law holds from 14 to 18, is understood of 18 beginning; and thus our law agrees with the civil law, *impuberi non licet testari before 17 complete, and 18 beginning.* Lord Nott. MSS.

shall be taken most strongly against himselfe, and so in the case aforesaid, where the debtor is made executor.

Totum jus, titulum, et clameum. But note, that *jus*, or right, in generall (10. Rep. 47.) signification includeth not onely a right for the which a writ of right doth lie, but also any title or claime, either by force of a condition, mortmaine, or the like, for the which no action is given by law, but only an entry.

Sect. 446.

*ITEM, ceux parolx que sont communement mis en tielx faits de releases, * scilicet (quæ quovismodo in futurum habere potero) sont sicome voides en le ley; car nul droit passa per un release, forsque le droit que le releffor ad al temps de le releas fait. Car si soit pier et firs, et le pier soit disseisee, et le firs (vivant son pier) releffa per son fait a le disseisor tout le droit que il ad ou aver püssoit en mesmes les tenements sans clause de garrantie, &c. et puis le pier morust, &c. le firs soit loyalment enter sur la possession le disseisor, pur ceo que il n'avoit † droit en la terre ‡ en la vie son pier, mes le droit descendist a luy per discent apres le releas fait per le mort son pere, &c.*

ALSO, these words which are commonly put in such releases, *scilicet (quæ quovismodo in futurum habere potero)* are as void in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made. (1) For if there be father and sonne, and the father bee disseised, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c. and after the father dieth, &c. the sonne may lawfully enter upon the possession of the disseisor, for that hee had no right in the land in his father's life, but the right descended to him after the release made by the death of his father, &c.

NOTE, a man may have a present right, though it cannot take effect in possession, but *in futuro*. (2)

As hee that hath a right to a reversion or remainder, and such a right he that hath it, may presently release. But here in the case which *Littleton* puts, where the sonne release in the life of his father, this release is void, [a] because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his owne release.

The baron make a lease for life and dieth, the release made by the wife of her dower to him in reversion is good, albeit shee hath no cause of action against him *in presenti*.

Sans clause de garrantie. For if there be

a warrantie annexed to the release, then the sonne shall be barred. For albeit the release cannot barre the right for the cause aforesaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantie being a covenant reall should barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie should recover the land against the

ter-tenant, and he by force of the warrantie to have as much in value against the same person: yet is there a diversity betweene a warrantie and a feoffment; [b] for if there be grandfather, father, and sonne, and the father disseiseth the grandfather, and make a feoffment

[a] 39. H. 6. 43. 21. E. 4. 81. 15. E. 4. tit. Entr. Cong. 21. in 9. H. 7. 1. b. 2. E. 3. 38.

* *scilicet*. --- &c. in L. and M. and Roh. and M. and Roh.

† *nil* added in L. and M. and Roh.

‡ *quant il releffasset*, added in L.

(1) To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the common law, that no possibility, right, title, or any other thing that was not in possession, could be granted or assigned to strangers. — A right in action could not be transferred even by act of law; nor was it considered as transferred to the king by the general transferring words of an act of attainder. (See the marquis of Winchester's case, 3. Rep. 2. b.) — But a right or title to the freehold or inheritance of lands might be released in five manners. — 1. To the tenant of the freehold in fact, or in law, without any privy. — 2. To him in remainder. — 3. To him in reversion. — 4. To him who had right only in respect of privy; as if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him. — 5. To him who had privy only, though he had not the right; as if tenant in tail made a feoffment in fee, after this feoffment no right remained in him; yet in respect of the privy only, the donor might release to him the rent and services. — 6. So if the terre-tenants and the person entitled to the right or possibility joined in a grant of the lands, it would pass them to the grantee discharged from the right or possibility. See 10. Rep. 49. b. — But the common law is altered in the above instances in many respects. — On the assignment of things in action, see ante note 1. to p. 232. b. A contingent remainder in real estates can only be transferred by a fine or a common recovery, in which the remainder man comes in upon the voucher. — Contingent interests in terms of years, and other personal estates, have been held to be assignable by deed for a valuable consideration. See Mr. Fearn's Essay on Contingent Remainders. The passage in the text was cited by lord chief-justice Trevor, in delivering his opinion on the case of *Arthur v. Bokenham*, (Fitzgib. 234.) with an observation, that the doctrine laid down there by *Littleton* had never been contradicted.

(2) This doctrine was fully investigated in the case of *Dormer v. Fortescue*, Vin. vol. 18. fol. 413. 3. Atk. 135. Bro. Par. Caf. v. 4. 353. 405. The case there was, that an estate was limited to the use of A. for 99 years, if he should live long; and after his decease, or the sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs, during his life, upon trust to preserve the contingent remainders; and after the end or determination of that term, to the use of A.'s first and other sons successively in tail male, with several remainders over. A. having a son, they joined in levying a fine and suffering a common recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of A. the recovery was void, there not being a good tenant to the præcipe; but if they took only a contingent estate, the freehold was in the son, and of course there was a good tenant to the præcipe. Upon this point the case was argued in the court of king's bench, and afterwards on appeal before the house of lords, where all the judges were ordered to attend. Lord chief-justice Lee, when the cause was heard in the king's bench, and lord chief-justice Willes, in delivering the opinion of the judges in the house of lords, entered very fully into the distinction between contingent and vested remainders. — They seem to have laid down the following points. That a remainder is contingent, either where the person to whom it is limited is not *in esse*; or where the

(Post. 339. a.)
 10. E. 2. confirmation 24.
 8. E. 2. garr. 62. 11. H. 4. 33.
 41. E. 3. 17. 42. E. 3. 24. per
 Finchden. 17. E. 3. 67.
 Lib. 1. fol. 112, 113. in Alba-
 nie's case.
 (9. Rep. 75.)
 (1. Roll. Rep. 197.)

15. H. 7. 11.

(1. Rep. 111. a. 173. Ant. 215. a.
 218. b. 237. a.)

[m] Lib. 1. Albanie's case, ubi
 supra.
 Lib. 5. Hoe's case 70, 71.
 10. H. 6. 4.

25. Aff. p. 7. 27. E. 3. Exec-
 ution 130. Pasch. 38. Eliz.
 Rot. 521. inter Borough et
 Gray.
 (2. Roll. Abr. 404. 408. Hob. 46.
 2. Cro. 401. 449.)

49. E. 3. 28.

(Doct. and Stud. 18. a.
 10. Rep. 48. b.
 Post. 276. a.)

[c] 7. E. 4. 13. 20. H. 6. 29.
 5. H. 7. 41. 18. E. 3. 12.
 8. H. 7. 5. E. 3. 36. 5. E. 3. 46.
 Vide Sect. 490. 491.
 (Post. 284. b.
 1. Rep. 87. b.
 3. Rep. 29. b.)

in fee, the grandfather dieth, the father against his owne feoffment shall not enter; but if he die, his sonne shall enter. And so note a diversity betwene a release, a feoffment, and a warrantie: a release in that case is void: a feoffment is good against the feoffor, but not against his heire; a warrantie is good both against himselfe and his heires. (1)

And here are three diversities worthy of observation, *viz.* First, betwene a power or an authority, and a right. Secondly, betwene powers and authorities themselves. Thirdly, betwene a right and a possibilitie.

As to the first, if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors release all their right and title in the land to the heire, this is void, for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton's* case of a release of a right. And so it is if *cestuy que use* had devised that his feoffees should have sold the land. Albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery.

As to the second, there is a diversity betwene such powers or authorities as are only to the use of a stranger, and nothing for the benefit of him that made the release (as in the case before) and a power or authority which respecteth the benefit of the releasor; as in these usuall powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uses (being intended for his benefit), he may release; and where the estates before were defeasible, he may by his release make them absolute, and exclude himselfe from any alteration or revocation, as it hath bene resolved; which diversity you may read in [m] *Albanie's* case. (2)

As to the third, before judgement the plaintife in an action of debt releaseth to the baile in the king's bench all demands; and after judgement is given, this shall not barre the plaintife to have execution against the baile, because at the time of the release he had but a meere possibilitie, and neither *jus in re*, nor *jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be released presently. So if the comfess of a statute, &c. release to the comfessor all his right in the land, yet afterwards he may sue execution; for he hath no right in the land till execution, but only a possibilitie; and so have I knowne it adjudged. (3)

Se^ct. 447.**DE tout le droit.**

This must be intended of a bare right, and not of a release of right, whereby any estate passeth, as to a lessee for yeares, &c. as shall be said hereafter. Also it must be intended of a release of a right of freehold at the least, and not to a right for any terme for yeares or chattle reall; as if lessee for yeares bee ousted, and hee in the reversion disseised, and the disseisor maketh a lease for yeares, the first lessee may release unto him. All which is implied in the first &c. Also in some case a release of a right made to one that hath neither freehold in deed, nor freehold in law, is good and available in law, [c] as the demandant may release to the vouchee, and yet the vouchee hath nothing in the land; but the reason of that is, for that when the vouchee entereth into the warrantie, he becommeth tenant to the demandant, and may render the land to him, in respect of the privitie; but an estranger cannot release to the vouchee, because, *in rei veritate*, he is not tenant of the land.

ITEM, en releas de tout le droit que home ad en certain terres, &c. il covient a celui a que le releas est fait en * aucun cas, que il ad le franktenement en les terres + en fait, ou en ley, al temps de releas fait, &c. † Car en cheacun cas lou celui a que le releas est fait, ad franktenement en fait, ou franktenement en ley, al temps del releas, || &c. ¶ doncque le releas est bone.

ALSO, in releases of all the right which a man hath in certaine lands, &c. it behooveth him to whom the release is made in any case, that hee hath the freehold in the lands in deed, or in law, at the time of the release made, &c. For in every case where he to whom the release is made, hath the freehold in deed, or in law, at the time of the release, &c. there the release is good. (4)

[d] And

* *aucun*—*iel*, in L. and M. and Roh.
 || *fait* added in L. and M. and Roh.

+ &c. added in L. and M. and Roh.
 § *doncque* not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

(1) Ant. 186. it is laid down that a man may warrant more than passes from him. In Fitzg. 234. lord chief-justice Trevor observes, that the reason why the feoffment prevails against the father, is, that by the disseisin he had acquired possession, and might make a feoffment, and the operation of a feoffment is to bar future and contingent rights.

(2) See note 2. to page 113. The doctrine of the suspension and extinction of powers will be considered in a note to the chapter of Discontinuance.

(3) In the king's bench, where the proceeding is by bill, the bail is not bound in a certain sum to the plaintiff, but only undertakes that the defendant shall pay the condemnation money, or render his body to prison; so that they are but in the nature of jailors to the defendant: but in the common pleas, the bail are bound to the plaintiff in a certain sum. 5. Rep. 70. 10. Rep. 51.

(4) Ant. 1st note to this Section.

particular estate may determine before the remainder can take place: but that in every case where the person to whom the remainder is limited is *in esse*, and is actually capable, or entitled to take on the expiration, or sooner determination, of the particular estate, supposing that expiration, or determination, to take place at that moment, there the remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the remainder is limited to a person *in esse*; but the title of the remainder man to take, depends on a collateral or extraneous contingency, which may or may not take place during the continuance of the preceding estate; and those cases where the preceding estate may endure beyond the continuance of the estate in remainder. Thus if an estate is limited to A. for life, and after the death of A. and I. S. to B. for life, or in tail; there, during the life of I. S. the title of B. depends on the contingency of I. S. dying in the lifetime of A. This being an event which either may or may not take place during the continuance of the preceding estate, B.'s estate is necessarily contingent. But then, supposing I. S. to die; still it remains an uncertainty whether B.'s estate will ever take place in possession; for if the remainder be limited to B. for life; there if B. dies in A.'s lifetime, A.'s estate would endure beyond the continuance of the estate limited in remainder. The same would be the case if the remainder over were limited to B. in tail, and B. was to die in A.'s lifetime without issue.—Yet, in both cases, it was agreed that B. took, not a contingent but a vested remainder. Hence they inferred that it was not the possibility of the remainders over never taking effect in possession, but the remainder man's not having a capacity or title to take, supposing the preceding estate at that instant to expire, or determine, and its being uncertain whether he ever will obtain that capacity or title, during the continuance of the preceding estate, that makes the remainder contingent. Upon these grounds they determined that the trustees took a vested remainder, and that the recovery therefore was void. The doctrine established in the case of *Dormer and Fortescue* is laid down by sir Edward Coke, 10. Rep. 85.; where he, with great accuracy of expression, observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever *vest in interest* or not, then the use or estate, is in contingency; because, upon a future contingency, it may either vest or never vest, as the contingent happens. And see 1. Rep. 137. b.

[d] And so it is if the tenant alien hanging the *præcipe*, the release of the demandant to the tenant to the *præcipe* is good, and yet he hath nothing in the land.

In time of vacation an annuity, that the person ought to pay, may be released to the patron in respect of the privity; but a release to the ordinary only seemeth not good, because the annuity is temporall.

If a disseisor make a lease for life, the disseisee may release to him; for to such a release of a bare right there needs no privity, as shall be said hereafter. But if the disseisor make a lease for yeares, the disseisee cannot release to him, because he hath no estate of freehold. And yet in some case a right of freehold shall drowne in a chattell; as if a feme hath a right of dower she may release to the gardein in chivalry, and her right of freehold shall drowne in the chattell, because the writ of dower doth lie against him, and the heire shall take advantage of it. And it is to be observed, that by the antient maxime of the common law, a right of entrie, or a chose in action, cannot be granted or transferred to a stranger, and thereby is avoyded great oppression, injurie and injustice. *Nul charter, nul vende, ne nul done vault perpetualment si le donor n'est seigneur al temps de contract de 2. droitz, s. del droit de possession, et del droit del proprietie.* And therefore well saith *Littleton*, that he to whom a release of a right is made must have a freehold.

For the better understanding of transferring of naked rights to lands or tenements, either by release, feoffment, or otherwise, it is to be knowne, that there is *jus proprietatis*, a right of ownership, *jus possessionis*, a right of seisin or possession, and *jus proprietatis & possessionis*, a right both of property and possession: and this is antiently called *jus duplicatum*, or *droit double*. For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis*; and if the disseisee release to the disseisor, hee hath *jus proprietatis et possessionis*. (1) And regularly it holdeth true, that when a naked right to land is released to one that hath *jus possessionis*, and another by a meane title recover the land from him, the right of possession shall draw the naked right with it, and shall not leave a right in him to whom the release is made. For example, if the heire of the disseisor being in by descent *A.* doth disseise him, the disseisee release to *A.* now hath *A.* the meere right to the land. But if the heire of the disseisor enter into the land, and regaine the possession, that shall draw with it the meere right to the land, and shall not regaine the possession only, and leave the meere right in *A.* but by the recontinuance of the possession, the meere right is therewith vested in the heire of the disseisor.

But if the donee in taile discontinue in fee, now is the reversion of the donor turned to a naked right. If the donor release to the discontinuee and die, and the issue in taile doth recover the land against the discontinuee, he shall leave the reversion in the discontinuee; for the issue in taile can recover but the estate taile onely, and by consequence must leave the reversion in the discontinuee, for the donor cannot have it against his release: but if the disseisee enter upon the heire of the disseisor, and infeoffe *A.* in fee, and the heire of the disseisor recover the whole estate, that shall draw with it the meere right, and leave nothing in the feoffee. *Nota* the diversity. Another diversity is observable when the naked right is precedent before the acquisition of the defeasible estate, for there the recontinuance of the defeasible estate shall not draw with it the preceding right. [e] As if the disseisee disseise the heire of the disseisor, albeit the heire recover the land against the disseisee, yet shall he leave the preceding right in the disseisee. So if a woman that hath right of dower disseise the heire, and he recover the land against her, yet shall he leave the right of dower in her.

Another diversity is to be noted, when the meere right is subsequent, and transferred by act in law; there, albeit the possession be recontinued, yet that shall not draw the naked right with it, but shall leave it in him: as if the heire of the disseisor be disseised, and the disseisor infeoffe the heire apparent of the disseisee being of full age, and then the disseisee dieth, and the naked right descend to him, and the heire of the disseisor recover the land against him, yet doth he leave the naked right in the heire of the disseisee. So if the discontinuee of tenant in taile infeoffe the issue in taile of full age, and tenant in taile die, and then the discontinuee recover the land against him, yet he leaveth the naked right in the issue. [e] But if the heire of the disseisor be disseised, and the disseisee release to the disseisor upon condition, if the condition be broken, it shall revert the naked right. And so if the disseisee hath entred upon the heire of the disseisor, and made a feoffment in fee, upon condition, if he entred for the condition broken, and the heire of the disseisor entred upon him, the naked right should be left in the disseisee. But if the heire of the disseisor had entred before the condition broken, then the right of the disseisee had bene gone for ever. But now let us heare what *Littleton* saith.

[d] 10. E. 4. 14. 12. Aff. p. 41.

8. E. 3. 21. 46. E. 3. 6. b.

8. H. 6. 23. 21. H. 7. 41.

(Poit. 284. a. 8. Rep. 148.

5. Rep. 24. b. 2. Cro. 151.)

(Dyer 30. b. 2. Cro. 105.)

Mirror, cap. 2. §. 17.

(2. Roll. Abr. 45. 46. 47. 48.

Ant. 214. a. 232. b. Poit. 280.)

Mirror ubi supra. Bracton, lib. 2.

fol. 32. Britton, fol. 89. 121.

Bracton, lib. 5. fol. 372.

(2. Rep. 56. Sect. 473.

Poit. 283. b. 286. a.)

(Poit. 319. a.)

[e] 5. Aff. 1. 10. Aff. 16.

50. E. 3. 7. 4. E. 3. Eilopp. 133.

30. Aff. 5. 11. E. 3. Entrie 56.

12. Aff. 41. 27. E. 3. 84. 488.

(6. Rep. 70. a.)

23. H. 8. tit. Restore al action.

Br. 5. 50. E. 3. 7. Vid. Sect. 473.

475. 478. 487.

[e] 38. E. 3. 16. 9. H. 7. 24.

(Poit. 279. a. 4. Rep. 9. b.)

Sect.

(1) These may be subdivided, with respect to the disseisor, into that bare, naked, possession which he acquires by the disseisin, and the estate by title which his heir acquires by the descent; and, with respect to the disseisee, into that right of possession which he can restore by entry, and the bare right which he can only recover by action.

Sect. 448.

(Doct. and Stud. 17. a.)

[a] Bract. li. 4. f. 206. 236.
Britton, fol. 83. b. Fleta, lib. 3.
cap. 15. Vid. Sect. 680.42. E. 3. 20. 10. H. 6. 14.
17. E. 3. 78. 2. E. 3. 33.
(5. Rep. 123. b.)

(Mo. 141.)

11. H. 4. 61. 21. H. 7. 12.

[g] 32. E. 3. barre 262.
41. Alf. 2. 13. H. 4.
surrender, 10.

[h] 38. E. 3. 12.

17. E. 3. 77. 18. E. 4. 25.

HERE Littleton describeth what a freehold in law is, for he had spoke before in many places of freeholds in deed. This *Bracton* calleth [a] *civilem et naturalem possessionem seu seisinam*. The naturall seisin is the freehold in deed, and the civill the freehold in law. (1)

If a man levie a fine to a man *sur consueance de droit come ceo que il ad de son done*, or a fine *sur consueance de droit tantum*; these be feoffments of record, and the consuee hath a freehold in law in him before hee entereth.

Upon an exchange, the parties have neither freehold in deed, nor in law, before they enter; so upon a partition the freehold is not removed untill an entry.

[g] If tenant for life by the agreement of him in the reversion surrender unto him; he in the reversion hath a freehold in law in him before he enter. [h] Upon a livery within the view no freehold is vested before an entrie.

If a man doth bargain and sell land by deed indented and inrolled, the freehold in law doth passe presently. And so when uses are raised by covenant upon good consideration.

If a tenant in a *præcipe* being seised of lands in fee, confesse himselfe to be a villeine to an estranger, and to hold the land in villenage of him, the estranger by this acknowledgement is actually seised of the freehold and inheritance without any entry. But let us returne to *Littleton*.

FRanktenement en ley est, sicome as if a man disseiseth another, and dieth seised, whereby the tenements descend to his sonne, albeit that his sonne doth not enter into the tenements, yet hee hath a freehold in law, which by force of the discent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shal be endowed. †

Sect. 449.

ITEM, en ascuns casés de releases de tout le droit, comment que celui a que le release est fait n'ad riens en le franktenement en fait ne en ley, uncore le release est assés bone. Sicome le disseisor lessa la terre que il ad per disseisin a un auter pur terme de sa vie, s'avant le reversion a luy, si le disseisee ou son beire release al disseisor tout le droit, &c.

ALSO, in some cases of releases of all the right, albeit (2) that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which hee hath by disseisin to another for terme of his life, saving the reversion to him, if the disseisee or his heire release to the disseisor all the right, &c. this

* ent added L. and M. and Roh.

† &c. added L. and M. and Roh.

(1) It may not, perhaps, be improper in this place, to attempt a short explanation of some words familiar both in the ancient and modern law. *Seisin* is a technical term, denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a discent the person on whom the lands descend, has not actually entered, and the possession continues vacant, not being usurped by another. *Disseisin* seems to imply the turning the tenant out of his fee, and usurping his place and relation. It has been observed in a preceding note, that persons, to avail themselves of the remedy by assise, frequently supposed or admitted themselves to be disseised, when they were not; and that this was called *disseisin by election*, in opposition to an *actual disseisin*. To constitute an actual disseisin, it was necessary that the disseisor had not a right of entry; (or, to use the old law expression, that his entry was not congeable;) that the person disseised was, at the time of the disseisin, in the actual possession of the lands; that the disseisor expelled him from them by some degree of constraint or force; and that he substituted himself to be tenant to the lord. But how this substitution was effected, it is difficult, perhaps impossible, now to discover. From what we know of the feudal law, it does not appear how a disseisin could be effected without the consent or connivance of the lord: yet we find, the relationship of lord and tenant remained after the disseisin. Thus, after the disseisin, the lord might release the rent and services to the disseisee; might avow upon him; and if he died his heir within age, the lord was entitled to the wardship of the heir. See Litt. Sect. 454. and the commentary upon it. It should be observed, that a disseisin did not disturb rent issuing out of land, the seisin of the rent being considered as a separate and distinct seisin from that of the land. 1. Rep. 133. b. A *discontinuance* is the effect of a disseisin, when, on certain events, the person disseised has lost his right of entry upon the disseisor, and can only recover by action. The word *freehold* is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps, in the old law it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then, for the life of the tenant; that afterwards they were descendible to some particular heirs of the body of the tenant; then, to all the heirs of his body; and that in succession of time the tenant had the complete dominion or power over the fee. The word *freehold* always imported the whole estate of feudatory, but varied as that varied. Hence we find the freeholder represented the whole fee, did the duty to the lord, and defended the possession against strangers. See Feud. l. 1. tit. 25. l. 2. t. 1. 2. Craig. lib. 2. tit. 2. 1. Inst. 31. 153. Litt. Sect. 59. 279. 592. Britton, cha. 32. and sir Ed. Coke's Commentary upon those Sections; and the case of Taylor on the demise of Atkins v. Horde, 1. Burrows 60.

(2) But a common recovery vests no freehold in deed or in law before execution served. See Moor 141.

cel release est bone, pur ceo que celuy a que le release est fait, avoit en luy un reversion al temps del release fait.

release is good, because hee to whom the release is made, had in law a reversion at the time of the release made (1).

(Plo. 352.)

HERE *Littleton* addeth a limitation to the next precedent Section, viz. that a release of all the right may be good to him in reversion, albeit he hath nothing in the freehold, because he hath an estate in him.

7. E. 4. 13. 14. H. 4. 32. b. ult. 41. E. 3. 17. 49. E. 3. 28. case

Tout le droit, &c. Or title, interest, demand, or the like; and so it is if he in the reversion hath an estate for life or in taile in reversion, as in the like case it appeareth in the next Section.

Sect. 450.

*EN mesme le maner est, lou leas est fait a un home pur terme de vie, le remainder a un autre pur terme de * autre vie, le remainder a le tierce en le taile, le remainder a le quart en fee, si un estranger que droit ad a la terre releffa tout son droit a aucun de eux en le remainder, tiel release est bone, pur ceo que chescun de eux ad un remainder en fait vestue en luy.*

IN the same manner it is, where a lease is made to a man for terme of life, the remainder to another for terme of another man's life, the remainder to the third in taile, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because everie of them hath a remainder in deed vested in him.

HERE is another limitation, that a release is good to him in the remainder, albeit hee hath nothing in the freehold in possession, because he hath an estate in him, as hath beene said. In both these limitations it is to be observed, that the state which maketh a man tenant to the *præcipe*, is said to be the freehold, as here the state of tenant for life, and not the reversion in fee.

7. E. 4. 13. 41. E. 3. 7. 17. E. 3. 54. 18. E. 2. Tit. Entrie 74. 3. E. 2. Tit. Entrie 7. F. N. B. 207. E.

Sect. 451.

MES si le tenant a terme de vie soit disseisfe, et puis celuy que ad droit (esteant le possession en le disseisor) releffa a un de eux a que le remainder fuit fait tout † son droit, cel release est void, pur ceo que il n'avoit ‡ un remainder en fait al temps de release fait, forsque tantselement un droit del remainder.

BUT if the tenant for terme of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right, this release is void, because hee had not a remainder in deed at the time of the release made, but only a right of a remainder.

Forsque tantselement un droit del remainder.

For a release of a right to one that hath but a bare right regularly is void; for, as *Littleton* hath before said, hee to whom a release is made of a bare right in lands and tenements, must have either a freehold in deed or in law in possession, or a state in remainder or reversion in fee or fee taile, or for life. Vide Sect. 454.

Sect.

* *auter* not in L. and M. nor Roh. nor in Cambr. MSS. † *son*—*le*, L. and M. and Roh. ‡ *en luy* added L. and M. and Roh.

(1) Releases may enure four manner of ways. 1st, *Per mitter le droit*, where a person is disseised, and he releases to the disseisor his heir or feoffee.—2d, *Per mitter le estate*, viz. when two or more are seised by a joint title of the same estate, as by a contract, or by descent, as jointtenants or coparceners, and one of them releases to the other, this enures *per mitter l'estate*.—3d, *Per Pelurger*, is where the possession and inheritances are separated for a particular time, and he who hath the reversion or inheritance, releases to the tenant in possession all his right and interest. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment.—4th, *Per extinguishment*, where the releasee cannot have the thing *per mitter le droit*, yet the release shall enure by way of extinguishment against all manner of persons; as when the lord grants the feignory to his tenant, such releases absolutely extinguish the rent, &c. although the releasee be only tenant for life. Ant. 193. b. and see post. 273. b.

Sect. 452.

BY this it appeareth, that as a release made of a right to him in reversion or remainder, shall aid and benefit him that hath the particular estate for yeares, life, or estate taile, so a release of a right made to a particular tenant for life, or in taile, shall aid and benefit him or them in the remainder.

If two tenants in common of land graunt a rent charge of 40s. out of the same to one in fee, and the grantee release to one of them, this shall extinguish but twentie shillings, for that the graunt in judgement of law was severall. (1) So it is if two men be seised of severall acres, and grant a rent *ut supra*. But there is a diversitie betwene severall estates in severall lands, and severall estates in one land; for if one be tenant for life of lands, the reversion in fee over to another, if they two joyne in a grant of a rent out of the lands, if the grantee releaseth either to him in the reversion, or to tenant for life, the whole rent is extinguished, for it is but one rent, and issueth out of both estates, and so note the diversitie. (2)

Si le tenant ad le fait en son poigne a pleader. And so it is in both cases: for albeit he in the reversion or remainder is a stranger to the deed, when the release is made to the tenant, and the tenant for life or in taile is a stranger to the deed, when the release is made to him in reversion or remainder, yet seeing they are privies in estate, none of them in pleading shall take benefit thereof, without shewing the same in court, which is worthy to be observed.

S'ils ceo poient monstre. The one cannot plead the release made to the other without shewing of it, for that they are privie in estate, as hath beene said. The residue of these two Sections needs no explication.

*ET nota, que chescun release fait a celuy que ad un reversion ou un remainder en fait, servira et aidera celuy que ad le franktenement, auxy bien come a celuy a que le release fuit fait, si le tenant avoit le release en son poigne * de pleader.*

AND note, that every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand to plead.

Sect. 453.

ET en mesme le man- ner † est lou un release ‡ est fait al tenant pur terme de vie, ou al tenant en le taile, || ceo urera a eux en le reversion, ou a eux en le remainder, auxy bien come al tenant de franktenement, et averont auxy grand advantage de cel, s'ils ceo foyent monstre §.

IN the same manner it is where a release is made to the tenant for life, or to the tenant in taile, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this, if they can shew it.

Sect.

(2. Roll. Abr. 414. Post. 275. a. 279. b. 285. b. 297. a. Ant. 147. b. 197.)

(1. Rep. Mayoe's case.)

35. H. 6. 8.

(Ant. 232. a. Hob. 66. 2. Roll. Abr. 412.)

* de pleader not in L. and M. nor Roh. † est lou not in L. and M. nor Roh. ‡ est not in L. and M. nor Roh. || ceo not in L. and M. nor Roh. § &c. added in L. and M. and Roh.

(1) If they grant a rent-charge of 20s. which in law amounts to a rent-charge of 40s. as two grants, for otherwise non est casus. When two tenants in common grant a rent, that is, several estates in one land, and yet they are several grants, therefore quere of this diversity. Plo. Que. pl. 315. contra. Lord Nott. MSS.

(2) For Plover. in his Quere 315. if tenant for life grants rent, and the grantee purchases the reversion, the rent remains during the life of the tenant for life. Lord Nott. MSS.

Sect. 454.

ITEM, *si soit seignior et tenant, et le tenant soit disseisee, et le seignior releffa al disseisee tout le droit que il avoit en le seigniorie ou en le terre, cel release est bone, et le seigniorie est extinct: et ceo est par cause del privitie que est perenter le seignior et le disseisee. Car si les avers le disseisee soient pris, et de eux le disseisee fust un replevin envers le seignior, il compellera le seignior d'avowrer sur luy; car s'il avowrer sur le disseisor, donques sur le matter monstre l'avowrie abatera, car le disseisee est tenant a luy en droit et en la ley.*

ALSO, if there bee lord and tenant, and the tenant be disseised, and the lord releaseth to the disseisee all the right which he hath in the seigniorie or in the land, this release is good, and the seigniorie is extinct: and this is by reason of the privitie which is betweene the lord and the disseisee. For if the beasts of the disseisee be taken, and of them the disseisee sueth a replevin against the lord, hee shall compell the lord to avow upon him; for if hee avow upon the disseisor, then upon the matter shewn the avowrie shall abate, for the disseisee is tenant to him in right and in law. (1)

HEREUPON may bee collected and observed two diversities: first, betweene a seigniorie or rent service, and a rent charge: for a seigniorie or rent service may bee released and extinguished to him that hath but a bare right in the land. And the reason hereof is, in respect of the privitie betweene the lord and the tenant in right; for he is not only as tenant to the avowrie, but if hee die his heire within age, hee shall bee in ward; and if of full age, hee shall pay releefe; and if he die without heire, the land shall escheat. But there is no such privitie in case of a rent charge, for there the charge only lieth upon the land.

(3. Rep. 35. b.)

The second diversitie is betweene a seigniorie and a bare right to land; for a release of a bare right to land to one that hath but a bare right is void, as hath beene said. But here in the case of our author, a release of a seigniorie to him that hath but a right, is good to extinguish the seigniorie.

Vid. Sect. 451.

Nota, a seigniorie, rent, or right, either *in presenti*, or *in futuro*, may be released five manner of wayes, and the first three without any privitie. First, to the tenant of the freehold in deed or in law.

Lib. 10. fol. 48. Lampet's case.

(Post. 275. 2. Roll. Abr. 402.)

Secondly, to him in remainder. Thirdly, to him in the reversion. The other two in respect of privitie: as, first, here the lord releaseth his seigniorie to the tenant being disseised, having but a right, and no estate at all: secondly, in respect of the privitie, without any estate or right; as by the demandant to the vouchee, or donor to the donee, after the donee hath discontinued in fee, as appeareth hereafter in this chapter.

Sect. 455.

Per cause de privitie, &c. See for this word (*privitie*), Sect. 461.

Il compellera le seignior d'avowrer sur luy, &c. This is regularly true; but if the lord hath accepted services of the disseisor, then the disseisee cannot enforce the lord to avow upon him, though his beasts be taken, &c. (2)

If a man hath title to have a writ of escheat, if he accept homage or fealtie of the tenant, he is barred of his writ of escheat; but if he accept rent of the tenant, that is no bar to him, for it may be received by the hands of a baylife. [d] But some doe hold, that if there be lord and tenant, and the tenant be disseised, and the disseisee die without heire, the lord accepts rent by the hands of the disseisor, this is no barre to him. Contrarie it is, if he avow for the rent in court of record, or if he take a corporall service, as homage or fealtie, for the disseisor is in by wrong: but if the lord accept the rent by the hands of the heire of the disseisor, or of his feoffee, because they be in by title, this shall barre him of his escheat, which is to bee

20. H. 6. 9. b. 41. E. 3. 28.

48. E. 3. 9. 2. E. 4. 6. 2.

31. E. 1. Discent 17. 26. E. 3. 72.

4. H. 6. 21. F. N. B. 144. o.

[d] 7. E. 6. tit. Escheat. Br. 18.

(9. Rep. 22. 1. Roll. Abr. 316. b.)

(1) Here the release operates by way of extinguishment. See post. 279. b.

(2) But the opinion of the 48. E. 3. 9. seems to the contrary; because when the tenant pleads the disseisin, to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. Gilb. Ten. 64. 65.

(c) 7. H. 4. 17. 3. R. 2. entr. bee understood of a discent or feoffment, after the title of escheat accrued: (c) for if the disseisor make a feoffment in fee, or die seised, and after the disseisee die without heire, then there is no escheat at all, because the lord hath a tenant in by title. And when *Littleton* wrote, the disseisee in the case here put, should have compelled the lord to have avowed upon him, as *Littleton* holdeth. But now this is altered by a latter statute of (f) 21 H. 8. For whereas by fines, recoveries, grants, and secret feoffments, &c. made by tenants to persons unknowne, the lords were put from knowledge of their tenants, upon whom by order of law they should make their avowrie, &c. it is by that statute enacted, that if the lord shall distreine upon the lands and tenements holden, &c. that he may avow, &c. upon the same lands, &c. as in lands, &c. within his fee or feignorie, &c. without naming of any person certaine, and without making avowrie upon a person certaine. Upon which statute these foure points are to be observed. First, that the lord hath still election either to avow according to the common law, by force of the statute, by reason of this word (*may*). Secondly, albeit the purview of the act be generall, yet all necessary incidents are to be supplied, and the scope and end of the act to be taken: and therefore, though he need not to make his avowrie upon any person certaine, yet he must allege seisin by the hands of some tenant in certaine, within fourte yeares. Thirdly, that if the avowrie be made according to the statute, everie plaintife in the replevin, or second deliverance, be he termor or other, may have everie answer to the avowrie that is sufficient; and also have aid, and everie other advantage in law (disclaimer only except); for disclaime he cannot, because in that case the avowrie is made upon no certaine person. Fourthly, where the words of the statute be, if the lord distreine upon the lands and tenements holden, yet if the lord come to distreine, and the tenant enchafe his beasts which were within the view out of the land holden, and there the lord distreine, albeit the distresse be taken out of his fee and feignorie in that case, yet is it within the said statute; for in judgment of law the distresse is lawfull, and as taken within his fee and feignorie; and this statute being made to suppress fraud, is to be taken by equitie (1).

(f) 21. H. 8. cap. 19.
(Hob. 242.)

Lib. 9. fol. 136. *Ascough's case*.

27. H. 8. fol. 4. 32. H. 8. cap. 2.
Lib. 9. fol. 36. *Bucknall's case*.

34. H. 8. Avowrie Br. 113.
27. H. 8. 4. & 20. *Bucknall's case*
ubi supra.

Lib. 9. fol. 22. in case d'avowrie.

44. E. 3. 20. 11. H. 7. 4. 21. H. 7. 40. 34. H. 6. 18. 16. E. 4. 10. 6. R. 2. *Rescou*. 11.
(Ant. 161.)

Sect. 455.

*ITEM, si terre soit done a un home en taile, reservant al donor et a ses heires un certaine rent, si le donee soit disseisee, et puis le donor releffa al donee et a ses heires tout le droit que il avoit en la terre, et puis le donee enter en la terre sur le disseisor; en cest case le rent est ale, pur ceo que le disseisee al temps de release fait, fuit tenant en droit et en la ley al donor, et avowrie a fine force covient de estre fait sur luy per le donor pur le rent aderere, &c. Mes uncore rien de droit de terres, scilicet, de le droit de le reversion, * passera per tiel release, pur ceo que le donee a que le release est fait, adonque n'avoit riens en la terre forsque tant-solement un droit, et issint le droit del terre ne pouvoit † adonques passer al donee per tiel release.*

ALSO, if land be given to a man in taile, reserving to the donor and to his heires a certaine rent, if the donee be disseised, and after the donor release to the donee and his heires all the right which hee hath in the land, and after the donee enter into the land upon the disseisor; in this case the rent is gone, for that the disseisee at the time of the release made, was tenant in right and in law to the donor, and the avowrie of fine (2) force ought to be made upon him by the donor for the rent behinde, &c. But yet nothing of the right of the lands, (scilicet) of the reversion, shall passe by such release, for that the donee to whom the release is made, then had nothing in the land but onely a right, and so the right of the land could not then passe to the donee by such release.

Si

* *adonques ne* added L. and M. and Roh.

† *adonques* not in L. and M.

(1) See the following page. *Gilb. Distr.* 189. *Lord Raym.* 257.

(2) That is, of necessity.

SI le donee soit disseise, &c. This is evident by that which hath bene said. But admit that the donee maketh a feoffment in fee, and the donor release unto him and his heires all the right in the land, this shall extinguish the rent, because the lord must avow upon him, and yet the tenant in taile after the feoffment hath no right in the land. But the reason is in respect of the privity, and that the [m] donor is by necessity compellable to avow upon him only; for if he should avow upon the discontinuee, then it should appeare of his owne shewing that the reversion whereunto the rent is incident should be out of him, and consequently the avowrie should abate; and so was it [n] resolved *Trin. 18. Eliz.* in the court of common pleas in *fir Thomas Wiat's* case, which I heard and observed. And *Littleton* saith here, that in case of the disseisin of fine force, the avowrie must be made upon the donee.

Vide Sect. 454. 1. H. 5. tit. grant. 43. 14. H. 4. 38. ii. 3. fol. 29. lib. 6. 58. *Lampet's* case ubi supra.
(Art. 46. Post. 318.)
[m] 10. E. 3. 26. 48. E. 3. 8. b. 31. E. 3. gard. 116. 5. E. 4. 3. 7. E. 4. 27. 15. E. 4. 13.
[n] *Trin. 18. Eliz. fir Thomas Wiat's* case in *communi banco.*

Uncore riens de droit, &c. de reversion, &c. Here the diversitie aforesaid betweene the rent service and a bare right to the land appeareth.

Sect. 456.

*EN mesme le manner est, si leas soit * a un pur terme de vie, reservant al lessor et a ses heires certaine rent, si le lessée soit disseise, et puis lessor releffa al lessée et a ses heires tout le droit que il ad en la terre, et apres le lessée enter, coment que en cest cas le rent est extincet, uncore rien del droit de la reversion passera, causâ quâ supra.*

IN the same manner it is, if a lease be made to one for terme of life, reserving to the lessor and to his heires a certaine rent, if the lessee be disseised, and after the lessor release to the lessee and to his heires all the right which he hath in the land, and after the lessee entreth, albeit in this case the rent is extincet, yet nothing of the right of the reversion shall passe, *causâ qua supra.*

HEREBY the diversity is made apparent betweene a release of a rent service out of land, and a release of right to land, in this Section.

Sect. 457.

MES si soit veray seignior et veray tenant, et le tenant fait un feoffment en fee, lequel feoffee ne unque devient tenant al seignior, † si le seignior releffa al feoffor tout son droit, &c. cest releas est en tout void, pur ceo que le feoffor ad nul droit en la terre, et il n'est tenant en droit al

BUT if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord, if the lord release to the feoffor all his right, &c. this release is altogether void, because the feoffor hath no right in the land, and he is not tenant in right to the

VERAY seignior et veray tenant.

This is to be understood of a lord in fee simple, and of a tenant of like estate.

There be foure manner of avowries for rents and services, &c. viz. 1. *Super verum tenentem*, as in the case here put. 2. *Super verum tenentem in formâ prædictâ*, as where a lease for life, or a gift in taile bee made, the remainder in fee. 3. Upon one as upon his tenant by the manor omitting (*verie*); and this is when the lord hath a particular estate in the seignorie, and so shall the donor upon

Vide *Ascough's* case, 1. 9. fo. 135. 136. 20. H. 6. 9. 2. H. 4. 21. 12. E. 4. 2. 26. H. 6. avowrie 17. 9. Eliz. *Dier* 257. 5. H. 7. 11. 7. E. 4. 24. 20. E. 3. avow. 131. (9. Rep. 135. b. 31. H. 8. c. 19.)

* fait added in L. and M. and Roh.

† &c. added in L. and M. and Roh.

47. E. 3. fol. ultimo. 38. H. 6. 23.

(Doc. Pla. 33.)

21. H. 8. cap. 19.
(Post. 345.)

(Doc. Pla. 321.)

4. E. 2. 22. 7. E. 3. 8.
7. E. 4. 27. 29. H. 8. tit. avow-
rie. Br. 111. li. 3. fol. 65. 66.
Pennant's case. 7. H. 4. 14.
2. E. 4. 6. 34. H. 6. 46.
3. H. 6. 29. H. 8. avowrie.
(6. Rep. 58. b.)

4. E. 3. 22. 47. E. 3. 4.

21. H. 8. cap. 19.

upon the donee, or lessor upon the lessee. 4. *Sur le matter en la terre*, as within his fee and seigniorie. As where the tenant by knights service maketh a lease for life reserving a rent, and die his heire within age, the gardeine shall avow upon the lessee, *scilicet, super materiam prædictam in terris et tenementis prædictis ut infra feudum et dominium suum*. Now by the statute the very lord may avow, as in lands within his fee and seigniorie, without avowing upon any person in certaine. (1)

Here appeareth the diversity betwene a tenant in taile, and a tenant in fee simple; for albeit tenant in taile make a feoffment in fee, yet the right of the entaile remaine, and shall descend to the issue in taile. But when the tenant in fee simple make a feoffment in fee, no right at all remaine of his estate, but the whole is transferred to the feoffee.

Also the lord is not compellable in that case to avow upon the feoffor; but if he will, as *Littleton* here saith, he may avow on the feoffee; but so it is not, as hath beene said, in case of tenant in taile.

Note a diversity betwene actions and acts which concerne the right, and actions and acts which concerne the possession only. For a writ of customes and services lieth not against the feoffor, nor a release to him shall extinguish the seigniorie. So if a rescous be made, an assise shall not lie against the feoffor, and him that made the rescous, because the feoffee is tenant, and in assise; the surplussage incroached shall be avoided. For these actions and acts concerne the right; but of a seisin and an avowrie which concerne the possession, it is otherwise. And if the lord release to the feoffor, this is good betwene them, as to the possession and discharge of the arrerages, but the feoffee shall not take benefit of it, for that, as hath beene said, it extendeth not to the right. But the feoffor shall plead a release to the feoffee, for thereby the seigniorie is extinct; as if lessee for life doth waste, and grant over his estate, and the lessor release to the grantee, in an action of waste against the lessee, he shall plead the release, and yet he hath nothing in the land. And so in waste shall tenant in dower or by the courtesie in the like case, and the vouchee, and the tenant in a *præcipe* after a feoffment made. And so in a *contra formam collationis*.

Le feoffee ne unques deveigne tenant. *Nota* here an excellent point of learning, *viz.* if there be lord and tenant, and the rent is behind by divers yeares, and the tenant make a feoffment in fee, if the lord accept the service or rent of the feoffee due in his time, he shall lose the arrerages due in the time of the feoffor; for after such acceptance he shall not avow upon the feoffor, nor upon the feoffee for the arrerages incurred in the time of the feoffor. But in that case if the feoffor dieth, albeit the lord accept the rent or service by the hand of the feoffee due in his time, he shall not lose the arrerages, for now the law compelleth him to avow upon the feoffee, (2) and that which the law compelleth him unto, shall not prejudice him.

So it is, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behinde, and after the tenant fore-judge the mesne, and the lord receive the services of the mesne which issue out of the tenancie, he shall not be barred of the arrerages which issued out of the mesnalty; and so if the rent be behinde, and the tenant dieth, the acceptance of the services by the hand of the heire shall not barre him of the arrerages; for in these cases albeit the persons be altered, yet the lord doth accept the services of him which only ought to doe them. (3)

But as long as the feoffor liveth, the lord shall not be compelled to avow upon the feoffee, unless he giveth the lord notice, and tender unto him all the arrerages.

But now by the statute the lord may avow upon the lands so holden, as in lands within his fee or seigniorie, without naming of any person certaine to bee tenant of the same, and without making of any avowrie upon any person certaine, as hath beene said, which hath much altered the common law in the cases abovesaid, for the benefit and safety of the lord.

But yet these cases are necessary to be knowne (for which purpose I have added them), for that the lord may avow still at the common law if he will.

Sect.

(1) On the continuance of the right of the entail in the tenant in tail after a feoffment made by him, see the case of lord Sheffield v. Radcliffe, Hob. 334. and see Duncombe v. Wingfield, ibid. 252.

(2) For the lord could not introduce the heir into the feud contrary to the express alienation of the ancestor. Gilb. Ten. 67.

(3) By acceptance of rent from the assignee, the lessor loses his action of debt against the first lessee, but he may still maintain an action of covenant against him. 1. Saund. 240. 241. 2. Saund. 302.

Sect. 458.

AUTERMENT est lou le veray tenant est disseise, come en le cas avantdit; car si le veray tenant que est disseise, teigne del seignior per service de chivaler et morust (son heire esteant deins age), le seignior avera et seisera le garde del heire, et issint n'avera il my le gard del feoffor que fist le feoffment en fee, &c. issint il est graund diversity enter les deux cases, &c.

OTHERWISE it is where the very tenant is disseised, as in the case aforesaid; for if the very tenant who is disseised, hold of the lord by knights service and dieth (his heire being within age), the lord shall have and seize the wardship of the heire, and so shall he not have the ward of the feoffor that made the feoffment in fee, &c. so there is a great diversitie betweene these two cases.

(Ant. 76. b.)

Of this sufficient hath beene said before.

Sect. 459.

ITEM, si un home lessa a un auter son terre pur terme d'ans, si le lessor releasa al lessée tout son droit, &c. devant que le lessée avoit enter en mesme le terre per force de mesme le leas, tiel releas est void, pur ceo que le lessée n'avoit possession en la terre al temps del releas fait, mes tantselement un droit d'aver mesme la terre per force de mesme le leas. Mes si le lessée enter en mesme la terre, et ent eit possession per force de mesme le leas, donque tiel releas fait a luy per le feoffor, ou per son heire, est *sufficient a luy per cause del privitie que per force del leas est perenter eux, &c.

ALSO, if a man letteth to another his land for terme of yeares, if the lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heire, is sufficient to him by reason of the privitie which by force of the lease is between them, &c. (1)

DEVANT que le lessée avoit enter,

&c. For before entry the lessee hath but *interesse termini*, an interest of a terme, and no possession, and therefore a release which enure by way of enlarging of an estate cannot worke without a possession, (2) for before possession there is no reversion; and yet if a tenant for twenty yeares in possession make a lease to B. for five yeares, and B. enter, a release to the first lessee is good, for he had an actual possession, and the possession of his lessee is his possession. And so it is if a man make a lease for yeares, the remainder for yeares, and the first lessee doth enter, a release to him in the remainder for yeares is good to enlarge his estate. (3)

12. H. 4. 13. 36. E. 3. tit. gard.
10. 6. H. 7. 9. 37. H. 6. 1.
32. H. 6. 27. 7. E. 6. tit. gard. Br.
(Post. 345. b.)

49. E. 3. 28. 22. H. 6. 8.
37. H. 6. 18. 22. E. 4. 37.
4. H. 7. 10. 15. H. 7. 14.

22. E. 4. Surrender. 6.
(Post. 273. a.)

But if a man make a lease for yeares to beginne presently, reserving a rent, if before the lessee doth enter the lessor releaseth all the right that hee hath in the land, albeit this release cannot enlarge his estate, yet it shall in respect of the privity extinguish the rent. And so it is if a lease be made to beginne at *Michaelmas*, reserving a rent, and before the day the lessor release all the right that hee hath in the land, this cannot enure to enlarge

(Ant. 46. b.)

* bon et added L. and M. and Roh.

(1) On releases which operate by enlargement, see post. 273. a.

(2) But this must be understood of a lease at common law; for if it be so framed as to be a bargain and sale under the statute, the possession is immediately executed in the lessee, so that no entry is necessary. See the note page 71. b. and Cro. Car. 110. 2. Ventris 35.

(3) By this passage it appears, that what sir Edward Coke observes a few lines before, that a release which enures by enlargement cannot work without a possession, must be understood to mean, not that an actual estate in possession is necessary, but that a vested interest suffices, for such a release to operate upon. By comparing this with what is said in note 1. 271. b. of the operation of a lease and release, it will be seen, that not only estates in possession, but estates in remainder and reversion, and all other incorporeal hereditaments, may be effectually granted and conveyed by lease and release: but it is an inaccuracy to say, that the releasee, in these cases, is in the *actual possession* of the hereditaments; the right expression is, that they are *actually vested* in him, by virtue of the lease of possession, and the statute.

[*h*] Mich. 39. & 40. Eliz. in *Seccario*, betweene sir Henrie Woodhouse and sir William Palton.

[*c*] Pasch. 38. Eliz. in quare impedit per Bennet, vers. l'evêque de Norwich in communi banco.

Pl. Com. 423.

25. E. 3. 53. 31. E. 3. Confirmat. 14. 31. Ail. Pl. 13.

enlarge the estate but to extinguish the rent in respect of the privity, as it was resolved [*h*] in the exchequer, which I observed.

A man granteth the next avoidance of an advowson to two, the one of them may before the church become void release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future, and not in possession, yet one of them to extinguish his interest may release to the other in respect of the privity. But after the church become void, then such a release is void, because then it is (as it were) but a thing in action. And this was resolved [*c*] by the whole court of common pleas, which I myselfe heard and observed. And by consequent in the case of *Littleton*, if a lease for yeares be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

Mes tantseulement un droit, &c. Which is not so to be understood that he hath but a naked right, for then he could not grant it over; but seeing he hath *interesse termini*, before entrie, he may grant it over, albeit for want of an actuall possession he is not capable of a release to enlarge his estate.

Mes si le lessée enter en mesme le terre, &c. This is evident. And herein note a diversity betweene a lease for life, and for yeares, for before the lessee for yeares enter, a release cannot be made unto him: but if a man make a lease for life, the remainder for life, and the first lessee dieth, a release to him in the remainder and to his heires is good before hee doth enter to enlarge his estate, for that he hath an estate of a freehold in law in him, which may be enlarged by release before entrie.

And where our author speaketh only of a lessee for yeares, the same law it is of a tenant by statute merchant or staple, or tenant by *elegit*, or the like.

Sect. 460.

21. H. 6. 37. 2. E. 4. 6. b. 7. E. 4. 27. 3. E. 4. 16. 29. H. 6. Release 6. (5. Rep. 13. 2. Sid. 153. Ant. 47. Cro. Jac. 169.)

BY these two Sections is to be observed, a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because between them there is a possession with a privity; but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for yeares hold over his terme, &c. a release to him is void, for that there is no privity between them; and so are the books that speake of this matter to be understood. (1)

Sed contrarium tenetur, &c. This is of a new addition, and the booke here cited ill understood, for it is to be understood of a tenant at sufferance.

EN mesme le maner est, come il semble, ou lease est fait a un home a tener de le lessor a sa volunt, per force de quel leas le lessée eit possession: si le lessor en cest casé fait un releas al lessée de tout son droit, &c. cest releas est assés bon pur le privity que est perenter eux; car en vain serra de faire estate per un liverie de seisin a un auter, lou il ad possession de mesmes les tenements per le leas de mesme celui devant, &c.

* Sed contrarium tenetur, P. 2. Ed. 4. per tous les justices.

IN the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough for the privity which is between them; for it shall bee in vaine to make an estate by a livery of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrarie is holden, *Pasch. 2. E. 4.* by all the justices. *

Sect.

* This paragraph is not in L. and M. nor Roh.

(1) A tenant at will is he who enters and enjoys the land by the expresse or implied consent of the owner, without there being any obligation on the part either of the lessor or lessee to continue it for any certain or determinate term. A tenant by sufferance is he who, having entered and obtained possession by title, continues the possession, after his title is ended, by the laches of the lessor. The former is in by the consent of the owner of the lands; this creates a privity between them. A tenant by sufferance is in only by the laches of the owner, so that there is no privity between them. Both these estates differ from that of a tenant from year to year, the tenant of which may determine it at the end of any year; but after a new year is begun, the tenure cannot be determined either by the lessor or lessee till the end of the year. See 1. lord Raymond, 707. 708. 2. Salk. 413. 3. Salk. 222. If a person holds by lease, and the term expires, the lease itself is notice of the expiration of the term, and the lessor may enter on the lessee without further notice, unless for double rent, under the 4. Geo. 2. sect. 1. in which case there must be a previous demand in writing. Where the tenant holds by will, the modern determinations are, that there must be a previous notice; but this notice varies according to the custom of the place, and the nature of the hereditaments in lease.

Sect. 461.

MES lou home de de sa teste demesne occupia terres ou tene-ments a la volunt celuy que ad* le franktene-ment, et tiel occupier ne claima riens forsque a volunt, &c. si celuy que ad le franktene-ment voile releaser tout son droit al occupier, &c. tiel release est void, pur ceo que nul privitie est perenter eux per lease fait al occupier, ne per auter manner, &c.

BUT where a man of his owne head occupieth lands or tene-ments at the will of him which hath the freehold, and such occupier claimeth nothing but at will, &c. if hee which hath the freehold will release all his right to the occupier, &c. this release is void, because there is no privitie betweene them by the lease made to the occupier, nor by other manner, &c.

DE sa teste demesne occupia.

Hee doth not say, de sa teste demesne enter, &c. so as this is to bee understood of a tenant at sufferance, viz. where a man commeth to the possession first lawfully, and holdeth over.

(m) For if a man entred into land of his owne wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but hee is a disseisor, (1) and then the release to him is good; or if the owner consented thereunto, then hee is a tenant at will, and that way also the release is good. But there is a diversitie when one com-

Vide Sect. 68.
(1. Roll. Abr. 658. Ant. 57.
Cro. Car. 3. 3.)

(n) Temps H. 8. tit. tenant a volunt. Br. 15. 2. E. 4. 38.
18. E. 4. 25. 39. E. 3. 28. 12. E. 3. Aff. 86. 11. E. 3. ibid. 87.
12. Aff. 21. 13. E. 3. Aff. 92.
28. Aff. 11. 34. Aff. 10.
10. E. 3. 41. 8. E. 3. 63.
(1. Roll. Abr. 662. Pol. 277.)

Vide 2. part of the Institutes.
Matlb. cap. 16. 10. E. 4. 9. 10.
(1. Roll. Abr. 861. Ant. 56. 2.)

Old N.B. 117. 137. Lib. 3. fo. 23.
Walker's case. Lib. 4. fol. 123.
124.
Vide Sect. 454.

(8. Rep. 42. b.)

(Ant. 242. a.)

meth to a particular estate in land by the act of the partie, and when by act in law; for if the garden hold over, he is an abator, because his interest came by act in law.

Nul privitie. Privitie is a word common aswell to the English as to the French, and in the understanding of the common law is fourefold.

1. As privies in estate, whereof *Littleton* here speaketh; as betweene the donor and donee, lessor and lessee, which privitie is ever immediate.

2. Privies in blood; as the heire to the ancestor, or betweene coparceners, &c.

3. Privies in representation; as executors, &c. to the testator.

And fourthly, privities in tenure; as the lord and tenant, &c. which may be reduced to two generall heads, privies in deed, and privies in law.

Sect. 462, 463.

ITEM, si home enfeoffe auters homes de sa terre sur confidence, et al entent de performer sa darreine volunt, et le feoffor occupiast mesme la terre a la volunt de ses feoffees, et puis les feoffees releffont per leur fait a leur feoffor tout leur droit, &c. ceo ad este un question, si tiel release soit bon ou non. Et ascuns ont dit, que tiel release

ALSO, if a man enfeoffe other men of his land upon confidence, and to the intent to performe his last will, and the feoffor occupieth the same land at the will of his feoffees, and after the feoffees release by their deed to their feoffor all their right, &c. this hath beene a question if such release be good or no. And some have said, that

HERE is a question moved, and the reasons of both sides shewed, and as it hath beene observed, the latter opinion is the better, being *Littleton's* owne opinion.

Il serra entendue per la ley que le feoffor doit maintenant occupie la terre a la volunt de les feoffees.

For intendments of law mentioned by our author, see the Section in the margin.

Here is to bee observed the intendment of law, that when a feoffment is made to a future use, as to the performance of his last will, the feoffees

12. E. 4. 12. b. 15. E. 4.
9. H. 7. 25.
Vide Sect. 392. 176. 349.

4. E. 4. 8. b. 9. H. 7. fol. ultimi.
15. H. 7. 2. b. 14. H. 8. 9. a.

Sect. 99. 100. 110. 367. 377. 393.
406. 440.

35. H. 6. Subpena 22. 15. H. 7.
12. b. 37. H. 6. 36. 11. H. 4. 52.
7. H. 4. 22. 1. Mar. 111. Dicr.
(6. Rep. 18. a.)
(Ant. 111. b. 112. a.)

* ent added L and M. and Roh.

(1) This is to be understood when there is no particular estate in the land; but if there be a term in esse, and one enters claiming the term, he shall not be a disseisor, but an action of debt or waste shall be against him, and one may be executor de son tort of a term.

3. Lev. 35.

(2) P. 9. Car. C. B. on the argument of the case of *Blundell* or *Baugh*, commonly called the *Earl of Nottingham's case*, justice *Barclay* said, that he whom lord *Coke* calls in this place an abator, must be taken for a disseisor, as he had actual possession by the possession of the guardian. Lord *Nott.* MSS.—See *Cro. Ca.* 302. *Litt. Rep.* 372. 1. Vent. 55. 80.

(1. Rep. 58.)

feoffees shall bee seised to the use of the feoffor and of his heires in the meane time.

Ipsæ etenim leges capiunt ut jure regantur.

(1. Roll. Abr. 859, Sid. 458. Dyer. 186. a.)

And reason would that seeing the feoffment is made without consideration, and the feoffor hath not disposed of the profits in the meane time, that by construction and intendment of law the feoffor ought to occupie the same in the meane time. And so it is when the feoffor disposeth the profits for a particular time *in presenti*, the use of the inheritance shall be to the feoffor and his heires, as a thing not disposed of; wherein it is to be observed, that lands and tenements conveyed upon confidences, uses, and trusts, are to be ruled and decided, if question groweth upon the confidences, uses or trusts, by the judges of the law; for that it appeareth by this and the next Section, they are within the entendment and construction of the lawes of the realme (1).

And it is to be observed (as hath beene said) that there is a diversitie betweene a feoffment of lands at this day upon confidence, or to the intent to performe his last will, and a feoffment to the use of such person and persons, and of such estate and estates, as hee shall appoint by his last will: for, in the first case, the land passeth by the will, and not by the feoffment; for after the feoffment the feoffor was seised in fee simple, as he was before; but in the latter case, the will pursuing his power is but a direction of the uses of the feoffment, and the estates passe by execution of the uses, which were raised upon the feoffment; but in both cases the feoffees are seised to the use of the feoffor and his heires in the meane time: and all this and much more concerning this matter hath beene adjudged.

Lib. 6. fol. 17. 18. Sir Edward Clere's case.
Dillon & Frayn's case, l. 1. &c.
fol. 113.

(1. Roll. Abr. 797. 1. Rep. 129. b. 392. b. Stat. 27. H. 8. c. 10. Plow. 348. 1. Rep. 127. Sid. 26.)

Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recoverie, &c. or out of the state of the owner of the land, by bargain and sale by deed indented and inrolled, or by covenant upon lawfull consideration, whereof you may read plentifully in my *Reports*.

A feoffee to the use of *A.* and his heires, before the statute of 27. H. 8. for money bargaineth and selleth the land to *C.* and his heires, who hath no notice of the former use; yet no use passeth by this bargain and sale, for there cannot be two uses in *esse*, of one and the same land; and seeing there is no transmutation of possession by the terre-tenant, the former use can neither be extinct nor altered. And if there could be two uses of one and the same land, then could not

*est voyd, par ceo que nul privitie fuit pe-
renter les feoffees et
leur feoffor, entant
que nul lease fuit
fait apres tiel feoff-
ment per les feoffees
al feoffor, a tener a
leur volunt. Et as-
cuns ont dit le con-
trarie, et ceo per deux
causes.*

such release is void, because there was no privitie betweene the feoffees and their feoffor, insomuch as no lease was made after such feoffment by the feoffees to the feoffor, to hold at their will: and some have said the contrarie, and that for two causes.

Sect. 463.

*UN est, que quant
tiel feoffment est
fait sur confidence a
performer la volunt
del feoffor, il serra in-
tendue per la ley, que
le feoffor doit mainte-
nant occuper la terre
a la volunt de ses
feoffees; et issint il
est tiel manner de
privitie enter eux, si-
come home fait un
feoffment as auters,
et ils incontinent sur
le feoffment voylent
et granteront, que leur
feoffor occupiera la
terre a leur volunt,
&c.*

ONE is, that when such feoffment is made upon confidence to performe the will of the feoffor, it shall bee intended by the law, that the feoffor ought presently to occupie the land at the will of his feoffees; and so there is the like kinde of privitie betweene them, as if a man make a feoffment to others, and they immediately upon the feoffment will and grant, that their feoffor shall occupy the land at their will, &c.

(1) Many references have been made, in the foregoing notes, to this part of the work, for some observations on conveyances at common law, and those which derive their effect from the statute of uses. It appeared advisable to collect them into one continued note, that the difference between the two modes of conveyance might appear in a stronger light; and to prevent a necessity of frequently repeating those general principles and illustrations, which otherwise must have been introduced on every occasion, where any point of this nature seemed to require an explanation. On the same ground it seemed advisable to anticipate some passages which otherwise would have had a place in a subsequent part of the notes.—*Feoffments* and *grants* were the two chief modes used in the common law for transferring property. The most comprehensive definition which can be given of a feoffment seems to be, a conveyance of corporeal hereditaments, by delivery of the possession upon or within view of the hereditaments conveyed. The delivery of the possession was made on or within view of the land, that the other tenants of the lord might be witnesses to it. No charter of feoffment was necessary: it only served as an authentication of the transaction; and when it was used, the lands were supposed to be transferred, not by the charter, but by the livery, which it authenticated. Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called fees. The original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify, a grant with livery of seisin of a free inheritance to a man and his heirs; more respect being had to the perpetuity, than the feudal tenure of the estate granted. In early times, after the Conquest, charters of feoffment were various in point of form. In the time of Edward I. they began to be drawn up in a more uniform style. The more ancient of them generally run with the words *dedi, concessi, or donavi*. It was not till a later period that *feoffment* came into use. The more ancient feoffments were also usually made in consideration of, or for, the homage and service of the feoffee, and to hold of the feoffor and his heirs. But after the statute *quia emptores*, feoffments were always made to hold of the chief lords of the fee, without the words *pro homagio et servitio*. Sir Edward Coke mentions in page 6. a. that there are eight necessary parts in a feoffment. The fifth, sixth, and seventh of these are not to be found in many of the ancient charters. When the land comprised in the feoffment descended from the ancestor, or by usage retained the property of the ancient bock-land, of not being alienable from the kindred, the ancient feoffments were often expressed to be made with the assent of the feoffor's wife, his heir or his heirs. In ancient charters there was inserted a general warranty: in that, the phrase was much varied. The oath of the party was often added to it, and sometimes a clause, that if the feoffor's title was evicted, he should give other lands of equal value. Sometimes these clauses extended to a second eviction; and sometimes the feoffor obliged himself, if he should make default in warranting the lands granted, to make restitution to the feoffee. The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees (or of estate tail, as they are now called) and of life estates; to which may be added, feoffments of estates given in frankmarriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists called investiture. It was often made by symbolical tradition; but it was always made upon or within view of the lands. When the king made a feoffment, he issued his writ to the sheriff, or some other person, to deliver seisin: other great men did the same. This gave rise to powers of attorney. (See the preface to Mr. Madox's *Formulare*.)

not the said statute execute either of them for the uncertainty. But if *A.* disseise one to the use of *B.* and *A.* doth bargain and sell the land for money to *C.* *C.* hath an use; and here be two uses of one land, but of severall natures; the one, *viz.* upon the bargain and sale to be executed by the statute, and the other not.

But since *Littleton* wrote, all uses are transferred by act of Parliament [c] into possession, [c] 27. H. 8. cap. 10. so as the case which *Littleton* here puts is thereby altogether altered. Yet it is necessarie to bee knowen, what the common law was before the making of the statute, and may serve for the knowledge of the law in like case. (Dr. and Stud. 98. a.)

Incontinent sur le feoffment. *Quæ incontinenti sunt in esse videntur.*

A leur volunt, &c. Here is implied, everie tenancie at will is at the will of both parties, as before in his proper place hath been shewed.

Sect. 464.

*UN autre cause ils allegeont, que si tiel terre vault xl. s. per an, &c. donquetiel feoffor sera jure en assises et en auters enquests en plees realx, et auxy en plees personals, de quel graund sum que les plaintives voient counter, * &c. Et ceo est per le common ley de la terre. Ergo, ceo est pur un graund cause. Et la cause est, que la ley voet que tiels feoffors et leur heires deient occuper, &c. et prender et enjoyer tous maner de profits, issues, et revenues, &c. sicome les tenements fueront leur mesmes, sans interruption de les feoffees, nient obstant tiel feoffment. Ergo, mesme la ley done privitie perenter tiels feoffors et*

ANOTHER cause they alleage, that if such land bee worth fortie shillings a yeare, &c. then such feoffor shall be sworn in assise and other enquests in plees realx, and also in plees personals, of what great sum soever the plaintiffe will declare, &c. And this is by the common law of the land. Ergo, this is for a great cause. And the cause is, for that the law will that such feoffors and their heires ought to occupie, &c. and take and enjoy all manner of profits, issues, & revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithstanding such feoffment. Ergo, the same law giveth a privitie between such feoffors and the feoffees upon confidence,

BY the statute of 2. H. 5. cap. 3. statute 2. it is enacted, that, in three cases, he that passeth in an enquest, ought to have lands and tenements to the value of fortie shillings, *viz.* First, upon trial of the death of a man. Secondly, in plea reall betweene partie and partie. And thirdly, in plea personall, where the debt or the damages in the declaration amount unto fortie marks. (1) And it is worth the noting, that the judges that were at the making of that statute did construe it by equitie: for where the statute speaks in the disjunctive debt or damages, they adjudged that where the debt and damages amounted to fortie marks, that it was within the statute. *Fortescue* [f] saith, *Ubi damna vel debitum in personalibus actionibus non excedunt quadraginta marcas monetæ Anglicanæ, hinc non requiritur, quod juratores in actionibus busmodi tantum expendere possint: habebunt tamen terram vel redditum ad valorem competentem, juxta discretionem justiciariorum, &c.* And forasmuch as at the time of the making of this statute, the greater part of the lands in England in those troublesome and dangerous times (when that unhappie controversie betweene the houses of Yorke and Lancaster was begun) were in use; and the statute was made to remedie a mischief, that the sheriffe used to return

(Ant. 156. b.)

28. H. 8. Dy. fol. 9.

Vid. W. 2. cap. 38. L'etat. de 21. E. 1. de juratis ponendis in assis, &c.

(Fortescue 62. a. 27. El. c. 6. Ant. 157. a.)

9. H. 5. fol. 5.

[f] Fortesc. cap. 15.

les

* &c. not in L. and M. nor Rob.

(1) By 32. H. 8. inhabitants of corporate towns worth 40 s. in goods, may try felonies in sessions and gaol deliveries for such towns, and this is not repealed by subsequent statutes concerning jurors. 1. Ven. 366. The 4th and 5th W. and M. c. 24. requires that all trials in the courts at Westminster, or before the judges of *nisi prius*, oyer and terminer, or gaol delivery, or general sessions of the peace, must be by jurors, each worth 10 l. *per annum*, of freehold or copyhold in the same county, if the trial be in England; and by jurors worth 6 l. *per annum*, if in Wales; and taleinen must have 5 l. *per annum* in England, and 3 l. *per annum* in Wales, excepting fireymen returned *propter medietatem lingue*.—But by the 14th and 15th Ann. c. 16. no hundreders are required except in prosecutions criminal, and on penal statutes, because in other cases the *venire* shall be *de corpore comitatûs*.

A grant, in the original signification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of incorporeal hereditaments, the transfer of them was always made by writing, in order to produce that notoriety in the transfer of them, which was produced in the transfer of corporeal hereditaments, by delivery of the possession. But, except that a feoffment was used for the transfer of corporeal hereditaments, and a grant was used for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ. — Such was the original distinction between a feoffment and a grant. But, from this real difference in their *subject matter*, a difference was supposed to exist in their operation. A feoffment visibly operated on the *possession*; a grant could only operate on the *right* of the party conveying. Now, as possession and freehold were synonymous terms, no person being considered to have the possession of the lands but he who had, at least, an estate of freehold in them; a conveyance which was considered as transferring the possession, must necessarily be considered as transferring an estate of freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense we are to understand the expressions which frequently occur in our law-books, where they describe a feoffment to be a *tortious*, and a grant to be a *rightful*, conveyance. Thus, from a difference in the *quality* of the hereditaments conveyed by those two modes of conveyance, a difference has been considered to exist in their operation. A great part of Mr. Knowler's celebrated argument in the case of Taylor on the demise of Atkins v. Horde, turns on this distinction. See 1. Burr. 92. This appears to have been the outline of conveyances at the common law. The introduction of *uses* produced a great revolution in this respect. Without entering into a minute discussion of the difference between uses at common law, and uses since the statute of 27. H. 8. it is sufficient to state the following circumstances. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seized, called by the law-writers the

cestuy

13. H. 7. 13. b. 13. H. 7. 7. b.
6. E. 4. 7. a.

simple men of small or no understanding; and therefore the statute provided, that hee should returne sufficient men: and albeit in law the land was the feoffees, yet for that they had it but upon trust, and *cestuy que use* tooke the whole profits, as our author here saith, and in equity and conscience the land was his, therefore the judges, for advancement and expedition of justice, extended the statute (against the letter) to *cestuy que use*, and not to the feoffees. (1)

[u] 3. H. 6. 39. Challeng. 19.
21. H. 6. 3.
(Ant. 157. 4.)

[u] But note, if a man hath a freehold *pur terme d'auter vie*, or is seised in his wife's right, and is returned on a jurie, yet if after he be returned, *cestuy que vie*, or his wife die, hee may be challenged; and so it is if after the returne the lands be evicted.

[g] 27. H. 8. cap. 10.

Et ceo est per le common ley. Here three things are to be observed. First, that the surest construction of a statute is by the rule and reason of the common law. Secondly, that uses were at the common law. Thirdly, that now seeing the statute [g] of 27. H. 8. cap. 10. which hath bene enacted since *Littleton* wrote, hath transferred the possession to the use, this case holdeth not at this day; but this latter opinion before that statute was good law, as *Littleton* here taketh it.

(8. Rep. 42. b.)

Mesme la ley done privitie, &c. Hereof it followeth, that when the law gives to any man any estate or possession, the law giveth also a privitie and other necessities to the same: and *Littleton* concludeth it with an illative, *ergo, mesme la ley done privitie*, which is verie observable for a conclusion in other cases.

(Ante 156. b.)

And the (*quære*) here made in the end of this Section is not in the original, but added by some other, and therefore to be rejected.

27. El. cap. 6.

Also since *Littleton* wrote, the said statute of 2. H. 5. is altered: for where that statute limited fortie shillings, now a latter statute hath raised it to foure pounds, and so it ought to be contained in the *venire facias*.

Pl. Com. 352. b. in Delamere's case, and 349. b. Lib. 1. fol. 121.
122. 127. 140. in Chudley's case.
Lib. 2. fol. 58. 78.
Lib. 6. fol. 64.
Lib. 7. fol. 13. & 34.

Nota, an use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privitie to the estate of the land, and to the person touching the land, *scilicet*, that *cestuy que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cestuy que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedie by the common law, but for breach of trust his remedie was only by *subpœna* in chancery: and yet the judges, for the cause aforesaid, made the said construction upon the said statute.

Fortesc. cap. 25, 26, 27.

Now how jurors shall be returned, both in common pleas, and also in pleas of the crowne, and in what manner evidence shall be given to them, and how they shall be kept, untill they give their verdict, you may read in *Fortescue*, and therefore need not to be here inserted.

Sect. 465.

Flet. lib. 5. cap. 34.
15. H. 7. 14. 22. E. 4. 4.

IT is a certaine rule, that when a release doth enure by way of enlarging of an estate, that there must be privitie of estate, as betweene lessor and lessee, donor and donee. For if *A.* make a lease to *B.* for life, and the

ITEM, releases
*solonque le mat-
ter en fait, ascun
foits ont leur effect
per force d'enlarger
l'estate celuy a que*

ALSO, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to
le

* &c. added L. and M. and Roh.

† This paragraph not in L. and M. nor Roh.

(1) See lord Bacon's reading on the statute of uses, p. 8. *accord.* edit. 1785.

cestuy que use, had the beneficial property of the lands; had a right to the profits; and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestuy que use*, or refused to convey the estate as he directed, the feoffee was without remedy. To redress this grievance, the writ of *subpœna* was devised, or rather adopted from the common-law courts, by the court of chancery, to oblige the feoffee to attend in court, and disclose his trust, and then the court compelled him to execute it. Thus uses were established. — They were not considered as issuing out of, or annexed to the land, as a rent, a condition, or a right of common; but as a trust reposed in the feoffee, that he should dispose of the lands, at the discretion of the *cestuy que use*, permit him to receive the rents, and in all other respects have the beneficial property of the lands. Yet an use, though considered to be neither issuing out of nor annexed to the land, was considered to be collateral to it, or rather as collateral to the possession of the feoffees in it, and of those claiming that possession under them. Hence the disseisor, abator, or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat, were not seised to an use, though the estates in their hands were subject to rents common, and conditions. They were considered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the post*, in contradistinction from those who, claiming under the feoffee, were said to be *in the per*. Thus, between the feoffee and *cestuy que use*, there was a confidence in the person, and privacy in estate. (See Chudleigh's case, 1. Rep. 120. and Burges's and Wheat, 1. Bla. 123.) But this was only between the feoffee and *cestuy que use*. To all other persons the feoffee was as much the real owner of the fee, as if he did not hold it to the use of another. He performed the feudal duties; his wife was intitled to dower; his infant heir was in wardship to the lord; and, upon his attainder, the estate was forfeited. To remedy these inconveniencies, the statute of 27. H. 8. was passed, by which the possession was divested out of the persons seised to the use, and transferred to the *cestuys que use*. For by that statute it is enacted, that when any person shall be seized of any lands to the use, confidence, or trust of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise; then, and in every such case, the persons having the use, confidence, or trust, should from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form, as they had before in the use. There seems to be little doubt, but that the intention of the legislature, in passing this act, was utterly to annihilate the existence of uses, considered as distinct from the possession. But they have been preserved under the appellation of *trusts*. The courts hesitated much before they allowed them under this new name. On the one hand, it had clearly been the intent of the legislature to destroy them, while they continued uses at the common law; on the other hand, motives of equity, or rather of compassion, and the general bent of the nation, pleaded strongly in their favour. The latter prevailed. Thus (to use the expression of lord Hardwicke, 1. Atk. 591.) a statute made upon great consideration, and introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Besides this; — one of the chief inconveniencies produced by trusts, was, the secret method they afforded for the transfer of property. The statute intended to restore the notoriety of the old common-law conveyances. So far from effecting it, the existence and transfer of fiduciary, or trust estates has continued. Secret modes of transferring the possession itself have

*le release est fait. Si come jeo lessa certain terre a un home pur terme des ans, per force de que il est en possession, et puis jeo relef-fa a luy tout le droit que jeo aye en le terre sans plus parolx mitter en le fait, et deliver a luy le fait, donques il ad estate forsque pur terme de sa vie. Et la cause est, pur ceo que quant le reversion ou le remainder est en un home lequel voile enlarger per son releas l'estate le tenant, &c. il n'avera plus greinder estate, mes en * tiel manner et forme sicome † tiel feoffor fuit seise en fee, et volloit per son fait faire estate a un en certaine forme, et deliver a luy seisin per force de mesme le fait: si en tiel fait de feoffement ne soit ascun parol de enheritance, ‡ donques il ad forsque estate pur terme de vie; et issint il est en tiels releases faits per || eux en la reversion ou en le remainder. Car si jeo lessa la terre a un home pur terme de sa vie, et puis jeo relef-fa a luy tout mon droit sans plus dire en le releas,*

whom the release is made. (1) As if I let certaine land to one for terme of yeares, by force whereof hee is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath hee an estate but for terme of his life. And the reason is, for that when the reversion or remainder is in a man who will by his release enlarge the estate of the tenant, &c. hee shall have no greater estate, but in such manner and forme as if such lessor were seised in fee, and by his deed will make an estate to one in a certain forme, and deliver to him seisin by force of the same deed: if in such deed of feoffement there be not any word of inheritance, then he hath but an estate for life; and so it is in such releases made by those in the reversion or in the remainder. For if I let land to a man for terme of his life, and after I release to him all my right without more saying in the release, his estate is not

lessee maketh a lease for yeares, and after *A.* releaseth to the lessee for yeares, and his heires, this release is void (Post. 296. a.) to enlarge the estate, because there is no privity between *A.* and the lessee for yeares.

If a man make a lease for twenty yeares, and the lessee (Ant. 270. a.) make a lease for ten yeares, if the first lessor doth release to the second lessee, and his heires, this release is void for the cause aforesaid.

For the same cause, if the donee in taile make a lease for his owne life, and the donor release to the lessee and his heires, this release is void to enlarge the estate.

And as privity is necessarie in this case, so privity only is not sufficient. As if an (Ant. 264. a. Post. 285. b. Sect. 490. 491.) infant make a lease for life, and the lessee granteth over his estate with warranty, the infant at full age bringeth a *dum fuit infra etatem*, the tenant voucheth his grantor, who entereth into warranty, the demandant releaseth to him and his heires; here is privity in law, and a tenancie in supposition of law: and yet because hee *in rei veritate* hath no estate, it cannot enure to him by way of enlargement; for how can his estate be enlarged, that hath not any.

If a tenant by the courtiesie grant over his estate, yet he is tenant as to an action of waste, attornment, &c. (Ant. 53. a. 54. a.) and yet a release to him and his heires cannot enure to enlarge his estate that hath no estate at all.

But if a man make a lease for yeares, the remainder for life, a release by the lessor to the lessee for yeares, and to his heires, is good, for that he hath both a privity and an estate; and the release also to him in the remainder for life and his heires, is good also. (2. Roll. Abr. 400.)

If I grant the reversion of my tenant for life to another for life, now shall not I have an action of waste: (2) but if I release to the grantee for life, and his heires, now hee hath

* tiel—*La*, L. and M. and Roh.

‡ per eux not in L. and M. nor Roh.

† *fi* added in L. and M. and Roh.

‡ &c. added L. and M. and Roh.

(1) Here Littleton treats of releases which operate by enlargement of the estate of the releasee. To make releases operate in this manner, it is necessary that the releasee, at the time the release is made, should be in actual possession of, or should have a vested interest in, the lands intended to be released; that there should be a privity between him and the releasor; and that the possession of the releasee should be notorious. Hence a tenant by *elegit*, or statute-merchant, is not capable of a release that is to operate by enlargement. But a tenant in dower or by the courtiesie are, as they have the notoriety of possession, and privity of estate, with respect to the releasor. See Roll. Abr. 400. 401. and Gilb. Ten.

(2) Because no person is entitled to an action of waste, but he who has an estate immediate in remainder or reversion, expectant on the estate of the person committing waste. See ant. note 2. to page 218. b.

have been discovered, and have totally superseded that notorious and public mode of transferring property, which the common law required, and the statute intended to restore; and many modifications or limitations of real property have been allowed, which the common law did not admit. An attempt will be made to give the reader a succinct view of these points, by some observations. First, on the nature of the estates of the feoffee and the *cestuy que use*, since the statute of uses. Secondly, on the limitations and modifications of landed property unknown to the common law, which have been introduced under the statute of uses. Thirdly, on the mode by which conveyances to uses operate. Fourthly, on the doctrine of powers deriving their effect from the statute of uses. Fifthly, on uses not executed by the statute. It is to be premised, that what is here said of a feoffee to uses, is equally to be understood of a releasee, donee, or recoveror, who stands seised to uses.—1. *As to the estates of the feoffee and the cestuy que use*;—the statute unites the possession to the use, so that the very instant the use is raised, the possession is joined to it; and the use and the possession are thereupon immediately consolidated, and become convertible terms. Thus, had all uses been vested either in possession or in right, no estate or interest of any kind could have been left in the feoffee. But uses are frequently limited in contingency; to serve which, as they come *in esse*, it is necessary that there should be a seisin somewhere. When this case was first considered by the lawyers, it was found difficult to discover any mode of reasoning consistent with the system generally received on the doctrine of uses, by which that seisin could be supposed to exist any where; or what the precise nature of it was. This was the great difficulty in Chudleigh's case. There the following case was put: Suppose a feoffment is made to the use of *A.* during his life, remainder to the use of his sons successively in tail; and, for want of such issue, to the use of *B.* in fee; is there any, and what seisin, to serve the uses limited to the sons of *A.*?—in whom does that seisin exist?—and how does it operate? Upon this point the judges seem, by the accounts which have come to us of that case, particularly sir Edward Coke's and lord chief-justice Popham's, to have held very different opinions. All agreed, that to the execution of an use under the statute, it was indispen-

hath the fee simple, and shall punish the waste done after (1).

It is further to be observed, that to a release that enureth by way of enlargement of the estate, there is not only required privity, as hath been said, and an estate also, but sufficient words in law to raise or create a new estate. If a man make a lease to *A.* for terme of the life of *B.* and after release to *A.* all his right in the land, by this, *A.* hath an estate for terme of his owne life; for a lease for terme of his owne life is higher in judgement of law, than an estate for terme of another man's life.

If a feme covert be tenant for life, a release to the husband and his heires is good, for there is both privity and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement (a); for by the entermarriage he gaineth a freehold in his wife's right.

Tout le droit. Vide Sect. 650.

Pur terme des ans. So it is if a release be made to tenant by statute, staple or merchant, or tenant by *elegit*, as hath been said; and so likewise to gardeine in chivalrie which holdeth in for the value, by him in the reversion of all his right in the land, by this a freehold passeth for the life of him to whom the release is made, for that is the greatest estate that can passe without apt words of inheritance.

If a man make a lease for ten yeares, the remainder for twenty yeares, he in the remainder releaseth all his right to the lessee, he shall have an estate for thirty yeares; for one chattle cannot drowne another, and yeares cannot be consumed in yeares.

Mes si jeo releasé a luy et a ses heires, &c. Here it is to be observed, that when a release doth enure by way of enlargement of an estate, no inheritance either in fee simple or fee taile, can passe without apt words of inheritance.

But there is a diversity betwene a release that enureth by way of enlargement of the state and by way of *mitter l'estate* (2); for when an estate passeth by way of *mitter l'estate*, there sometime there need not any words of inheritance. As if a joynt estate be made to the husband and to his wife, and to a third person and to their heires, the third person releaseth all his right to the husband, this shall enure by way of *mitter l'estate*, and not by way of enlargement of the estate, because the husband had a fee simple, and needeth not to have any words of inheritance. So it is if the release had been made to the wife.

(b) If there be three joyntenants, and one release to one of the other all his right, this enureth by way of *mitter l'estate*, and passeth the whole fee simple without these words (heires). But if there be two joyntenants, and the one of them release all his right to the other, this doth not to all purposes enure by way of *mitter l'estate*, for it maketh no degree, and hee to whom the release is made shall for many purposes be adjudged in from the first feoffor, and this release shall vest all in the other joyntenant without these words (heires).

But if there be two coparceners, and the one release all his right to the other, this shall enure by way of *mitter l'estate*, and shall make a degree, and without these words (heires) shall passe the whole fee simple. And it is to be observed, that to releases that enure by way of *mitter l'estate*, there must be privity of estate at the time of the release.

If two coparceners be of a rent, and the one of them take the ter-tenant to husband, the other may release to her, notwithstanding the rent be in suspense, and it shall enure by way of *mitter l'estate*, and she may release also to the ter-tenant, and that shall enure by way of extinguishment: but if she release to her sister and to her husband, it is good to be seen how it shall enure.

Littleton having now spoken of releases that enure by way of enlargement of the estate, and of releases that enure by way of *mitter l'estate*, proceedeth to releases that enure by way of *mitter le droit*. So as of that which hath been said and shall be said by our author of releases, it appeareth that some doe enure by way of enlargement of estate, some by way of *mitter l'estate*, some by way of *mitter le droit*, by way of entrie and feoffment, and some by extinguishment.

Sect.

(1) By the release the tenant for life in remainder obtains the immediate remainder in fee.

(2) Here the release operates by *mitter l'estate*; which is, where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releaseth to the other the benefit of it. In releases which operate by this last mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, words of inheritance in the release are useless; but where the release operates by enlargement, the releasee having no such previous inheritance, and seifs being either for life or in fee, as they are originally granted, the release gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs.

necessary that there should be a person seised to the use; an use in possession, reversion, or remainder; and a *cestuy que use in esse*. From these positions some of the judges in that case inferred, that the whole use was executed in *A.* and *B.* in a manner that left nothing of the ancient seisin in the feoffees; and that the contingent use, when it came *in esse*, was executed out of the first livery, and the original estate, of the feoffees. Others held, that an actual estate in remainder was vested in the feoffees, to serve the contingent uses as they arose. But both these systems were found to be open to unanswerable objections. For, with respect to the first, one of the requisites indispensably necessary to the execution of an use, under the statute, is, that there must be a person seised to the use, at the time of the execution of it. Now, if the whole original seisin was divested out of the feoffees, there would not, when the son of *A.* was born, be any person seised to his use;—or, in other words, there could be no seisin to that use. This would make the estates limited to the sons of *A.* and all other contingent remainders, void in their creation, for want of a seisin to support them, when they come *in esse*.—With respect to the latter system,—it is to be observed, that under the limitations upon which the case arose, *A.* took an estate for life in possession, and *B.* took an estate in remainder in fee;—and that, previous to the birth of *A.*'s children, there was no use vested in any person which separated those two estates. Those uses, therefore, were commensurate to the whole fee, and admitted no opening for any intermediate vested use. Besides, the feoffor neither limited, nor intended to limit, any such intermediate use to the feoffees. Thus, on one hand, the objection to supposing that nothing of the old seisin remained in the feoffees; on the other, the objection to supposing that any use or legal estate remained in them, made it difficult to conceive what estate or seisin could be in them, to serve the contingent use. To clear up this difficulty it was observed, that the possession was not executed by the statute, but in the same manner, and to the same extent, in which the use was limited. Now, in the case we have mentioned, the use was limited, and consequently the possession executed, to the use of *A.* during his life, remainder to *B.* in fee, but subject to the possibility of *A.*'s having sons, and their becoming intitled to the use, and consequently to the possession, for an estate or estates in tail. Thus, during the suspense of the contingent use, the feoffees had a possibility of possession, untouched and unaffected by the statute, as there was

Sect. 466.

IT E M, ascuns foits releases urera de mitter, et vester le droit celuy que fait le releas a celuy a que le releas est fait. Si come un home est disseisi, et il releffa a son disseisor tout le droit que il ad, en cest cas le disseisor ad son droit, issint que lou son estate adevant fuit torcions, ore per tiel releas il est fait loyal et droiturel.

ALSO, sometimes releases shall enure de mitter, and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongfull, now by this release it is made lawfull and right. (1)

ET il releffa a son disseisor, &c. This release so putteth the right of the disseisee to the disseisor, that it changeth the quality of the estate of the disseisor; for where his estate was before wrongfull, it is by this release made lawfull. But how farre, and to what respects his estate is changed, shall be said hereafter in this chapter in his proper place.

Sect. 467.

MES hic nota, **BUT** here note, that *que quant home* when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speake of the heires of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an houre, this shall bee as strong to him in law, as if he had released to him and his heires. For when his right was once gone from him by his release without any con-

IL ne besoigne a parler de les heires,

&c. And the reason of *Littleton* hereof is, for that the disseisor hath a fee simple at the time of the release made. And this appeareth by that which hath beene said before, so as regularly hee that hath a fee simple at the time of the release made of a right, &c. needeth not speake of his heires. (Post. 280. 2.)

Car si releas fuit fait a luy pur un jour, Vide 6. E. 3. 17. 12. E. 4. 124. Descent. F. 29.

&c. For the diversity is betweene a release of part of the estate of a right, and between a release of a right in part of the land. And therefore *Littleton* here saith, that a release of a right for a day or an houre is of as good force, as if he had released his right to him and his heires. But if a man be disseised of two acres, he may release his right in one of them, and yet enter into the other. (Ant. 252. 2.)

Sans ascun condition,

* et a ses heires added L. and M. and Roh.

(1) Here *Littleton* treats of releases which operate by *mitter le droit*. Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor; and the uniting the right to the possession completes the title of the releasee: but the different degrees of title in the disseisor, his feoffee, or his heir, give the releases made to them different operations. They all agree in this respect, that no privity is required, or indeed can, from the nature of the case, exist between them and the releasor.

no use *in esse* to which it could be executed. The moment the use came *in esse*, the feoffees would be entitled at common law to the possession, to the use, or, as we should now call it, in trust for the *cestuy que use*; but by the operation of the statute, the possession is instantaneously divested from the feoffees, and executed in the *cestuy que use*. Thus, by supposing a possibility of seisin, but no actual seisin or use to remain in the feoffees during the suspense of the contingent use, a sufficient seisin is provided to serve the contingent use when it comes *in esse*, without interfering with, or breaking in upon, the legal fee.—II. With respect to the *limitations and modifications of landed property, unknown to the common law, which have been introduced under the statute of uses*; the principal of these are known by the general appellation of springing or secondary uses. No estate could be limited upon or after a fee, though it were a base or a qualified fee; nor could a fee or estate of freehold be made to cease as to one person, and to vest in another, by any common-law conveyance. But there are instances where, even by the common law, these secondary estates seem to have been allowed when limited, or rather when declared, by way of use. See *Jenk. Cent. 8. case 52*. After the statute of uses, the judges seem to have long hesitated whether they should receive them. In *Chudleigh's case* it was strongly contended, that it would be wrong to make "any estate of freehold and inheritance lawfully vested, to cease as to one, and to vest in others" against the rule of law, and that no estates should be raised by way of use but those which could be raised by livery of seisin at the "common law." The courts, however, admitted them. After they were admitted, it was found necessary to circumscribe them within certain bounds; because when an estate in fee simple is first limited, there is no method by which the first taker can bar or destroy the secondary estate, as it is not affected either by a fine or common recovery. It is now settled, that when an estate in fee simple is limited, a subsequent estate may be limited upon it, if the event upon which it is to take place be such, that if it does happen, it must necessarily happen within the compass of one or more life or lives in being, and 21 years and some months over. It was long before the courts agreed upon this period. In the late case of *Buckworth v. Thirkill*, lord Mansfield mentioned that it was not settled till his time. It is observed in note 5. to p. 20. a. "that this period was not arbitrarily prescribed by our courts of justice with respect to the limitation of personal estates, but wisely and reasonably adopted in analogy to the cases of freehold and inheritance, which cannot be

[c] 4. E. 2. Release 50.
43. Aff. 12. 17. Aff. 2.
31. Aff. 13. 21. H. 24.

(6. Rep. 62. 2. Post. 297. 2.
300. b.)

Rot. Parliament 18. H. 6.
num. 29. Ap. Gwilliam's case.
30. E. 3. cap. 2. 3. H. 7. f. 6.

tion, &c. Herein is im-
plied two diversities: first, be-
tweene the quantity of the e-
state in a right, and the qua-
lity thereof; for albeit the disseisee cannot release part of the estate, as hath beene said, yet
may he release his right upon condition, as here it appeareth by *Littleton*, [c] and it agreeth
with our bookes.

Also here is another diversity betweene a right, whereof *Littleton* putteth his case, which
is favoured in law, and a condition created by the party which is odious in law, for that
it defeateth estates. And therefore if a condition be released upon condition, the release is
good, and the condition void.

What things may be done upon condition, is too large a matter to handle in this place,
our author having treated of Conditions before: only to give a touch of some things omitted
there, shall suffice. An expresse manumission of a villeine cannot be upon condition, for
once free in that case, and ever free; also an attornment to a grantee upon condition, the
condition is void because the grant is once settled. But this is to be understood of a condi-
tion subsequent, and not of a condition precedent; for in both those cases, the condition
precedent is good. But letters patents of denization made to an alien, may be either upon
condition subsequent or precedent; and so may the king make a charter of pardon to a man
of his life upon condition, as is above said.

Sect. 468.

(2. Roll. Abr. 400.)

MES lou * home ad un reversion
en fee simple, ou un re-
mainder en fee simple, al temps
de releas fait, la s'il voyle releaser
al tenant pur terme d'ans, ou pur
terme de vie, ou al tenant en le
taile, il covient a determiner l'e-
state que celui a que le releas est
fait avera per force de mesme le
releas, pur ceo que tiel releas en-
urera pur enlarger l'estate de ce-
luy a que le releas est fait. †

BUT where a man hath a rever-
sion in fee simple, or a remain-
der in fee simple, at the time of the
release made, there if he will re-
lease to the tenant for yeares, or for
life, or to the tenant in taile, hee
ought to determine the estate
which he to whom the release is
made shal have by force of the same
release, for that such release shall
enure to enlarge the estate of him
to whom the release is made. (1)

Of this sufficient hath beene said before.

Sect. 469.

MES autrement est lou home
ad forsque droit a la
terre, et n'ad riens en le re-
version ne en le remainder en
fait. Car si tiel home releassa tout
son droit a un que est tenant de
le franktenement, tout son droit
est ale, coment que nul mention
soit fait de les heires celui a
que le releas est fait. Car si jeo
lessa terres ‡ a un home pur terme

BUT otherwise it is where a man
hath but a right to the land,
and hath nothing in the reversion
nor in the remainder in deed. For
if such a man release all his right
to one which is tenant in the free-
hold, all his right is gone, albeit
no mention be made of the heires
of him to whom the release is
made. For if I let lands to one for
terme of his life, if I after release
de

* home—un, L. and M. and Roh.

† &c. added L. and M. and Roh.

‡ ou tenements added L. and M. and Roh.

(1) All releases *per mitter le droit* also agree in this, that words of inheritance are not necessary in releases which operate by *mitter le droit*; as the disseisor, to whom, or to whose feoffee, or heir, that release is made, acquires the fee by the disseisin, and therefore cannot take it under the release. In this respect they differ from releases by enlargement.

be limited by way of remainder, so as to postpone a complete bar of the entail, by fine or recovery, for a larger space. The same analogy has been observed with respect to these secondary fees, when limited upon an estate in fee simple. But the reason which induced the courts to adopt this analogy, with respect to these estates when limited upon an estate in fee simple, does not hold when they are limited upon or after an estate in tail; because, when they are limited upon or after an estate in tail, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee simple absolutely discharged from it. See *Page v. Haywood*, 2. Salk. 570. And see 1. Lev. 35. *Goodman v. Cook*, 2. Sid. 102. Hence if the secondary estates we are speaking of, are limited upon or after an estate in tail, they may be limited generally, without restraining or confining the event or contingency upon which they are to take place, to any period. Thus, if an estate be limited to *A.* and his heirs; and if *B.* (a person *in esse*) dies, without leaving any issue of his body living at the time of his decease; or having such issue, if all of them die before any of them attain the age of 21 years, then to *C.* and his heirs; here the limitation to *C.* is limited after a previous limitation in fee simple; and it is a good limitation, because the event upon which it is to take place, must, if it does take place, necessarily take place within the period of a life in being, and 21 years and a few months. But if the estate were limited to *A.* and his heirs; and after the decease of *B.* and a total failure of heirs or heirs male of the body of *B.* to *C.* and his heirs; here, as the secondary use is limited after a previous limitation in fee simple, and the event on which the fee limited to *C.* is to take place is not such as must necessarily happen within the period we are speaking of (for *B.* may have issue, and that issue not fail till many years after the expiration of 21 years after *B.*'s decease), the limitation to *C.* and his heirs is void. But suppose the estates were limited to *A.* for life, then to trustees and their heirs during his life, for preserving contingent remainders; then to *A.*'s first and other sons successively in tail male; with several remainders over; with a proviso, that if *B.* dies, and there should be a total failure of heirs or heirs male of his body, the uses limited to *A.* and his sons, and the remainders over, shall determine, and the lands remain and go over to *C.* and his heirs; here the limitation to *C.* and his heirs is limited upon or after previous limitations for life, or in tail; and the event upon which it is to take effect, may possibly not happen till after a period of one or more life or lives in being, and 21 years. But so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds we have mentioned; and so far as it is limited upon an event which may happen during the continuance of the estate of the tenants in tail, or after them, the first tenant in tail in possession by

suffering

*de sa vie, si jeo puis release a luy pur enlarger son estate, il covient que jeo releffa a luy et a ses heires de son corps engender, * ou a luy et a ses heires, ou per tiels parols, Aaver et tener a luy et a ses heires † de son corps engendres, ‡ ou a les heires males de son corps engendres, ou tiels semblables estates, ou autrement il n'ad plus greinde estate que il avoit adevant.*

to him to enlarge his estate, it behoveth that I release to him and to his heires of his body engendered, or to him and his heires, or by these words, To have and to hold to him and to his heires of his bodie engendered, or to the heires males of his bodie engendered, or such like estates, or otherwise hee hath no greater estate than hee had before.

A *Un que est tenant de franktenement.* Here it appeareth, that to a release of (Ant. 266.) a right, made to any that hath an estate of freehold in deed or in law, no privitie at all is requisite. As if a disseisor make a lease for life, if the disseisee release to the lessee, this is good, and directly within the rule of *Littleton*, because the lessee hath an estate of freehold, albeit there be no privitie. And so it is if a disseisor make a lease to *A.* and his heires during the life of *B.* and *A.* dieth, a release by the disseisee to his heire, before hee doth actually enter, is good.

Sect. 470.

MES *si mon tenant a terme de vie lessa mesme la terre ouster a un auter pur terme de vie de son lessee, le remainder a un auter en fee, ore si jeo releffa a celuy a que mon tenant lessast pur terme de vie, § ceo serra barre a tous jours, comment que nul mention soit fait de ses heires, pur ceo que al temps de release fait jeo avoy nul reversion, mes tantselement un droit d'aver la reversion. Car per tiel leas, et le remainder ouster, que mon tenant fist en ceo cas, mon reversion fuit discontinue, || &c. et tiel release urera a celuy en le remainder, d'aver advantage de ceo, auxibien come al tenant a terme de vie.*

BUT if my tenant for life letteth the same land over to another for terme of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for terme of life, I shall bee barred for ever, albeit that no mention be made of his heires, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, (Post. 327.) which my tenant made in this case, my reversion was discontinued, &c. and this release shall enure to him in the remainder, to have advantage of it, aswell as to the tenant for terme of life (1).

LITTLETON having before spoken of releases which enure by way of enlargement, by way of *mitten l'estate*, and by way of *mitten le droit*, here speaketh of a release of a right which (Post. 279.) in some respects enureth by way of extinguishment; as in this case which *Littleton* here putteth, the release to the lessee doth not enure by way of *mitten le droit*, for then should he have the whole right, but as it were by way of extinguishment, in respect of him that made the release, and that it shall enure to him in the remainder, which is a qualitie of an inheritance extinguished.

* ou not in L. and M. nor Roh.

† males added L. and M. and Roh.

‡ ou a les heires males de son corps engendres

not in L. and M. nor Roh.

§ ceo—jeo, L. and M. and Roh.

|| &c. not in L. and M. and Roh.

(1) Here *Littleton* shews the operation of a release *per mitten le droit*, when made to the feoffee of the disseisor. The feoffee is in by title; his estate cannot be divested, or disaffirmed, but by an act equal to that which created it. A release does not affect his possession or title, but discharges it from the right of the releasor; so that whether the whole fee is in the feoffee, or carved out into particular estates, it remains unaltered by the release, except as it is discharged by it from the right of the releasor.

suffering a recovery, before the event happens, may bar the limitations over, and thereby acquire an estate in fee simple; and therefore the limitation over to *C.* and his heirs, is good.—III. With respect to the *mode by which conveyances to uses operate*. It is to be observed, that to raise an use under the statute, the possession or seisin to serve the use must be in some person distinct from the *cestuy que use*; the statute requiring that the person seised to the use, and the person to whom the use is limited, should be different persons; so that if the possession is conveyed, and the use limited to the same person, at least if the use is limited in fee simple, that is not an use executed by the statute, but the party is in by the common law. For the statute of uses mentions those cases only, where "any person or persons stand seised to the use of any other person or persons." Thus, in the case of *Jenkins v. Young*, Cro. Car. 231. 245. lands were given to two, *habendum* to the use of them and the heirs of their two bodies. It was argued, that the estate out of which the use should rise, was but for their lives, and that therefore, on the death of the *cestuys que vie*, the use limited upon their estate was determined: but the court held, that where an estate is limited to one, and the use to a stranger, the use should not be more than the estate out of which it was derived; but that when the limitation is to two, *habendum* to the use of them and the heirs of their bodies, it was no limitation of the use, nor was the use to be executed by the statute. So in *Gilb. Rep.* p. 17. it is expressly said, that if a fine be levied to a man and his heirs, to the use of him and his heirs, he shall take by the common law, and not by way of use. And see *Dyer* 186. and ant. 22. b. and *Bac. uses*, ed. 1785. p. 63. *Com.* 313. *Skin.* 209. Now the possession or seisin on which the use is declared, must either remain in the party, or be transferred to some third person. This is the meaning of those passages in the books, where it is said that uses are either raised by transmutation of the possession, or without such transmutation. A bargain and sale, and a covenant to stand seised, operate on the possession of the bargainor or covenantor. A feoffment, fine, and common recovery, operate on the possession of the feoffee, conveyee, or recoveror. A lease and release has a mixt operation; the lease having the operation of, and being in fact, a bargain and sale under the statute, and the estate of the releasee being extended or enlarged to an estate of inheritance by the operation of the release at the common law. For with respect, first, to a bargain and sale, and a covenant to stand seised; a bargain and sale is considered as a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey the lands to the bargainee. A covenant to stand seised to uses, is where a man covenants to stand seised of them to the use of his wife, his child, or kinsman. Here, in the first instance, the bargainor stands seised to the use of the bargainee; in the second, the covenantor stands seised to the use of the parties intended to be benefited.

extinguished. But yet the right is not extinct in deed, as shall be said hereafter in this chapter.

(Post. 327. b.)

Mon reversion suit discontinue, &c. Here *discontinue* is in a large sense taken for devested, though the entrie of the lessor be not taken away, which is implied in this (&c.)

Se^{ct}. 471.

SONT come un tenant en ley. Which is cer-

tainly true in this case of remainder, and so it is also in case of a reversion; as if a disseisor make a lease for life, and the disseisee doth release all his right to the lessee, this release shall enure to him in the reversion, albeit they have severall estates, as hath been said, which is implied in this (&c.)

But if a disseisor make a lease for life, the remainder in fee, albeit they to some purposes (as here is said) are as one tenant in law, yet if the disseisee release all actions to the tenant for life, after the death of the tenant for life, he in the remainder shall not take benefit of this release, for it extended only to the tenant for life, as it is holden [a] in *Edward Altham's case*. And in like manner, if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this inureth not to him in the reversion; and so our author is to be understood of a release of rights, and not of a release of actions, to the tenant for life, as to or for the benefit of him in the remainder or reversion.

[a] Lib. 8. fol. 148. Edw. Altham's case.
(Post. Se^{ct}. 494.)

CAR a cel intent le tenant a terme de vie et celuy en le remainder sont si come un tenant en ley, et sont si come un tenant fuit sole seisie en son demesne come de fee al temps de tiel release fait a luy, &c.

FOR to this intent the tenant for terme of life and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

Se^{ct}. 472.

SI home soit disseisie, &c. This is to be understood where tenant in fee simple is disseised and release; for if tenant for life be disseised by two, and he releaseth to one of them, this shall inure to them both; for he to whom the release is made, hath a longer estate than hee that releaseth, and therefore cannot inure to him alone, to hold out his companion, for then should the release inure by way of entrie and grant of his estate; and consequently the disseisor, to whom the release is made, should become tenant for life, and the reversion reversioned in the lessor, [b] which strange transmutation and change of estates in this case the law will not suffer. But if lessee for yeares be ousted, and he in the rever-

*ITEM, si home soit disseisie per deux, s'il releassa a un d'eux, il tiendra son compaignon hors de terre, et per tiel release il avera le sole possession et estate en la terre. Mes si un disseisor enseossa deux en fee, et le disseisee releassa a l'un des feoffees, ceo urera a ambideux de les feoffees, et la cause de diversity entre ceux deux cases est assets preignant. * Pur*

ALSO, if a man be disseised by two, if he release to one of them (1), hee shall hold his companion out of the land, and by such release hee shall have the sole possession and estate in the land. But if a disseisor infeoffe two in fee, and the disseisee release to one of the feoffees, this shall inure to both the feoffees, and the cause of the diversity between these two cases is pregnant e-

ceo

* The remainder of this Section not in L. and M. nor Rob.

(1) Here the release is to the disseisors themselves. They have only a bare possession, preceded by no previous conveyance, and founded on no right or title, and therefore the release of the disseisee who has the right, passes the right to the disseisor to whom it is made, and his holding out his companion is an act of notoriety equal to that by which the joint estate by disseisin was originally acquired. Thus the possession of each of the estates being founded on an equal degree of title, the disseisor to whom the release is made, having the right, must be preferred to him who has none: so that, in this case, the release is tantamount to an actual entrie and feoffment.

benefited. In both, the possession or seisin remains in the party; and the statute draws it from them, and executes it in the *cessuys que use*. Secondly, with respect to a feoffment, fine, and common recovery; the transfer or transmutation of the possession from the lessor, conveyer, and recoverer to the feoffee, conveyee, or recoveror, is effected solely by the operation of these conveyances or assurances at the common law; and if the use is declared to the feoffee, conveyee, or recoveror, in fee simple, the conveyance is completed at the common law, in the same manner as if the statute of uses had never passed. It is only when the use is declared to a third person, that the statute has any operation; and then, by the operation of the statute, the possession previously transferred or transmuted to the feoffee, conveyee, or recoveror, by the operation of the feoffment, fine, and common recovery, at the common law, is divested from the feoffee, conveyee, or recoveror, and vested in the *cessuys que use* by the statute. Thirdly, as to the conveyance by lease and release. The form of that conveyance is originally derived to us from the common law, and it is necessary to distinguish in what respect it operates as a common-law conveyance, and in what it operates under the statute of uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate for the express and sole purpose of conveying the reversion; and then, by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for yeares; for at the common law, the ceremony of livery of seisin is as necessary to create even an estate of freehold, as it is to create an estate of inheritance. Still an actual entrie would be necessary on the part of the particular tenant; for, without actual possession, the lessee is not capable of a release, operating by way of enlargement. But this necessity of entrie for the purpose of obtaining the possession, was superseded, or made unnecessary, by the statute of uses: for by that statute, the possession was immediately transferred to the

cessuys

ceo que ils veignent nough. For that they
cins per feoffment, et come in by feoffment,
l'auters per tort, &c. and the others by
wrong, &c.

disseisor hath a freehold, whereupon the release of tenant for life may enure; but the disseisor hath no terme for yeares, whereupon the release of the lessee for yeares may enure.

And so it is if donee in taile be disseised by two, and releaseth to one of them, it shall enure to them both. But if the king's tenant for life be disseised by two, and he releaseth to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. So if two joyntenants make a lease for life, and after doe disseise the tenant for life, and he release to one of them, he shall hold out his companion, for the disseisin was but of an estate for life.

If tenant for life be disseised by two, and he in the reversion and tenant for life joyne in a release to one of the disseisors, he shall hold his companion out, and yet it cannot enure by way of entrie and feoffment. But if they severally release their severall rights, their severall releases shall enure to both the disseisors.

But here in *Littleton's* case, where tenant in fee simple is disseised by two, and releaseth to one of them, this for many purposes enureth by way of entrie and feoffment, and therefore he to whom the release is made shall hold out his companion, and be made sole tenant of the fee simple. And this holdeth not only in case of a disseisin, but also in case of intrusion and abatement: but necessarily he to whom the release is made must bee in by wrong, and not by title.

If two men doe gaine an advowson by usurpation, and the right patron releaseth to one of them, he shall not hold out his companion, but it shall enure to them both; for seeing their clerke came in by admission and institution, which are judicall acts, they are not merely in by wrong: for an usurpation shall cause a remitter, as it appeareth in *P. N. B. 31. m.*

But if a lease for life be made, the remainder for life, the remainder in fee, and he in remainder for life disseiseth the tenant for life, and then tenant for life dieth, the disseisin is purged, and he in the remainder for life hath but an estate for life. And so note a diversitie where the particular estate for life is precedent, and when subsequent.

Where our author putteth his case of one disseised, put the case that two joyntenants in fee be disseised by two, and one of the disseises release to one of the disseisors all his right, he shall not hold out his companion, because the release is but of the moytie, without any certainment. If a man be disseised by two women, and one of them take husband, and the disseisee release to the husband, this shall enure to the advantage of both the disseisors, because the husband was no wrong doer, but in a manner in by title.

Il avera le sole possession et estate. If two disseisors be, and they make a lease for life, and the disseisee release to one of them, this shall enure to them both, and to the benefit of the lessee for life also: for he cannot by the release have the sole possession and estate, for part of the estate is in another.

And so it is (as it seemeth) if the disseisors make a lease for yeares, and the disseisee release to one of them, this shall enure to them both, for by the release he cannot have the sole possession: and it appeareth by *Littleton*, that he must have the sole possession, and hold his companion out. But the mortgagee upon condition, having broken the condition, is disseised by two, the mortgagor having title of entrie for the condition broken, release to the one disseisor, albeit they be in by wrong, yet the release shall enure to them both for two causes: first, for that they are not wrong doers to the mortgagor, but to the mortgagee; and by *Littleton's* case it appeareth, that wrong is done to him that made the release: secondly, that hee that makes the release hath but a title by force of a condition, and *Littleton's* case is of a right. Like law of an entrie for mortmaine, or a consent to ravishment, &c.

Mes si un disseisor infeoffa deux, &c. And the reason of this diversitie is, for that the feoffees are in by title, and are presumed to have a warrantie, which is much favoured in law, and the disseisors are merely in by wrong. And the equitie of the law doth preserve in this case the benefit of the estranger to the release comming in by one joynt title.

Pur ceo que ils veignent cins per feoffment, et l'auters per tort. This is of a new addition, and not in the originall, and therefore I passe it over.

Sect.

cestuy que use; so that a bargainee under that statute is as much in possession, and as capable of a release before or without entrie, as a lessee is at the common law after entrie. All, therefore, that remained to be done to avoid, on the one hand, the necessity of livery of seisin from the grantor; and to avoid, on the other, the necessity of an actual entrie on the part of the grantee; was, that the particular estate (which, for the reasons abovementioned, should be an estate for yeares) should be so framed, as to be a bargain and sale within the statute. Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale under the statute. But as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary; it became the practice to insert, among the operative words, the words *bargain and sale* (in fact, it is more accurate to insert no other operative words), and to express that the bargain and sale or lease is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of a release. The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee is in the possession, by the statute. The release operates by enlarging the estate or possession of the bargainee to a fee: this is at the common law, and if the use be declared to the releasee in fee simple, it continues an estate at the common law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the releasee to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee, under the lease, is not so properly merged in, as enlarged by the release: but, at all events, it does not, after the release, exist distinct from the estate passed by the release. As the operation of a lease and release depends upon the lease, or bargain and sale, if the grantor is a body corporate, the lease will not operate under the statute of uses; for a body corporate cannot be seised to an use, and therefore the lease of possession, considered as a bargain and sale under the statute, is void; and the release, then, must be of no effect, for want of a previous possession in the releasee. In cases of this nature, therefore, it is proper to make the conveyance by feoffment, or by a lease and release, with an actual entrie by the lessee, previous to the release; after which the release will pass the reversion. It may also be observed, that in *exchanges*, if one of the parties die before the exchange is executed by entrie, the exchange is void. *Ant. 506.* But if the exchange be made by lease and release, this inconvenience is prevented, as the statute executes the possession without entrie, and all incidents annexed to an exchange, at common law, will be preserved.—IV. The next consideration is, upon the doctrine of *powers deciding their effect from the statute of uses*; but the nature of these notes requires, that what is said on this head should be confined to some general observations upon the mode by which powers operate; and the relation which the deeds by which they are executed, bear to the deeds by which they are created. As to the first all powers of this kind are, in fact, powers of revocation and appointment: indeed, every declaration of an use may, in some respect, be considered as an appointment of the use or uses to which the feoffee is to stand seised: but the word appointment is generally applied to those cases, where either the power of appointment is first referred, or given, with a subsequent limitation of uses, to take place until, and in default of the appointment; or where the uses are first limited, and a power is afterwards given to some person to limit other uses. As the uses limited under this power cannot operate but by the appointing, abridging, or defeating the prior uses, it is usual in some cases, to precede the power of appointment by a power of revocation. But this is immaterial. The powers of leasing, jointuring, charging, selling, and exchanging, usually inserted in marriage settlements, are powers of revocation and appointment. All of them postpone, abridge, or defeat, in a greater or less degree, the pre-

Se^{ct}. 473.

*ITEM, si jeo sue disseisie, et mon disseisor est disseisie, si jeo release a le disseisor de mon disseisor, jeo n'avera a unque assise ne entra sur * le disseisor, pur ceo que son disseisor ad mon droit per mon release, &c. † Et issint il semble en tiel cas, si soyent xx. disseisors, chescun apres auter, et jeo releffa a le darreine disseisor, ‡ celui disseisor barrera tous les auters de lour actions et lour titles. Et la cause est, § come il semble, pur ceo que en mults cases, quant un home ad loyal title d'entre, || coment que il n'entra pas, il defeatera tous meane titles per son release, &c. Mes ceo n'est ¶ my en chescun case, come serra dit apres.*

ALSO, if I bee disseised, and my disseisor is disseised, if I release to the disseisor of my disseisor, I shall not have an assise nor enter upon the disseisor, because his disseisor hath my right by my release, &c. And so it seemeth in this case, if there be xx. disseised one after another, and I release to the last disseisor, this disseisor shall barre all the others of their actions and their titles. And the cause is, as it seemeth, for that in many cases, when a man hath lawfull title of entrie, although he doth not enter, hee shall defeat all meane titles by his release, &c. But this holds not in everie case, as shall be said hereafter (1).

HERE it is to be observed, that a release by one whose entry is lawfull to him that is in by wrong, shall purge and take away all meane estates and titles. And where our author first putteth his case of two estates by wrong, and after of twentie disseisins, all estates be wrong.

If A. disseise B. who enfeoffeth C. with warrantie, who enfeoffeth D. with warrantie, and E. disseiseth D. to whom B. the first disseisee releaseth, this doth defeat all the meane estates and warranties, because the release of B. is made to a disseisor, and his entrie is lawfull.

(Post. 277. b. 278. 2.)
21. H. 6. 41. 11. H. 4. 37.
9. H. 7. 25. 2. E. 4. 16. 21. E. 4.
78. 12. Aff. 22. Vide 3. H. 6.
38.

Se^{ct}. 474.

ITEM, si mon disseisor leffa, &c. If the disseisor make a lease for life, and the lessee maketh a feoffment in fee, and the disseisee releaseth to the feoffee, the disseisor shall not enter upon the feoffee; for albeit the release to one joynt feoffee of a disseisor, as hath beene said, shall not exclude the other, yet a release to the feoffee of a tenant for life in this case shall take away the entrie of the disseisor for the alienation which was made to his

*ITEM, si mon disseisor leffa les tenements dont il moy disseisist a un ** auter home pur terme de vie, et puis le tenant a terme de vie aliena en fee, et jeo releffa al alienee, &c. dunque mon disseisor ne poit enter, causâ quâ supra, coment que a un*

ALSO, if my disseisor letteth the tenements wherof he disseised mee to another for terme of life, and after the tenant for terme of life alieneth in fee, and I release to the alienee, &c. then my disseisor cannot enter, causâ quâ supra, albeit that at one foits

* le—son, L. and M. and Roh. † et not in L. and M. nor Roh. ‡ celui disseisor—il, L. and M. and Roh.
§ come il semble not in L. and M. nor Roh. || coment que il n'entra pas—et entre, L. and M. and Roh. ¶ my—pas, L. and M. and Roh. ** auter not in L. and M. nor Roh.

(1) This is upon the same principle, that where the title to the possession is equal, the party who obtains the right shall be preferred.—So, by the modern law, where the equity of the parties is equal, he who has the law, is to be preferred.

vious uses and estates, and appoint new uses in their stead. As soon as the uses created by them spring up, they draw to them the estate of the feoffee; and the statute executes the possession. But it must be observed, that these powers do not operate as a conveyance of the possession or estate, but as a limitation of the use. Hence, if a person, having a power of appointment, appoints the estate to A. and his heirs, to the use of B. and his heirs, the use is executed in A. and his heirs, and B. takes only an equitable fee. Thus, suppose a marriage settlement framed in the usual manner, and with the usual power of selling and exchanging reserved to the feoffees; in these cases, it is sometimes expressed, that it shall be lawful for the feoffees to grant, bargain, sell, and convey. But whatever are the words made use of, they can only operate as a limitation of the use; and the vendee will take the legal estate. If the feoffees make a conveyance by lease and release, there is no doubt but it will be effectual; it will operate, however, as an appointment; the releasee will take the legal estate, and if the release is made to uses, the intended cestuys que use will have only equitable estates.—Secondly, as to the relation which the deed by which the power of appointment is executed, has to the deed by which the power is created. It is frequently said in the books, that when a power is executed, from that time the feoffee, conusee, recoveror, or releasee, is seised to the use created by the power, in the same manner as if in the original deed in which the power is contained, not the power, but the use raised under the power had been inserted. And this is true, so far as the use thus appointed derives its effect from, and is served by or out of the original seisin of the conusee, recoveror, feoffee, or releasee; and as it precedes and takes place of all the uses limited subsequent or subject to the power. In this sense, it clearly has a relation to the deed by which it is raised. But it has no other relation in point of time. In the case of the duke of Marlborough v. lord Godolphin, 2. Vez. 61. lord Sunderland left the interest of 30,000l. to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2000l. to Mr. Spencer and 1500l. to lady Morpeth, who both died in her life-time. It was contended, that the appointment related back to the time of lord Sunderland's will, which relation would overreach the death of the two parties, who were alive at the time of the death of the testator, lord Sunderland; and then it would be considered as vesting in them in their lives. But lord Hardwicke denied this. He admitted that an use taking effect by virtue of an execution of a power, was taken under the authority of that power, but not from the time of its creation; and he exemplifies this distinction by appointments of uses; in which case, says his lordship, if a feoffment is executed to such uses as the feoffor shall

foits l'alienation fuit time the alienation a son disinheritance, was to his disinheri-
Et. *tance, &c.*

estate. But if the entry of the disseisee were not lawfull, it is otherwise. As if a man make a lease for life, and the lessee for life is disseised, and that disseisor is disseised, and he in the reversion releaseth to the second disseisor, the first disseisor shall enter upon the second disseisor, and his entry is lawfull; and if the lessee for life re-enter, he shall leave the reversion in the first disseisor; and the cause is, for that the entry of the disseisor at the time of the release made was not lawfull. And the booke of [m] 9. H. 7. 25. is to be intended of an estate *taille mutatis mutandis*.

If, in the case aforesaid, the disseisor make a lease for life, and the lessee infeoffeth two, and the disseisee release to one of the feoffees, this shall barre the disseisor, as hath beene said; but yet he shall not hold out his companion for the cause aforesaid.

Sect. 475.

ITEM, *si home soit disseise, lequel be disseised, who ad firs deins age et hath a sonne within morust, et esteant le age and dieth, and the firs deins age le disseisor morust seisi, et sonne being within la terre descendist a seised, and the land son heire, et un estrange descend to his heire, (1) abate, et puis le firs and a stranger abate, and le disseisee, quant il after the sonne of the vient a son plein age, disseisee, when hee releffa tout son droit commeth to his full a l'abator; en cest case age, releaseth all his l'heire le disseisor n'a-vera assise de mor-d'ancestor envers l'abator, mes serra bar,* pur ceo que l'abator ad le droit del firs le disseisee per son releas, et l'entry le firs fuit congeable, † pur ceo of the sonne of the disseisee by his release, al temps del discent, and the entry of the sonne was congeable, &c. for that hee was within age at the time of the discent, &c.*

THE reason of this case is, for that the entry of the heire is congeable, and the abator is in the land by wrong.

Abate is both an English and French word, and signifieth in his proper sense to diminish, or take away, as here by his entrie he diminisheth and taketh away the freehold in law descended to the heire; and so it is said to abate an account, signifying subtraction or withdrawing, &c. and to abate the courage of a man. In another sense it signifieth to prostrate, beat downe, or overthrow, as to abate castles, houses, and the like, and to abate a writ; and hereof commeth a word of art, *abatamentum*, which is an entrie by interposition. Now the difference *inter disseisinam, abatamentum, intrusionem, deforciammentum, et usurpationem, et purpresturam*, is this.

A disseisin is a wrongfull putting out of him that is actually seised of a freehold. And abatament is when a man died seised of an estate of inheritance, and betwene the death and the entry of the heire, an estranger doth interpose himselfe, and abate.

Vet. N. B. 115. Britten cap. 51.
 Bracon lib. 4. cap. 2.
 F. N. B. 203. f. W. 1. ca. 17.

Intrusion first properly [n] is, when the ancestor died seised of any estate of inheritance expectant upon an estate for life, and then tenant for life dieth, and betwene the death and the entry of the heire an estranger doth interpose himselfe and intrude.

Secondly, [o] he that entreth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

[n] F. N. B. 203. Fleta li. 4. cap. 30.
 [o] Pl. Com. case de mynec.

Thirdly,

* *d'assise* added in L. and M. and Roh.

† *&c.* added in L. and M. and Roh.

(1) Littleton having treated of releases *per mitter le droit*, when made to the disseisors themselves and their feoffees, now treats of their operation when made to the heir of the disseisor. In note 1. to page 239, it was observed, that a disseisor has a mere naked possession, unsupported by any right, and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by entry. But though the feoffee of the disseisor comes in by title, still the right of possession remains in the disseisee, and he may equally enter on the feoffee as on the disseisor; so that a release *per mitter le droit* gives both to the disseisor and his feoffee the right of possession and the right of property: but if the disseisor dies, the entry of the disseisee is taken away, and a presumptive right of possession is in the heir; so that the release of the disseisee only passes the right of property.

shall appoint by will; when the will is made, it is clear the appointee is in by the feoffment, but has nothing from the time of the execution of the feoffment, so as to vest the estate in him; and he thereupon decreed these legacies to have lapsed by the death of the legatee in the life-time of the testator. This shews how much it is necessary to qualify the general expressions above alluded to. It also reconciles them with a known circumstance attending powers of this nature, with which it is otherwise difficult to reconcile them, viz. that by an execution of a power, a person may limit estates which he could not limit by the deed in which the power is contained; for by an execution of a power of appointment, a life-estate may be limited to a person not *in esse* at the time when the deed giving the power was executed, with remainders over. Now, if we consider these limitations as inserted in the original deed, the remainders over would be void; for though a person may limit an estate for life to a person not *in esse*, he cannot limit a remainder upon it. But these limitations under powers of appointment are in every day's practice; and estates for life, with remainders over, are limited under them to persons not *in esse* at the time of the execution of the original deed, in the same manner, and to the same extent, as if instead of being derived out of the seisin of the feoffees of the original deed, and in that point of view, as making a part of that deed, the uses and estates so limited were created by an original, substantive, independent, and integral conveyance.—V. The remaining subject for observation is, *what uses are not executed by the statute*. First, as to uses created by *wills*, it is to be observed, that lands were not devisable at common law, except through the medium of a previous feoffment to uses. The *cestuy que use* might dispose of the use by will: but the court of chancery considered the will as a declaration of the use, and compelled the feoffees to convey the lands accordingly. But when by the statute of the 27th Henry VIII. the possession was annexed to the use, as the use thereby became merged in the land, this indirect power of devising lands was absolutely lost. The 32. and 34. Hen. VIII. gave a power to devise the whole of lands held in socage, and two-thirds of lands held by knights service. The 12. Car. II. converted knights service into socage; so that now all landed property, except that which is of the tenure of copyhold, is devisable. But as the statute of uses preceded the statutes of wills, it does not necessarily extend to them. It is true, that the statute of uses speaks of persons seised to uses by virtue of wills; but this must apply

[p] F. N. B. 141. f. g. h.

Thirdly, [p] when the heire in ward entreth at his full age without satisfaction for his marriage, the writ saith, *quid intravit*.

Deforciammentum comprehendeth not only these aforementioned, but any man that holdeth land whereunto another man hath right, be it by descent or purchase, is said to be a deforceor.

Usurpation hath two significations in the common law: one, when an estranger that no right hath presenteth to a church, and his clerke is admitted and instituted, hee is said to be an usurper, and the wrongfull act that he hath done is called an usurpation.

Secondly, when any subject doth use, without lawfull warrant, royal franchises, he is said to usurpe upon the king those franchises.

Purprestura, or *pourprestura*, a purpresture. [q] *Purprestura est, &c. generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regie viae (vel aliquarum publicarum) vel civitatis, &c.* And because it is properly when there is a house builded, or an enclosure made of any part of the king's demelines, or of an high way, or a common street or publike water, or such like publike things, it is derived of the French word *pourpris*, which signifieth an inclosure, but specially applied, as is aforesaid, by the common law.

[q] Glanvil. lib. 9. cap. 11.
Britton fol. 28. 29.
(Cro. Car. 17. 2. Inst. 278.)

Sect. 476.

HERE the entry of the disseisee is congeable, and yet the release doth not avoid the condition, because the feoffee is in by title, as hath bene said, and may have a warranty. (2) And herein our author expresth a diversitie betweene a condition in law, and a condition in deed; for in the case before when the disseisee releaseth to the feoffee of the tenant for life, the condition in law is taken away, but otherwise it is in this case of a condition in deed.

But if the feoffee upon condition make a feoffment in fee over without any condition, and the disseisee release to the second feoffee, the condition is destroyed by the release before the condition broken or after. For the state of the second feoffee was not upon any expresse condition, as Littleton here putteth his case, and he may have advantage of the release, because it is not against his owne proper acceptance, as Littleton speaketh in the next Section.

But if it be a wrongfull title, such a title is taken away by a release; as if *A.* disseised *B.* to the use of *C.* *B.* release to *A.* this shall take away the agreement of *C.* to the disseisin, because it should make him a wrong doer: as if the disseisor be disseised, the disseisee releaseth to the second disseisee, this taketh away the right the first disseisor had against the second, and a relation of an estate gained by wrong shall never defeat an estate subsequent gained by right, against a single opinion, not affirmed by any other in one of our bookes.

9. H. 7. 25.

(Sect. 415.)
Lib. 1. f. 147. Mayowe's case.

14. H. 8. 18. per Port.
(Ant. 271. a. 276. b.)

*MES si * home* BUT if a man be disseised, and the disseisor fait feoffment sur condition, *cestascavoir, de rendre a luy certaine rent, et par default de payment un re-entre, &c.* if the disseisee releaseth to the feoffee upon condition, yet this shall not amend the estate of the feoffee upon condition; for notwithstanding such release, yet his estate is upon condition, as it was before (1).

‡ Et cum hoc concordat opinio omnium justiciariorum, P. 9. H. 7. And with this agreeeth the opinion of all the justices, Pasch. 9. H. 7.

Sect. 477.

ET le disseisor grant un rent-charge, &c. Here is implied commons or any other *ET mesme le maner est lou home soit disseise de certaine terre, et le disseisor* IN the same manner it is where a man is disseised of certain lands, and the disseisor

* of *un* added in L. and M. and Roh.
‡ *avidera*, Vell. M.S.

† *n'amendra---ne obatera*, L. and M. and Roh. *ne alicraft*, Pap. M.S.
‡ This paragraph not in L. and M. nor Roh.

(1) The observations made on note 1. to page 275. a. note 1. to page 276. b. and the note to the preceding page, apply to the cases put by Littleton in this and the following Section, and by sir Edward Coke in his commentary. The whole of the chapter contained in this chapter is particularly well explained by lord chief-baron Gilbert in his treatise on tenures.

(2) The reason of this case in the book here cited is, that the condition is like a covenant between them; and he is stopped from claiming it otherwise; and the diversity following seems to warrant this. Post. 278. b. — Lord Nott. MS.

apply either to those lands which were deviseable by custom; — as when a person seised of lands deviseable by custom, devised them to *A.* and his heires, to the use of *B.* and his heires: — or to uses at common law; — as where a feoffment was made to *A.* and his heires, to the use of *B.* and his heires, and *B.* devised the use. To uses of this description the statute extended; but it is difficult to conceive how uses created under the testamentary power given by the statutes of wills can be within the statute of uses. It is said, that tho' the law will not force the operation of the statute of uses upon devises to which it is the testator's intention it should not extend; yet it will apply it to those cases to which it is his intention it should extend. This opinion makes it depend entirely on the will of the testator, whether the statute of uses shall or shall not operate upon the devises of his will. Thus, if a devise is made to the use of *A.* for life, with remainders over, if it were to be considered as a limitation under the statute of uses, it would be void, for want of a seisin to serve the uses. It cannot therefore be the testator's intention that it should operate under that statute; consequently the law will not force it under that statute, but leave it solely to its effect under the statutes of wills. But suppose a devise to *A.* and his heires, to the use of *B.* and his heires, that would be good to give the legal fee to *B.* as a limitation under the statute of uses. The testator therefore might intend, and the form of the devise shews he did intend, to raise an use under that statute, and the law, in conformity to his intentions, extends its operation to the devise. But against this it may be argued, that a statute can never be considered as relating to any thing which did not exist at the time of its passing; and therefore, as lands were not deviseable till some years after the statute of uses, the statute of uses cannot extend to uses created by devise: that in wills the testator's intention is chiefly considered; and as by a devise to *A.* and his heires, to the use of *B.* and his heires, the testator shews it to be his intention that *B.* should have the legal fee, the law will

for grant un rent-charge hors de mesme la terre, &c. coment que apres le disseisee releffa al disseisor, &c. uncore le rent-charge demurt en sa force. Et la cause en ceux deux cases est ceo, que home n'avera advantage per tiel releas que serra encounter son proper acceptance, et encounter son grant demesne. Et coment que ascuns ont dit, que lou l'entre de home est congeable sur un tenant, s'il releasist a mesme le tenant, que ceo availeroit a le tenant, sicome il usten-ter sur le tenant, et puis luy enseoffa, &c. ceo n'est pas voier en chescun cas. Car en le primer cas de ceux deux avantdits cases, si le disseisee usten-ter sur le feoffee sur condition, et puis luy enseoffa, donques est le condition tout defeat et avoid. Et isint en le second case, si le disseisee entraist et enseoffa celuy que grantalerent-charge, donques est le rent-charge anient et avoid, mes il n'est pas void per seun tiel releas sans entry fait, &c.

grant a rent-charge out of the same land, &c. albeit the disseisee doth afterwards release to the disseisor, &c. yet the rent-charge remaynes in force. And the reason in these two cases is this, that a man shall not have advantage by such release which shall bee against his proper acceptance, and against his own grant. And albeit some have said, that where the entry of a man is congeable upon a tenant, if hee releases to the same tenant, that this shall availe the tenant, as if he had entred upon the tenant, and after enseoffed him, &c. this is not true in every case. For in the first case of these two cases aforesaid, if the disseisee had entered upon the feoffee upon condition, and after enseoffed him, then is the condition wholly defeated and avoided. And so in the second case, if the disseisee entereth and enseoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided, but it is not void by any such release without entrie made, &c.

And the reason is, because he shall not avoid his owne grant by a release hee himselfe hath acquired since the grant: but if the disseisor in that case be disseised, and the disseisee release to the second disseisor, he shall avoid it, as by that which hath beene said, *Sec. 473.* appeareth. So likewise if *A.* and *B.* bee joint disseisors, and *B.* grant a rent-charge, and the disseisee release to *A.* all his right, *A.* shall avoid the rent-charge, because it was not granted by him, and so not within the reason of our author. (6. Rep. 78. b.) (7. Rep. 38.) (Post. 349. a.) (Mo. 95.)

If there bee two femes joint disseisors, and the one taketh husband, and the disseisee release to the other, there is sole seised, and shal hold out the husband and wife. (Ant. 276. a.)

If two disseisors bee, and they infeoffe another, and take backe an estate for life or in fee, albeit they remaine disseisors to the disseisee as to have an assise against them, yet if he release to one of them, he shall not hold out his companion, because their state in the land is by feoffment.

If there be two disseisors, and they be disseised, and they release to their disseisor, and after disseise him, and then the disseisee release to one or both of them, yet the second disseisor shall re-enter, for they shall not hold the land against their owne release; for *Littleton* here saith, that they shall not avoid their owne grant, and by like reason they shall not avoid their owne release, *et sic de similibus.*

Come s'il uft enter sur le tenant et luy enseoffe.

Here is another kinde of release, *viz.* a release which enureth by way of entry and feoffment; for if a disseisee release to one of the disseisors to some purpose, this shall enure by way of entry and feoffment, *viz.* as to hold out his companion. But as to a rent-charge granted

will put that construction on the devise, and give it that operation. At the end of Mr. Hillyard's edition of *Shepherd's Touchstone*, there is a very learned opinion of the late Mr. Booth on the doctrine of uses. In two copies which the Editor has seen of this opinion, made immediately under the eye of Mr. Booth, and delivered by him to the persons in whose custody they now are, and also in a copy of it bequeathed by Mr. Booth, with his other valuable law manuscripts, to Mr. Holliday, the following note is added to it:—"P. S. Powers under wills are not like powers under conveyances, operating by way of use. The execution of a power under a devise, is not the limitation of a use; no, not where the devise is to uses: as where there is a devise to *I. S.* and his heirs, to the use of *A.* for life, remainder to *B.* in tail, with power for *A.* to limit a jointure, or lease, or charge; here, there will be no seisin in *I. S.* consequently no such use in *A.* or *B.* as is executed by the statute of uses; consequently, the execution of the power is no use; it operates as a devise under the statute of wills."—See also *Popham v. Bamfield*, 1. Vin. 79. *Burchett v. Durdant*, 2. Vent. 312. *Broughton v. Langley*, Salk. 679. *Gilb. Uses*, 281. —But whether a devise to uses operates solely by the statute of wills, or by that statute jointly with the statute of uses, is a matter rather of speculation than of use; as it is now settled, that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator. 2dly, *With respect to copyhold estates*, the statute of uses does not extend to them, as it is against the nature of the copyhold tenure, that any person should be introduced into the estate without the consent of the lord. *Gilbert's Tenures*, 179. 3dly, *With respect to leases for years*; —these estates are not executed by the statute. But this must be understood of leases actually in existence, at the time of their being assigned to the use. Therefore, if *A.* possessed of a lease for years, grants it over, or assigns it, to *B.* and *C.* to the use of *D.*; all the estate is in *B.* and *C.* and *D.* only takes a trust, or equitable estate. But if *A.* being seised of lands in fee, makes a feoffment to the use of *B.* and *C.* for a term of years, this term is served out of the seisin of the feoffee, and is executed by the statute.—It is the same if he bargains and sells the estate, of which he is seised in fee, for a term of years. *Gilb. Uses*, 198. *Dyer* 369. 2. Inst. 671.—Such are the general outlines of the doctrine of uses; one of the most important parts of the law, as all the landed property of the kingdom is, either directly or indirectly, regulated by it. It is to be observed, that one of the chief objects, both of the legislature and the judicature of this kingdom, in their regulations upon this subject, has been, on the one hand, to guard against those restraints upon alienation, which are incompatible with the welfare of a free and commercial people; and on the other, to admit of reasonable settlements and provisions being made for wives and children, and the general wants of families. Experience seems to shew that they have accomplished their object. This fully answers the objections which foreigners make to the nature of our family-settlements, that we exclude the ancestor, whose character is known to us, from the disposal of the property; and intrust it to the children, with whom we cannot but be perfectly unacquainted.—So detrimental has an unqualified and unlimited power of settlement been found even in France, that it has been made a question there, whether it would not be for the advantage of the nation at large, that all settlements and trusts should be abrogated. This question, so far as it related to moveables, was by the order of Louis XV. proposed in the year

ed by him, it shall not enure by way of entrie and feoffment; for if the disseisee had entred and enfeofed him, the rent-charge had bene avoided. But it is a certaine rule, that when the entrie of a man is congeable, and he releaseth to one that is in by title, (as hereto the feoffee upon condition is) it shall never enure by way of entrie and feoffment, either to avoid a condition with which he accepted the land charged, or his owne grant, or to hold out his companion.

(Dr. and Student, 50. a.)

And where it appeareth by our author, that acts done by the disseisor shall not be avoided by the release of the disseisee, it is to be noted, that acts made to the disseisor himselfe shall not be avoyded by the alteration of his estate by the release of the disseisee; as if the lord before the release had confirmed the estate of the disseisor to hold by lesser services, the disseisor shall take advantage of it, and so of cistovers to be burnt in the house, and the like law of a warrantie made unto him.

If the heire of the disseisor indow his wife *ex assensu patris*, and the disseisee release to the disseisor, he shall not avoide the indowment, for that is like the case put by *Littleton* of the rent-charge.

If an alien be a disseisor, and obtaine letters of denization, and then the disseisee release unto him, the king shall not have the land, for the release hath altered the estate, and it is as it were a new purchase; otherwise it is if the alien had bene the feoffee of a disseisor.

If the lord disseise the tenant, and is disseised, the disseisee release to the second disseisor, yet the feignorie is not revived, for betweene the parties the release enures by way of entrie and feoffment as to the land; but not having regard to the feignorie, and for that the possession was never actually removed or revented from the disseisor, who claimeth under the lord, the feignorie is not revived. But if the lord and a stranger disseise the tenant, and the disseisee release to the stranger, there the feignorie by operation of law is revived, for the whole is vested in the stranger which never claimed under the lord: and in that case, if the lord had died, and the land had survived, the feignorie had bene revived. But if the lord had disseised the tenant, and bene disseised by two, and the disseisee released to one of them, the feignorie is not revived, because he claimed (as hath bene said) under the lord.

Sect. 478.

(Ant. 45. a.)
Vid. Sect. 514.

28. E. 3. 98. 9. E. 4. 46.
21. E. 4. 55. 41. E. 3. 10.
2. H. 4. 12.

*QUEL brieve de eux
il esliera, &c.*

Note, many times in one case the law doth give a man severall remedies, and of severall kindes, as in this case by action and by entrie; by action, either a writ of right, or *dum fuit infra ætatem*.

Et puis le disseisor porta brieve de droit, &c. Here it appeareth, that there is a great art and knowledge for a man that hath divers remedies to chuse his aptest remedie; as in this case, if he bring his writ of right, the disseisor shall be barred, but if he had entred upon the heire of the alienee, he should have enjoyed the land for ever. For in that case the heire of the alienee after such an entrie shall never have a writ of right, no more then if the disseisee entred upon the heire of the disseisor, and make a feoffment in fee, if the heire of the disseisee

*ITEM, si home soit
disseise per un
enfant * lequel aliena
en fee, et alienee devie
seisie, et son heire en-
ter, estant † le dissei-
sor deins age, ore est
en election ‡ le dissei-
sour d'aver un brieve ||
de dum fuit infra æta-
tem, ou brieve de droit
envers le heire del a-
lienee, et quel brieve
de eux que il esliera, il
doit recover per la ley,
§ &c. Et auxi il poit
enter en la terre sans
ascun recoverie, et en
cest case l'entre le dis-
seisie est tolle, &c. Mes
en cest cas si le dissei-
sie releffa son droit al*

*ALSO, if a man bee
disseised by an in-
fant who alien in fee,
and the alienee dieth
seised, and his heire en-
treth, the disseisor be-
ing within age, now is
it in the election of
the disseisor to have a
writ of *dum fuit infra
ætatem*, or a writ of
right against the heire
of the alienee, and
which writ of them
hee shall chuse, hee
ought to recover by
the law, &c. And also
he may enter into the
land without any re-
covery, and in this case
the entrie of the dis-
seisee is taken away.
heire*

* *deins age* added in L. and M. and Roh.

† *le disseisor—d'alienour*, L. and M. and Roh.
nor Roh.

‡ *le disseisor—l'alienour*, in L. and M. and Roh.

§ *de not* in L. and M. nor Roh.

|| &c. not in L. and M.

1744 by the Chancellor D'Aguesseau to all the parliaments and superior councils of France. See *Questions concernant les Substitutions, avec les Responses de tous les Parlemens et Cours Souverains du Royaume, et les Observations de M. le Chancelier d'Aguesseau sur les dits Responses*. Toulouse, 1770. And see also *Commentaire de l'Ordonnance de Louis XV. sur les Substitutions, par Mons. Furgole*. Paris, 1767.

It is hoped, that the importance of the subject, and the want of a comprehensive and systematic treatise upon it, will be thought a sufficient apology for the great length of the foregoing note. Lord chief-baron Gilbert's Essay upon Uses and Trusts, considered in the only light in which it can be considered with justice to its author, as an unfinished sketch, is intitled to great commendation. It certainly contains several most profound and learned observations, but in many instances is very defective and erroneous.

In a future part of this work an attempt will be made to explain the leading points of the doctrine of trusts. --- The suspension and extinction of powers; --- the destruction of contingent remainders; --- and the difference between the operations of feoffments, fines, common recoveries, bargains and sales, releases, and wills, will be considered in a note on the chapter of Discontinuance.

*beire del alienee, et puis le disseisor porta briefe de droit envers l'heire d'alienee, et il joynele mise sur le mere droit, &c. le graunde assise doit trouver per la ley, que le tenant ad plus mere droit * que ad le disseisor, † &c. pur ceo que le tenant ad le droit le disseise per son release, lequel est plus ancien et plus mere droit: car per tiel leas tout le droit le disseisee passa a le tenant, et est en le tenant. Et a ceo que ascuns ont dit, que en tiel case lou home que ad droit al terres ou tenements (mes son entrie n'est pas congeable) s'il releffa al tenant ‡ tout son droit, &c. que tiel release urera per voy d'extinguishment. Quant a ceo il puit estre dit, que ceo est § voyer quant a ce luy que releffa; car per son release il ad luy demise || quietment de ¶ son droit, quant a son person, mes uncore ** le droit que il avoit bien poit passer a le tenant per son release. Car inconvenient serroit que tiel ancien droit serroit extinct tout ousterment, &c. car il est communement dit, que*

&c. But in this case if the disseisee release his right to the heire of the alienee, and after the disseisor bringeth a writ of right against the heire of the alienee, and hee joyne the mise upon the meere right, &c. the great assise ought to finde by the law, that the tenant hath more meere right than the disseisor, &c. for that the tenant hath the right of the disseisee by his release, the which is the most ancient and most meere right: for by such release all the right of the disseisee passeth to the tenant, and is in the tenant. And to this some have said, that in this case where a man which hath right to lands or tenements (but his entrie is not congeable) if he release to the tenant all his right, &c. that such release shal enure by way of extinguishment. As to this it may bee said, that this is true as to him which releaseth; for by his release hee hath dismissed himselfe quite of his right as to his person, but yet the right which hee hath may well passe to the tenant by his release. For it should bee inconvenient that such an ancient right should bee extinct altogether,

re-enter he shall detain the land for ever, and the feoffee shall not maintaine any writ of right; for a bare right shall never be left in the feoffee, but shall ever follow the possession, as hath beene said: but if the disseisee entreth upon the heire of the disseisor, and make a feoffment in fee upon condition, and entreth for the condition broken before the heire of the disseisor enter, hee is restored to his right againe.

A man maketh a gift in taile, the remainder in fee, tenant in taile dieth without issue, an estranger intrude, and he in the remainder brings a formedon, and recovereth by default, and maketh a feoffment in fee, the intruder reverse the recoverie in a writ of disseit and entreth, he shall detain the land for ever, and the feoffee shall not have a writ of right.

And so likewise if a disseisor die seised and a stranger abate, and the disseisee release to him, the heire of the disseisor shall enter and detain the land for ever. For the right to the possession shall draw the right of the land to it, and shall not leave a right in him to whom the release is made, as hath beene said before in the 447. Section.

Le droit del disseisee passa al tenant, et est en le tenant.

For seeing the tenant hath the whole fee simple, he is capable of the whole right of the disseisee, and, as *Littleton* here saith, the right is in the tenant.

Inconvenient serroit. Here againe, as hath beene often observed, an argument *ab inconvenienti* is forcible in law; and that judges by the authoritie of our author are to judge of inconveniences as of things unlawfull, as hereby and by

(Ant. 266. a.)
38. E. 3. 16. 24. H. 8. Restore
al primer action. 5.
Vide Sect. 447.

9. H. 7. 24.

9. H. 7. 24.

Vide Sect. 87. 138. 139. 231.
269. 440. 722.

* &c. added L. and M. and Roh.
§ voyer—verite, L. and M. and Roh.
L. and M. and Roh.

† &c. not in L. and M. nor Roh.

|| quietment not in L. and M. nor Roh.—nettement, MSS.

‡ &c. added L. and M. and Roh.

** le droit que il avoit bien poit passer a le tenant per son release, not in the Vell. MS. but omitted most probably through mistake.

by many other places it ap-
peareth.

Un droit ne poit rier.

pas morier. Dormit ali-

quando jus, moritur nunquam. For of such an high estimation is right in the eye of the law, as the law preserveth it from death and destruction: trodden downe it may bee, but never trodden out. For where it hath beene said, that a release of right doth in some cases enure by way of extinguishment; it is so to be understood, either (as *Littleton* doth here) in respect of him that makes the release, or in respect that by construction of law it enureth not alone to him to whom it is made, but to others also who be estrangers to the release, which, as hath beene said, is a qualitie of an inheritance extinguished.

As if there be lord and tenant, and the tenant maketh a lease for life, the remainder in fee, if the lord release to the tenant for life, the rent is wholly extinguished, and he in the remainder shall take benefit thereof; even so when the heire of a disseisor is disseised, and the disseisor make a lease for life, the remainder in fee, if the first disseisee release to the tenant for life, this is said to enure by way of extinguishment, for that it shall enure to him in the remainder, who is a stranger to the release; and yet in truth the right is not extinct, but doth follow the possession, *viz.* the tenant for life hath it during his time, and he in the remainder to him and to his heires, and the right of the inheritance is in him in the remainder; for a right to land cannot die or be extinct in deed; and therefore if, after the death of tenant for life, the heire of the disseisor bring a writ of right against him in the remainder, and he joine the mise upon the meere right, it shall be found for him, because in judgment of law he hath by the said release the right of the first disseisee.

Sect. 479.

24. H. 8. fol. 5. 6. 11. H. 7. 25.
30. H. 6. tit. barre, 39. 38. E. 3.
20.

HERE *Littleton* putteth a diversity betwene releases which enure by way of extinguishment against all persons, and whereof all persons may take advantage, and releases which in respect of some persons enure by way of extinguishment, and of other persons by way of *mitter le droit*: or betwene releases which in deed enure by extinguishment, for that hee to whom the release is made cannot have the thing released, and releases which, having some quality of such releases, are said to enure by way of extinguishment, but in troth doe not, for that he to whom the release is made may receive and take the thing released. And here *Littleton* putteth cases where releases do absolutely enure by extinguishment without exception, having respect to all persons. And first of the lord and tenant: secondly, of the rent-charge: thirdly, of the common of pasture.

MES releases que enurera per voy d'extinguishment envers tous persons, sont lou celui a que le releas est fait, ne poit aver ceo que a luy est releas. Si come si soyent seignior et tenant, et le seignior releas al tenant tout le droit que il ad en la seigniorie, ou tout le droit que il ad en le terre, &c. tiel releas va per voy de extinguishment envers tous persons, pur ceo que le tenant ne poit aver *service pur prender de luy mesme.

BUT releases which enure by way of extinguishment (1) against all persons, are where hee to whom the release is made, cannot have that which to him is released. As if there bee lord and tenant, and the lord release to the tenant all the right which hee hath in the seigniorie, or all the right which he hath in the land, &c. this release goeth by way of extinguishment against all persons, because that the tenant cannot have service to receive of himselfe.

Sect. 480.

FIRST, of the lord and tenant, and the lord release to the tenant his seigniorie,

EN mesme le maner est de re-

IN the same manner is it of a release
leas

* service pour prender—ceo, L. and M. and Roh.

(1) Here *Littleton* returns to releases by extinguishment. See ant. 263.

*leas fait al tenant del terre de un rent-charge ou common de pasture, &c. pur ceo que le tenant ne poit aver ceo que a luy est releffe, &c. issint tiels releases urera * per extinguishment en tous voyes.*

made to the tenant of the land of a rent-charge or common of pasture, &c. because the tenant cannot have that which to him is released, &c. so such releases shall enure by way of extinguishment in all wayes.

this must of necessity enure by way of extinguishment to all men; for the tenant cannot have service to be taken of himselfe, nor one man can be both lord and tenant. The second is of a rent-charge; a man cannot have land and a rent issuing out of the same land. Thirdly, a man cannot have land and a common of pasture issuing out of the same land, *et sic de ceteris*. For in all these cases and the like he to whom the release is made

cannot have and enjoy the thing that is released. But in the case of the right of the land, the tenant of the land may take and enjoy it for strengthening his estate therein.

The mesne being a feme entermarrie with the tenant peravale, if the lord release to the feme, the feignorie only is extinct; but if hee release to the husband, both feignorie and mesnaltie are extinct. And in this case, if the lord release to the husband and wife, it is a question how the release shall enure; but it is no question but that a release may be made to a mesnaltie or a feignory suspended in part of the estate.

But here observe a diversity where a release enureth by way of extinguishment of an inheritance, which is in possession and may be granted over, and a release of a right, or an action to lands which cannot be granted over. [r] For the lord may release his feignorie to the tenant of the land for life or in taile, *et sic de ceteris*. But so cannot one release a right or an action; for if it be released but for an houre, it is extinct for ever, as hath bene said.

And two things are to be observed here. First, that by the release of all the right in the land the feignorie is extinct, as well as by the release of all the right in the feignorie, for the feignorie issueth out of the land. Secondly, that by the release of all his right in the feignorie or the land, the whole feignorie is extinct without any words of inheritance. If the tenancie be given to a lord and to a stranger, and to the heires of the stranger, the lord release to his companion all the right in the land, this release doth not onely passe his estate in the tenancie, but extinguisheth also his right in the feignorie, and so one release enures to extinguish severall rights in one and the same land.

If there be lord and tenant by fealty and rent, the lord granteth the feignorie for yeares, and the tenant attorneth, the lord releaseth his feignorie to the tenant for yeares, and to the tenant of the land generally, the whole feignorie is extinct, and the state of the lessee also. But if the release had bene to them and their heires, then the lessee had had the inheritance of the one moitie, and the other moitie had bene extinct. And the reason of this diversity is, because when the release is made generally, it can enure to the lessee but for life, because it enureth by way of enlargement of estate, and being made to the tenant of the land, it enureth by way of extinguishment, as *Littleton* here saith, and then there cannot remaine a particular estate in the feignorie for life. But when the release is made to them and their heires, each one takes a moitie, the one by way of encreasing of the state, and the other by extinguishment.

Sect. 481.

ITEM, de prover que le graund assise doit passer pur le demandant, en le case avantdit, jeo aye oye sovent † la lecture de l'estatute

ALSO, to prove that the graund assise ought to passe for the demandant, in the case aforesaid, I have often heard the reading of the statute of West. 2.

JE O aye oye sovent la lecture de West. 2. Here it is to be observed, of what authoritie antient lectures or readings upon statutes were, for that they had five excellent qualities. First, they declared what the common law

* per extinguishment en tous voyes, — toutz faitz per voie d'extientissement envers toutes persons, L. and M. and Roh.
† en added L. and M. and Roh.

law was before the making of the statute, as here it appeareth. Secondly, they opened the true sense and meaning of the statute. Thirdly, their cases were briefe, having at the most one poynt at the common law, and another upon the statute. Fourthly, plaine and perspicuous, for then the honour of the reader was to excell others in authorities, arguments, and reasons for prooffe of his opinion, and for confutation of the objections against it. Fifthly, they read, to suppress subtile inventions to creepe out of the statute. But now readings having lost the said former qualities, have lost also their former authorities: for now the cases are long, obscure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vanish away like smoke, and the readers are like to lapwings, who seeme to bee neere their nests when they are farthest from them, and all their studie is to find nice evasions out of the statute.

By the authority of *Littleton*, antient readings may be cited for prooffe of the law; but new readings have not that honour, for that they are so obscure and darke.

L'estatute de W. 2. Which is the third chapter.

Le remainder ouster en fee. Here is to be observed, that although the statute speaketh of a reversion [a], yet by the authority of *Littleton* a remainder is within the statute.

See the statute of 14. *Eliz. cap. 8.* which provideth fully for him in the remainder.

Feint action. *Feint* is a participle of the French word *feindre*, which is to feigne or falsly pretend, so as a feint action is a false action.

N'avoit aucun remede devant l'estatute. [b] Here it appeareth by *Littleton*, that if a man maketh a lease for life, the remainder in fee, and tenant for life suffereth a recovery by default, that he in the remainder should not have a formedon by the common law: for *Littleton* saith, that he hath not any remedy before the statute. Neither is there any such writ in that case in the Register, albeit in some bookes mention is made of such a writ.

Sect. 482.

38. E. 3. 3. Tit. Juris Utrum 1.

H E R E a disseisin gotten by wrong, and defeated by the entrie of him that right hath, is sufficient to maintaine a writ of right against the recoveror in this case, for albeit

M E S *si celuy en le remainder* BUT if he in the remainder had entered upon the tenant *der ust enter sur le* ed upon the tenant *tenant a terme de vie,* for life, and disseised *et luy disseisist, et apres* him, and after the te-
le

^a *mesme* not in L. and M. nor Roh. † *a une home*— *al tenant*, L. and M. and Roh. ‡ *le tenant* not in L. and M. nor Roh.

[a] 24. E. 3. 35. 28. E. 3. 96.
18. E. 2. Entrie 74.
3. E. 2. Entrie 7. 6. E. 3. 24.
7. E. 3. Ent. 62. 7. E. 3. 54, 55.
15. E. 4. 15. F. N. B. 217. d.
Register 241.

[b] W. 2. cap. 5.
Vide 34. E. 3. Formdon 31.
21. E. 3. ibid. 31. 8. E. 3. 59.
F. N. B. 217. d. 7. H. 7. 13.

*le tenaunt entra sur
luy, et apres le te-
nant a terme de vie
per tiel recovery per-
de per default et
morust, ore celuy en
le remainder bien poit
aver brieve de droit
envers celuy que re-
covera, pur ceo que le
mise sera joine sole-
ment sur le mere droit,
Ec. Uncore en cest
case, le seisin de celuy
en le remainder fuit
defeat per entree del
tenant a terme de vie.
Mes peradventure as-
cuns vellent argue et
dire, que il n'avera
brieve de droit en cest
case, pur ceo que quant
le mise est joine, il est
joine entiel maner, (sci-
licet) si le tenant ad
plus mere droit en le
terre en le maner come
il tyent, que le deman-
dant ad en le maner
come il demanda, et pur
ceo que le seisin del de-
mandant fuit defeat per
l'entry de le tenant a
terme de vie, Ec. don-
que il ad nul droit en
le maner come il de-
maund.*

required a more actuall seisin, and a seisin to maintaine a writ of right. And hereby also are the (Ec.) in this Section explained.

nant enter upon him, and after the tenaunt for life by such recovery lose by default and die, now he in the remainder may well have a writ of right against him which recovers, because the mise shal be joined only upon the mere right, &c. Yet in this case the seisin of him in the remainder was defeated by the entry of the tenant for life. But peradventure some will argue and say, that hee shall not have a writ of right in this case, for that when the mise is joined, it is joined in this manner, (*scilicet*) if the tenaunt hath more mere right in the land in the manner as he holdeth, than the demandant hath in the maner as hee demandeth, and for that the seisin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the maner as he demandeth.

the seisin is defeated betweene the lessee for life and him in the remainder, yet having regard to the recoveror, who is a meere stranger, and hath no title, it is sufficient against him. But otherwise it is against the party himselfe that defeated the seisin, and the law is prone to give remedie to him that right hath. And where some have thought, that there is no authority in law to warrant *Littleton's* opinion herein, they are greatly mistaken, for *Littleton* hath good warrant for all that he hath written.

Lands are letten to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.* *A.* dieth, *B.* entreth and dieth, a stranger intrudeth, the heire of *A.* shall have a writ of right of the seisin which *A.* had as tenant for life.

Lands are letten to *A.* and *B.* and to the heirs of *A.* *A.* dyeth, a recovery is had against *B.* the heire of *A.* shall have a writ of right of the whole, for every joyntenant is seised *per my et per tout*.

If lands be given in taylor, the remainder to *A.* in fee, the donee dyeth without issue, his wife *privement* enseint, *A.* entreth, the issue is borne and entreth upon him and dyeth without issue, *A.* shall have a writ of right, of the seisin which he had.

If lands be given in taylor to *A.* the remainder to his right heirs, *A.* dieth without issue, the collateral heire of *A.* shall have a writ of right of the seisin of *A.*

And so note a diversity betweene a seisin to cause *possessionis fratris*, &c. for there is

7. E. 3. 6. 38. E. 3. 37.
tit. Jur. Utr. 1.

(Post. 315. a.)

(Ant. 184. a. b.)

4. E. 3. 16. 17.

(Ant. 14. b. 15. a.)
40. E. 3. 8. 42. E. 3. 20.
37. Af. 4. 24. E. 4. 24. 7. H. 5. 4.
11. H. 4. 11.

Sect. 483.

A CEO poit estre dit, que ceux parols (modo et formâ prout, &c.) in mults des cases sont prout, Ec.) TO this it may bee said, that these words (*modo et formâ* in many cases are words parols

*parols de forme de pleder, et ne-
my parols de substance. Car si
home port briefe d'entre in casu
proviso, del alienation fait per le
tenant en dower a son disinherit-
tance, et counta del alienation
fait en fee, et le tenant dit, que il
ne aliena pas en le manner come
le demaundant ad declare, et sur
ceo sont a issue, et trove est per
verdict, que le tenant alyenast en
le taile, ou pur terme d'auter vie,
le demaundant recovers: uncore
l'alienation ne fuit en le manner
come le demaundant avoit declare,
&c.*

(Yelv. 148. Hob. 73. 105.)
(6. Rep. 24.)

[c] 9. H. 6. 1. 40. E. 3. 35.
21. E. 4. 22. F. N. B. 206. g.
40. E. 3. 5. 32. H. 8. issue.
Br. 80. Vid. Sect. sequent.

12. E. 4. 4.
(Doc. Pla. 175. 199. 344. 345.)

of forme of pleading, and not
words of substance. For if a man
bring a writ of entrie *in casu pro-
viso*, of the alienation made by the
tenant in dower to his disinherit-
tance, and counteth of the alie-
nation made in fee, and the tenant
saith, that he did not alien in maner
as the demaundant hath declared,
and upon this they are at issue, and
it is found by verdict, that the te-
nant aliened in taile, or for tearme
of another man's life, the deman-
dant shall recover: yet the aliena-
tion was not in manner as the de-
maundant hath declared, &c.

WHERE *modo et forma* are of the substance of the issue, and where but words of forme, this diversity is to be observed. [c] Where the issue taken goeth to the point of the writ or action, there *modo et forma* are but words of forme, as here in the case of the writ of entrie *in casu proviso*, and so is the (&c.) well explained in this Section. But otherwise it is when a collateral point in pleading is traversed; as if a feoffment be alleadged by two, and this is traversed *modo et forma*, and it is found the feoffment of one, there *modo et forma* is materiall. So if a feoffment be pleaded by deed, and it is traversed *absque hoc quod feof-
favit modo et forma* upon this collateral issue, *modo et forma* are so essentiall, as the jury can-
not find a feoffment without deed.

Sect. 484.

Vid. Sect. preced.
(8. Co. 89. Sid. 15.)

10. E. 4. 7. 8. E. 4. 15.
20. E. 4. 3. 21. E. 4. 3.
Merlebr. cap. 3.

(Doc. Pla. 191. 344.)

(9. Rep. 33.)

*TROVE est per
verdict, que il
tient per fealtie
tantum.* Here is an-
other diversitie to be ob-
served: That albeit the
issue bee upon a collate-
rall point, yet if by the
finding of part of the
issue, it shall appeare to
the court that no such
action lieth for the plain-
tiffe no more than if the
whole had been found,
there *modo et forma*
are but words of forme,
as here in the case which
Littleton putteth of the
lord and tenant ap-
peareth.

*Car le matter
del issue est lequel il
tient de luy ou nemy,
&c.*

Here it appeareth, that

*AUXR, si soient seig-
nior et tenant, et le te-
nant tient del seignior per
fealtie solement, * et le
seignior distreine le tenant
pur rent, et le tenant
porta briefe de trespas
envers son seignior de
ses avers issint prises,
et le seignior plede que
le tenant tient de luy
per fealtie et certain
rent, et pur le rent arere
il vient a distreiner, &c.
et demaunde judgement
de briefe port vers luy,
quare vi et armis, &c.
et l'auter dit, que il ne
tient de luy en le maner
come il suppose, et sur*

ALSO, if there bee
lord and tenant, and
the tenant hold of the
lord by fealty only, and
the lord distreine the
tenant for rent, and
the tenant bringeth a
writ of trespasse against
his lord for his cat-
tell so taken, and the
lord plead that the tenant
holds of him by fealty
and certaine rent, and
for the rent behinde he
came to distreine, &c.
and demand judgement
of the writ brought a-
gainst him, *quare vi et
armis, &c.* and the other
saith, that hee doth not

ceo

* et—si, L. and M. and Roh.

ce sont a issue, et treuve est per verdict que il tient de luy per fealtie tantum; en cest case le briefe abatera, et uncore il ne tient de luy en le maner come le seignior avoit dit. Car le matter de l'issue est, lequel le tenant tient de luy ou nemy; car s'il tient de luy, coment que le seignior distreina le tenant pur auter services que ne doit aver, uncore tiel briefe de trespasse, quare vi et armis, &c. ne gist envers le seignior, mes terra abate.

quare vi et armis, &c. doth not lie against the lord, but shall abate.

he pleadeth that in his visitation he deprived him as ordinary, and it is found that he deprived him as patron, the ordinary shall have judgement, for the deprivation is the substance of the matter.

The lessee covenant with the lessor not to cut downe any trees, &c. and bind himself in a bond of forty pounds for performance of covenants, the lessee cut downe ten trees, the lessor bringeth an action of debt upon the bond, and assigneth a breach that the lessee cutteth downe twenty trees, whereupon issue is joined, and the jury finde that the lessee cut downe ten, judgement shall be given for the plaintife; for sufficient matter of the issue is found for the plaintife.

hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty onely; in this case the writ shall abate, and yet hee doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if hee holdeth of him, although that the lord distreine the tenant for other services which he ought not to have, yet such writ of trespasse

doth not lie against the

if the matter of the issue be found, it is sufficient. And this rule holds in criminall causes. For if *A.* be appealed, or indicted of murder, viz. that hee of malice prepened killed *I. A.* pleadeth that he is not guilty *modo et forma*, yet the jury may find the defendant guiltie of manslaughter without malice prepened, because the killing of *I.* is the matter, and malice prepened is but a circumstance.

In assise of *darreine presemment*, if the plaintife alleage the avoydance of the church by privation, and the jury find the avoydance by death, the plaintife shall have judgment; for the manner of voydance is not the title of the plaintife, but the voydance is the matter.

[d] If a gardeine of an hospitall bring an assise against the ordinary, whereupon issue is taken,

(Doc. Plz. 191. Ant. 227.
2. Roll. Abr. 704. 708.
Sid. 5. Hob. 18. 73. 81.
Doc. Plz. 355. 344. 345.)
Pl. Com. 101.

(9. Rep. 348. 1. Cro. 14. 18.
Haw. P. C. 266.)

6. E. 3. 41. b. 25. E. 3. 50.
9. H. 7. 3. 13. H. 7. 14.
29. E. 3. 38.
(Sid. 21. 22.)

(Doc. Plz. 348.)

[d] 8. E. 3. 70. 8. Aff. 29. & 39.
9. E. 3. 338. 24. E. 3. 34.
5. H. 4. 2. 7. H. 4. 11.
Pl. Com. 92. 3. Mar. Dier 116.
40. E. 3. 35.
Dier 2. & 3. Ph. & Mar. 115. b.
Trin. 22. Eliz. Rot. 920. Wol-
man's case. 41. E. 3. 28.
34. Aff. 3. 30. Aff. 5.
35. E. 3. verdict 27.
22. E. 3. 1. b. 18. E. 3. 48.
31. E. 3. account 58. 28. Aff. 43.
(2. Roll. Abr. 704. 719.)

Sect. 485.

*AUXRY, * en briefe de trespasse de batterie, ou des biens emports, si le defendand plede de rien culpable, en le maner come le plaintife suppose, et treuve est que le defendand est culpable en auter ville, ou a auter jour que le plaintife suppose, uncore il recovers.*

A L S O, in a writ of trespasse for batterie, or for goods carried away, if the defendand plead not guiltie, in manner as the plaintife suppose, and it is found that the defendand is guiltie in another towne, or at another day than the plaintife supposes, yet hee shall recover.

EN briefe de trespasse de batterie, et des biens emports, &c.

(11. Rep. 5.)

Here *Littleton* speaketh of actions brought for things transitory. In which cases the wrong being done in one towne, the plaintife may not only alledge it in another towne, as *Littleton* here saith, but also in another county, and the jurors upon not guilty pleaded are bound to find for the plaintife.

Neither can the assault, battery, or taking of goods, &c. alledged in another county, be traversed without speciall cause

(7. Rep. 2. b. 2. Roll. Abr. 688.
Doc. Plz. 93. 369. 386.)

(1. Roll. Abr. 335. Hob. 103. 104.
Doc. Plz. 367. 5. Rep. 77.)

* *en—un*, L. and M. and Roll.

(1. Rep. 1. 396. 6. Rep. 6. b.)

(Doc. Pla. 367. 2. Cro. 45. 372.
Noy 57. 3. Cro. 353. Doc.
Pla. 361.)

(1. Leo. 39. Sid. 234. 294.
3. Rep. 52. b. Ant. 145. b.
Dor. Pla. 43. 2. Sid. 118.
Cro. El. 99.)

Trin. 30. Eliz. in the king's
bench, betwene Inglebert and
Jones. And herewith agreeth
a judgement in the court of com.
pleas, Pasch. 38. Eliz. Rot. 1656.

[c] 18. E. 3. 1.
(1. Cro. 105. Ant. 72. Mo. 350.
2. Cro. 372.)
[f] 2. H. 4. 18. 31. E. 3.
Gager. deliver. 5.
[*] 42. Aff. 12. 4. E. 3. ca. 5.
18. E. 3. ca. 1. & ca. 6.
4. H. 4. ca. 2.
[d] Li. 6. fo. 46. 47. Dowdale's
calc. 3. E. 3. Aff. 446. 27. E. 3.
86. 1. Aff. 16. 3. Aff. 4.
6. Aff. 4. 5. Aff. 7. 18. E. 3. 38.
21. Aff. 8. 29. Aff. 5. 44. E. 3. 6. b.
14. H. 4. 35. 5. H. 5. 2.
10. H. 6. 13. 21. H. 6. 51.
27. H. 6. 2. 7. E. 4. 45.
18. E. 4. 1. 22. E. 4. 19.
13. H. 7. 17. 2. Mar. Br. at-
taint. 104. 10. Eliz. Dier 171.
[i] 19. H. 6. 48. 11. H. 6. 16.
4. E. 3. 23. b. 46. E. 3. 3. a.
9. H. 6. 62. 21. H. 6. 27.
14. H. 8. 24. 18. E. 4. 1.
20. H. 6. 2. 34. H. 6. 42.
14. H. 6. 21. 22. 4. H. 6. 13.
3. H. 6. 25. 12. E. 4. 12.
28. H. 8. Dier. 29.
21. E. 4. 19. 80. 27. H. 8. 19.
12. H. 8. 1. 11. H. 4. 65.
19. H. 8. 6.
(Hob. 134. 1. Leo. 301. Cro.
Car. 514. Cro. Ja. 366.)

cause of justification which
extendeth to some certaine
place; as if a constable of a
towne in another county
arrest the body of a man that
breaketh the peace, there he
may traverse the county (but
he must not rest there) but all
other places saving in the
towne whereof hee is con-
stable. And so it is of taking
of goods, if the defendant jus-
tific for damage feasant in
another county, he must tra-
verse as before. But where
the cause of the justification
is not restrained to a certaine
place, that is so locall as it
cannot be alledged in any
other town, as in the cases
before alledged, and the like,
then albeit the action bee
brought in a forraigne coun-
tie, yet he must alledge his
justification in the county
where the action is brought.

As if a man be beaten in the county of *Middlesex*, and hee
bringeth his action in the county of *Buck*, the defendant cannot pleade that the plaintife
assaulted him in the county of *Midd. &c.* and traverse the county; but he must pleade his
justification in the county of *Buck*, for that the cause of his justification is good in any place.
And so it is in case of bailement of goods, and other cases for transitory things; as for example.

In an action upon the case the plaintife declared for speaking of slanderous words, which
is transitory, and laid the words to be spoken in *London*, the defendant pleaded a concord
for speaking of words in all the counties of England, saving in *London*, and traversed the
speaking of the words in *London*: the plaintife in his replication denied the concord, where-
upon the defendant demurred, and judgment was given for the plaintife. For the court
said, that if the concord in that case should not be traversed, it would follow, that by a new
and subtil invention of pleading, an ancient principle in law (that for transitorie causes of
action the plaintife might alledge the same in what place or county he would) should be sub-
verted, which ought not to be suffered; and therefore the judges of both courts allowed a
traverse upon a traverse in that case: and the wisdom of the judges and sages of the law
have alwayes suppressed new and subtil inventions in derogation of the common law. And
therefore the judges say in one booke [c], We will not change the law which alwayes hath
been used. And another saith [f], It is better that it be turned to a default, than the law
should be changed, or any innovation made.

A man did grant a rent, with a new invented clause of distress, *viz.* that the grantee
should hold the distress against gages and pledges; and yet by the whole court he shall gage
deliverance, for otherwise by this new invention all replevies shall be taken away.

[*] See many other new inventions in derogation of the common law disallowed by the
judges, and by the court of parliament.

[b] Where the jury is bound to finde aswell locall things in many cases as transitory in
other counties, see at large in my Reports.

By this which hath bene said you shall know the law as it is now in use in these cases,
and the better understand our [i] books, when you shall reade them concerning as well locall
as transitory things, wherein you shall finde great variety of opinion in our bookes.

Si le defendant plead de rien culpable. This is a good issue, if the defendant
committed no battery at all; but regularly by the common law if the defendant hath cause of
justification or excuse, then can he not pleade not guilty, for then upon the evidence it shall
be found against him, for that he confesseth the battery, and upon that issue cannot justifie it,
but he must pleade the speciall matter, and confesse and justifie the battery.

The like law is in other cases, and therefore this is a learning necessary to be knowne, for
that the losse of most causes dependeth thereupon. As if in battery the defendant may justifie
the same to be done of the plaintife's owne assault, he must pleade it specially, and must not
pleade the generall issue, and so of the like. In trespass of breaking his close, upon not guilty
he

*Et * issint en † plu-
sors autres cas ceux
parols, scilicet, en le ma-
ner come le demaundant
ou le plaintife ad sup-
posé, ne font ascun
† matter de substance
del issue: car en brieve
de droit, lou le mise
est joyne sur le mere
droit, il est a tant a dire,
et a tiel effect, scilicet,
lequel ad plus mere
droit, le tenant ou le
demaundant al chose en
demand.*

And so in many other
cases these words, *viz.*
in manner as the de-
mandant or the plain-
tife hath supposed, do
not make any matter of
substance of the issue:
for in a writ of right,
where the mise is joyn-
ed upon the meere
right, that is as much
as to say, and to such ef-
fect, *viz.* whether the
tenant or demaund-
ant hath more meere
right to the thing in
demand.

* *issint* not in L. and M. nor Roh.

† *moltes* added in L. and M. and Roh.

‡ *matter—manner*, L. and M. and Roh.

he cannot give in evidence, that the beasts came thorow the plaintife's hedge, which he ought to keep, nor upon the generall issue justifie by reason of a rent-charge, common, or the like.

In detinue the defendant pleadeth *non detinet*, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but must pleade it; but he may give in evidence a gift from the plaintife, for that proveth he detaineth not the plaintife's goods.

[d] So in an action of waste, upon the plea *nul wast fait*, he may give in evidence any thing that proveth it no waste, as by tempest, by lightening, by enemies, and the like; but he cannot give in evidence justifiable waste, as to repaire the house, or the like. [e] If one doth waste, and before the action brought the lessee repaireth it, and after the lessor bringeth an action of waste, and the lessee pleade *quod non fecit wadium*, he cannot give in evidence the especiall matter.

If two men be bound in a bond jointly, and the one is sued alone, he may plead this matter in abatement of the writ; but he cannot plead *non est factum*, for it is his deed, though it be not his sole deed. [f] See in *Whelpdale's case*, where a man may safely plead *non est factum*, and where not, and the former books that treat of that matter well reconciled.

[g] Upon *plend administravit* pleaded by an executour, *et issint riens inter maines*, if it be proved that he hath goods in his hands which were the testatour's, he may give in evidence that he hath paid to that value of his owne mony, and need not plead it specially. (1)

In an assise, if the tenant plead *nul tort nul disseisin*, he cannot give in evidence a release after the disseisin; but a release before the disseisin he may, for then there is no disseisin upon the matter.

In a writ of right, if the tenant joyne the mise upon the meere right, he cannot give in evidence a collateral warranty; for he hath not any right by it, and therefore it ought to have been pleaded.

Of this learning you shall reade plentifully in our bookes, and in my Reports. This little taste shall here suffice to make the reader capable of the rest. Regularly whensoever a man doth any thing by force of a warrant or authority, he must plead it.

But all that hath been said must be under two cautions: first, that whensoever a man cannot have advantage of the speciall matter by way of pleading, there he shall take advantage of it in the evidence. For example, the rule of law is, that a man cannot justifie in the killing or death of a man; and therefore in that case, he shall be received to give the especiall matter in evidence, as that it was *se defendendo*, or in defence of his house in the night against thieves and robbers, or the like.

Secondly, that in any action upon the case, trespassse, battery, or of false imprisonment against any justice of peace, maior, or bailife of city or towne corporate, headborough, port-reve, constable, tithingman, collector of subsidy or fifteen, in any his majesty's courts in *Westminster*, or elsewhere, concerning any thing by any of them done by reason of any of their offices aforesaid, and all other in their aide or assistance, or by their commandement, &c. they may plead the generall issue, and give the speciall matter for their excuse or justification in evidence.

In an action of trespassse or other suit against any person for taking of any distresse or other act doing by force of the commission of sewers, the defendant in any such action shall and may make avowry, conuſance, or justification generally, that it was done by authority of the commission of sewers for lotte or taxe assessed by that commission, &c. and the plaintife shall reply he did it of his owne wrong without such cause. And both these acts were made for avoiding of prolixity and captiousnesse of pleading, tending to the great charge and danger of officers and ministers of justice, &c. Evidence, *evidentia*. This word in legall understanding doth not only containe matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under seale, as charters and deeds, and other writings without seale, as court rolles, accounts, and the like, which are called evidences *instrumenta*, but in a larger sense it containeth also *testimonia*, the testimony of witnesses, and other proofes to be produced and given to a jury, for the finding of any issue joined betweene the parties. And it is called evidence, because thereby the point in issue is to be made evident to the jury. *Probationes debent esse evidentes (id est) perspicuae et faciles intelligi*. But let us now returne to *Littleton*.

Ou a auter jour que le plaintife suppose. [b] As if the trespassse were done the fourth of May, and the plaintife alledgeth the same to be done the fifth of May, or the first of May, when no trespassse was done; yet if upon the evidence it falleth out that the trespassse was done before the action brought, it sufficeth: and this is warranted by *Littleton*, who speaketh indefinitely, that the jury may find the defendant guilty at another day than the plaintife supposeth.

Et a tiel effect. Here is to be observed, that the law of England respecteth the effect

25. H. 8. Br.
(Doc. Pla. 197.)

22. H. 6. 33.
(4. Rep. 33. 2. Roll. Rep. 491.
Foll. 303. 1. Lco. 228.)

[d] 12. H. 8. 1. 19. E. 3.
Walt. 30. 20. E. 3. Walt. 32.
[e] 10. Eliz. Dier 276.
2. Mar. Dier 212.

(1. Sid. 450. Doc. Pla. 198.)

[f] Lib. 5. fo. 119. Whelpdale's case. 7. E. 4. 5. 7. E. 6.
Br. non est fact. 14. 1. H. 7. 15.
14. H. 8. 28. Pl. Com. Dive and
Man case. 36. H. 8. Dier 59.
2. Mar. Dier 112. 1. Eliz. Dier 167.

[g] Hill. 10. H. 8. Rot. 323.
in com. banc. et Mich. 6. E. 6. in
com. banco. Bendloes. 7. H. 5. 9.
6. H. 7. 10. 34. E. 3. Droit 29.
9. E. 3. 32. 8. E. 3. 24. 33. E. 3.
Verd. 18. H. 6. 24. 39. H. 6. 38.
18. E. 3. 19. Pl. Com. 81. 173.
21. H. 7. 76. 16. Kielw.

21. E. 4. 11. 22. E. 4. 45.
13. H. 7. 13. Stanf. Pl. Cor. 15.
22. Aff. 55. 37. H. 6. 21.
(Doc. Pla. 198. Ant. 227. a.
Hob. 174. Foll. 303. b.)

7. Ja. ca. 5.

23. H. 8. ca. 5.

[h] 19. H. 6. 47. 5. E. 4. 5.
21. E. 4. 66.
(Cro. Jac. 366. 1. Cro. 501. 514.
515. 228. 229. 2. Cro. 202.
Sid. 308.)

(1) Yet if the matter be pleaded specially, that is not cause of demurrer, though it amounts to the general issue, because it has no colour of matter in law, as was adjudged by justice *Walmesley*. Hob. 127. Lord Nott. MSS.

effect and substance of the matter, and not every nicety of forme or circumstance: *Qui hæret in literis, hæret in cortice, et apices juris non sunt jura.*

Sect. 486.

ITEM, si home soit disseise, **ALSO**, if a man be disseised, and
 et le disseisor devie seise, the disseisor dyeth seised, &c.
 &c. et son firs et heire est eins and his sonne and heire is in by dis-
 per discent, et le disseisee en- cent, and the disseisee enter upon
 ter sur l'heire disseisor, lequel the heire of the disseisor, which
 entrie est un disseisin, &c. si l'heire entrie is a disseisin, &c. if the
 port assise, ou brieve * de en- heire bring an assise, or a writ of
 tre en nature de assise, il reco- entrie in nature of an assise, hee
 vera. shall recover.

AND the reason hereof is, for that in the writ of right mentioned in the next Section, the charge of the grand assise upon their oath is upon the meere right, and not upon the possession.

Sect. 487.

(Ant. 266. a.)

CAR si le heire
 le disseisor, &c.

Here is a diversity to be observed concerning that which hath been said, when the possession shall draw the right of the land to it, and when not. And therefore when the possession is first, and then a right commeth thereunto, the entry of him that hath right to the possession shall gaine also the right which, as before it appeareth in those cases there put, followeth the possession, and the right of possession draweth the right unto it; but when the right is first, and then the possession commeth to the right, albeit the possession be defeated, (as here in *Littleton's* case it is by the heire of the disseisor) yet the right of the disseisee remaineth.

6. E. 3. 7.

Vid. Sect. 447.

4. Aff. 1. 10. Aff. 16.

Brieve d'entrie en le per. A. dyeth seised, and the land descendeth to B. his sonne; before he entreth, an estranger abateth and dyeth seised, B. entreth, against whom the heire of the abator recovereth in an assise, B. may have a writ of *mort d'an-*

MES si l'heire
 port brieve de

droit envers le disseisee, il serra barre, pur ceo que quant le graund assise est jure, leur serement est sur le mere droit, et nemy sur le possession. Car si l'heire le disseisor † fust un assise de novel disseisin, ou brieve d'entrie en nature d'assise, et recoverast vers le disseisee, et fust execution, uncore poit le disseisee aver brieve d'entrie en le per envers luy de le disseisin fait a luy per son pere, ou il poit aver envers l'heire brieve de droit.

BUT if the heyre bring a writ of right against the disseisee, he shall bee barred, for that when the graund assise is sworne, their oath is upon the meere right, and not upon the possession. For if the heyre of the disseisor sue an assise of *novel disseisin*, or a writ of *entrie* in nature of an assise, and recover against the disseisee, and sueth execution, yet may the disseisee have a writ of *entrie* in the *per* against him, for the disseisin made to him by his father, or he may have against the heire a writ of right.

cesser

* *de entre en nature de assise il recovera.* Mes si l'heire port (the beginning of next Section) not in L. and M. nor Roh. but in both MSS.

† *fust*—*porta*, L. and M. and Roh.

*cefter, and recover the land againſt him. And if the diſſeiſin had beene done to A. &c. then after the recovery in the aſſiſe, B. ſhould have had a writ of *entrie* in the *per*, becauſe the heyre that is in by diſcent is in the *per*.*

Sect. 488.

*MES ſi le heyre doit reco-
ver envers le diſſeiſee en le
caſe avantdit per brieſe de droit,
donque tout ſon droit ſerroit clere-
ment ale, pur ceo que judgement
final ſerroit done envers luy, que
ſerroit encounter reaſon lou le
diſſeiſee ad le plus meere droit,
&c.*

BUT if the heire ought to reco-
ver againſt the diſſeiſee in the
caſe aforeſaid by a writ of right,
then all his right ſhould be cleere-
ly taken away, for that judge-
ment finall ſhall bee given againſt
him, which ſhould bee againſt
reaſon where the diſſeiſee hath
the more meere right.

Judgement final. The forme whereof you ſhall ſee in the laſt Section of this chapter.

Que ſerra encounter reaſon. *Argumentum ab inconvenienti.*

Vid. Sect. 87. &c.
(Poit. 295. b.)

Sect. 489.

*ET ſaches, mon ſits, que en brieſe
de droit, apres ceo que les
quater chivalers ont eſlie le grand
aſſiſe, donques il n'ad plus greinder
delay que en un brief de forme-
don, apres ceo que les parties
ſont a iſſue, &c. Et ſi le miſe ſoit
joyne ſur le bataille, donques il ad
meindre delay.*

AND know (my ſonne) that in
a writ of right, after the foure
knights have choſen the grand aſ-
ſiſe, then he hath no greater de-
lay than in a writ of *formedon*, af-
ter the parties be at iſſue, &c.
And if the miſe bee joyned upon
bataille, then hee hath leſſer de-
lay.

BATTLE. See for this word in the laſt Section of this chapter.

(Poit. 294. b.)

Issue, &c. Or demurrer, which is an iſſue in law.

(5. Rep. 104.)

Sect. 490.

*ITEM, releaſe de tout le droit,
&c. en aſcun caſe eſt bone, fait
a celui que eſt ſuppoſe tenant en ley,
coment que il n'ad riens en les
tenements. Sicome en præcipe
quod reddat, ſi le tenant alie-
na la terre pendant le brieſe, et
puis le demaundant releſſa a*

ALSO, a releaſe of all the right, (2. Infl. 244.)
&c. in ſome caſe is good,
made to him which is ſuppoſed
tenant in law, albeit he hath no-
thing in the tenements. As in a (Ant. 266. 267.)
præcipe quod reddat, if the tenant
alien the land hanging the writ,
and after the demandant releaſeth
luy

luy tout son droit, &c. cel release est bone, pur ceo que il est suppose d'estre tenant per le fuit del demandant, et uncore il n'ad riens en la terre al temps de release fait.

to him all his right, &c. this release is good, for that he is supposed to be tenant by the fuit of the demandant, and yet hee hath nothing in the land at the time of the release made.

Sect. 491.

*EN mesme le manner est si en præcipe quòd reddat le tenant vouche, et le vouchee entre en le garrantie, si apres le demandant releffa al vouchee tout son droit *, ceo est assets bone, pur ceo que le vouchee apres ceo que il avoit enter en le garrantie, est tenant en ley al demandant,† &c.*

IN the same manner it is in a præcipe quòd reddat the tenant vouch, and the vouchee enters into warranty, if afterward the demandant release to the vouchee all his right, this is good enough, for that the vouchee after he hath entred into warranty, is tenant in law to the demandant, &c.

[47] 10. E. 4. 13. 12. Af. 41.
22. Af. 13. 23. E. 3. 21. 25. E. 3.
40. 38. E. 3. 10. 11. 7. E. 3. 6.
19. E. 3. tit. Resceit. 34. E. 3.
tit. Resceit. 9. E. 4. 16. 39. H. 6.
40. 17. Af. 24. 8. H. 7. 5.
20. Af. 2. 14. E. 3. Proce-
do 4. 9. E. 3. 17. 32. E. 3.
Quare Imp. 2. Dyer. 17. Eliz.
341. Sect. 447.
* Vi. devant Sect. 447.
(Ante 265. b. 273. a.)

HERE it doth appeare, that there is a tenant in deed and a tenant in law, and *Littleton* in this and the next Section putteth two examples of tenants in law, viz. (b) the tenant to a præcipe after alienation, and of the vouchee, whereof somewhat hath been said before.

And it is observable, that *Littleton* saith, that in both cases hee is tenant in law to the demandant, and yet he hath nothing in the land. And therefore if after the vouchee hath entered into warranty, and become tenant in law, an ancestor collaterall of the demandant releaseth to the vouchee with warranty, he shall not plead this against the demandant, for that the release by the estranger is void, which, besides the authorities before vouched, appeareth by *Littleton* himselfe; * for he saith, that he is tenant in law to the demandant, whereby he excludeth that he is tenant in respect of any estranger.

Sect. 492.

Glan. li. 1. ca. 1. Braët. li. 3.
fo. 101. Brit. fo. 71. Flet. li. 1.
ca. 15. & 16.

Mir. ca. 2. §. 1. Braët. ub. sup.
Flet. li. 1. ca. 1.

NOTA, there be two kind of actions, viz. one that concern the pleas of the crowne, *placita coronæ*, or *placita criminalia*; another that concerne common pleas, *placita communia*, seu *civilia*. Of that which concerneth pleas of the crowne, *Littleton* speaketh hereafter in this chapter. Of actions concerning common pleas, *Littleton* speaketh in this place. And these are threefold (that is to say), reall, personall, and mixt. *Placitorum aliud personale, aliud reale, aliud mixtum*. Or, *Actionum quedam sunt in*

ITEM, quant al releases d'actions, realls et personals, il est issint, que ascuns actions sont mixt en le realty et en le personaltie: si come un action de waste sue envers tenant a terme de vie; cest action est ‡ en le realtie, pur ceo que le lieu waste serra recover; et auxy en le realty and in the personaltie: as an action of waste sued against tenant for life; this action is in the realty, because the place wasted shall bee recovered; and also in the personaltie, because

* &c. added L. and M. and Roh.

† &c. not in L. and M. nor Roh.

‡ en not in L. and M. nor Roh.

*personalitie, pur ceo que treble damages serront recovers pur le * tortious wast fait per le tenant; et pur ceo en cest action un releas d'actions reals est bon plee en barre, et issint est un releas d'actions personals.*

treble damages shall bee recovered for the wrongfull waste done by the tenant; and therefore in this action a release of actions reals is a good plea in barre, and so is a release of actions personals.

rem, quædam in personam, et quædam mixte. And generally, *actio* is defined, [i] *Actio nihil aliud est quam jus prosequendi in judicio quod sibi debetur.* Or, *Action n'est autre chose que loyall demande de son droit.* (Flo. 484)

[k] And by the release of all actions, causes of action be released; but within a submission of all actions to arbitrement, causes of action are not contained. [l] Lib. 8. 153. Altham's case. 35. H. 8. Dier 57. 5. Mar. 217. Vide 36. H. 6. 8. Vid. 42. E. 3. 22. 23. (5. Rep. 8. a. 103. 77. b.)

Tenant pur vie. And so it is if it be brought against tenant for yeares, because it agreeth with the reason of *Littleton* here rendred, viz. that the place wasted shall be recovered, and therefore foundeth in the realty.

Auxy en le personaltie, pur ceo que treble damages serra recovers, (Cro. Car. 171.) which doe found in the personaltie. Wherefore *Littleton* concludeth, that in an action mixt a release of all actions reals is a good barre, and so is a release of all actions personals.

And here is to be observed a diversity betweene the act of the party, and an act in law; for a man by his owne act cannot alter the nature of his action; and therefore if the lessee for life or lessee for yeares doe waste, now is an action of waste given to the lessor, wherein he shall recover two things, viz. the place wasted, and treble damages: in this case if the lessor release all actions reals, he shall not have an action of waste in the personalty only; and if he release all actions personals, he shall not have an action of waste in the realty only.

[l] And so it is if the lessee doth waste, and after surrendreth to the lessor his estate, and the lessor accept thereof, the lessor shall not have an action of waste. [l] 19. H. 6. 66. 14. H. 6. 14. 11. R. 2. Wals. 99. 14. H. 8. 14. 23. H. 8. Br. Wals. (5. Rep. 75.) (Noy 118.)

But by act in law the nature of the action may be changed; as if a man make a lease *pur terme d'auter vie*, and the lessee doth waste, and then *cessy que vie* dyeth, an action of waste shall lye for damages only, because the other is determined by act in law.

And againe, hereupon is another diversity to be observed, that in case when an action is well begun, and part of the action determineth by act in law, and yet the like action for the residue is given, there the writ shall not abate, but proceed. But where by the determination of part the like action remaineth not for the residue, there the action well commenced shall abate. As if an action of waste be brought against tenant *pur terme d'auter vie*, and hanging the writ *cessy que vie* dyeth, the writ shall not abate, but the plaintife shall recover damages only, because if *cessy que vie* had died before any action brought, the lessor might have an action of waste for the damages. So if an *ejectione firme* be brought, and the terme incurreth hanging the action, yet the action shall proceed for damages only, because an *ejectione* doth lye after the terme for damages only. But if tenant *pur auter vie* bring an assise, and *cessy que vie* dyeth hanging the writ, albeit the writ were well commenced, yet the writ shall abate, because no assise can be maintainable for damages only.

So if an action of waste be brought by baron and fem in remainder, in especiall tayle, and hanging the writ the wife dieth without issue, the writ shall abate, because every kind of action of waste must be *ad exheredationem*. 2. H. 4. 22. 6. E. 2. briefe 807. (Ant. 53. b. Flo. 18. b.)

If a writ of annuity be brought, and the annuity determineth hanging the writ, the writ faileth for ever, because no like action can be maintained for the arrerages only, but for the annuity and arrerages. 34. H. 6. 10. 9. E. 4. 39. 14. H. 7. 31. 18. E. 3. Scire facias 10. (Wm. Jones 215. Cro. Car. 171. 5. Rep. 48. b.)

But where damages only are to be recovered, there albeit by act in law the like action lyeth not afterwards, yet the action well commenced shall proceed; [m] as if a conspiracy be brought against two, and one of them dyeth hanging the writ, it shall proceed. [m] 22. R. 2. briefe 888. 18. E. 4. 1. (Doc. Pla. 47.)

And in an assise of *novel disseisin*, a writ of annuity, *quare impedit*, and other mixt actions (1), a release of actions reals is a good plea, and so it is of a release of actions personals. (Ray. 18. 1. and 176. S. C.)

But if three joyntenants be disseised, and they arraigne an assise, and one of them release to the disseisor all actions personals, this shall barre him, but it shall not barre the other plaintife; for having regard to them the realty shall bee preferred, *et omne majus trahit ad se minus dignum*. [n] And in a writ of ward brought by two, the release of the one shall not grieve the other, but shall enure to his benefit, for he shall recover the whole ward, and hold his companion out. (1. Saun. 228. S. C. 1. Vent. 12. & 18. 2. H. 4. 13. 9. H. 6. 57. Mo. 133. contra.)

But here a diversity is to be observed betweene reall actions, wherein damages are to bee reco- 30. H. 4. Barre 59. (2. Roll. Abr. 411. 2. Co. 68. a. Ant. 197. b.)

* *tortious wast*—*tort et wast*, L. and M. and Reh.

(1) 5. Car. B. R. Sir John Bodvill's case. Resolved contra; scilicet, that it was a mere personal action, and not mixt; et ideo, annuity in Wales by bill lies well; where, if it had been mixt, the action ought to have been brought by original, per 34. H. 8. ca. 6. upon argument by the court on error brought. Cro. 170. L. Nott. MSS.

[e] Merton cap. 1. in dower.
Gloc. cap. 1.

recovered at the common law, as in an assise, &c. and reall actions where damages are not to be recovered by the common law, but are given by the [e] statute, for there a release of all actions personals is no barre; as in the writ of dower, *entrie sur disseisin in le per, &c. mord'anc', aiel, &c.*

* Sect. 493.

(5. Rep. 97.)

ET en quare impedit, un releas d'actions personals est bone plea, et issint est un release d'actions reals, per Martin, quod fuit concessum. Hill. 9. H. 6. 57.

AND in a *quare impedit*, a release of actions personals is a good plea, and so is a release of actions reals, *per Martin, quod fuit concessum. Hill. 9. H. 6. fol. 57.*

9. H. 6. 57.
22. H. 6. 27. b.

THIS is an addition to *Littleton*, which although it be law, and the booke truly cited, yet I passe it over. But yet note by the way, that a release of actions personals is also a good barre in a *quare impedit*, because it is an action mixt.

Sect. 494.

(Post. 303. b.)
(1. Roll. Rep. 36. 57.)
(Ant. 180. b.)
(Hob. 103.)

[e] 11. Aff. 9. 18. E. 3. 2.
23. 24. 31. E. 3. quare
imp. 161. 7. E. 3. 5. 9. E. 3. 6.
39. E. 3. 30. 22. E. 3. 2.
13. H. 4. 7. 3. E. 2. quare
imp. 44. 38. E. 3. 30. 31.
5. F. 3. 26. 21. E. 3. 16. 17.
5. H. 7. 54. 8. H. 5. 14.
22. H. 6. 28. 29. 1. H. 7. 34.
27. E. 3. 81. 32. H. 6. 15. b.
17. Aff. 25. 2. H. 7. 14.
13. H. 8. 13. 14. 44. E. 3. 12.
46. E. 3. 13. 16. E. 4. 11.
24. E. 3. 31. 4. E. 4. 18.
7. H. 4. 34. 2. R. 2. encum-
bent. 4. 33. E. 3. quare imp.
194.
(8. Rep. 151. b.)
(Sect. 278)

13. H. 4. 2. 2.
(7. Rep. 26. 2.)

(Sect. 471.)

(10. Rep. 51. b.)

[7] 10. H. 6. 22. 2.
(2. Rep. 152.)

LE disseisor bien poet pleder, &c.

Nota, every man shall plead such pleas as are proper for him, and apt for his defence to be pleaded. [7] As a disseisor that hath nothing in the land may pleade a release of actions personals, because damages are to be recovered against him, and therefore for his defence hee may plead it; but a release of actions reals he cannot plead (1), because he hath no estate in the land, and none shall plead a release of actions reals in an assise, but the tenant of the land. *Et sic de ceteris*. But the tenant in an assise shall plead a release of actions personals to the disseisor, for that plea proveth that the plaintife hath no cause of action against him.

If the disseisee release to the disseisor all actions reals, and the disseisor maketh a feoffment in fee, and an assise is brought against them, the feoffee shall not plead the release to the disseisor, for that he is not privie to the release, for a release of actions shall only extend to privies.

If a disseisor make a lease for life, the remainder in fee, and the disseisee release all actions to the tenant for life, after the death of tenant for life, he in the remainder shall not plead the said release.

If the disseisee release all actions to the disseisor, and die, this doth barre him but for his life, for after his decease his heire shall have an action [7], as some have said. And hereby may appeare a manifest diversity between a release of a right, and a release of actions.

ET mesme le maner est en assise de novel disseisin, pur ceo que il est mixt en le realtie et en le personalty. Mes si un tiel assise soit arraigne enter le disseisor et le tenant, le disseisor bien poet pleder un releas d'actions personals pur barrer l'assise, mes nemy un releas d'actions reals, car nul pledera releas d'actions reals en assise forsque le tenant.

IN the same manner it is in an assise of *novel disseisin*, for that it is mixt in the realtie and in the personalty. But if such an assise be arraigned against the disseisor and the tenant, the disseisor may well plead a release of actions personals to barre the assise, but nota release of actions reals, for none shall plead a release of actions reals in an assise but the tenant.

Sect.

* This Section is not in L. and M. nor Roh.

(1) *Hob. 162. accord. whether the action be brought against the disseisor only, or against him and the tenant; but if the same person be disseisor and tenant, then he may plead a release of actions real. L. Nott. MSS.*

Sect. 495.

ITEM, en tiels actions reals que covient d'estre sue envers le tenant del franktenement, si le tenant ad un releas d'actions reals del demandant fait a luy devant le brieve purchase, et il plede ceo, il est bon plee pur le demandant a dire, que celui que pleda le plee n'avoit rien en le franktenement al temps del releas fait, car adonque il n'avoit cause d'aver aucun action real envers luy.

ALSO, in such actions reals ^(8. Rep. 140.) which ought to bee sued against the tenant of the freehold, if the tenant hath a release of actions reals from the demandant made unto him before the writ purchased, and he plead this, it is a good plea for the demandant to say, that hee which plead the plea had nothing in the freehold at the time of the release made, for then he had no cause to have an action reall against him.

THIS is evident enough by that which hath beene said, that a release of all actions reals must bee made to him that is tenant of the land, because a reall action must be brought against such a tenant. ^(8. Rep. 151. b.)

Sect. 496.

ITEM, en tiel cas ou home poet enter en terres ou tenements, et auxy poet aver un action real de ceo, que est done per la ley envers le tenant*; si en cest case le demandant releffa al tenant tous maners de actions reals, uncore ceo ne tolle le demandant de son entrie, mes le demandant bien poet enter nient contristiant tiel releas, pur ceo que nul chose est releffe forsque l'action, &c.

ALSO, in such case where a man may enter into lands or tenements, and also may have an action reall for this, which is given by the law against the tenant; if in this case the demandant releaseth to the tenant all maner of actions reals, yet this shall not take the demandant from his entrie, but the demandant may well enter notwithstanding such release, for that nothing is released but the action, &c.

POET enter. Here ^(8. Rep. 152.)

it appeareth, that where a man may enter, a release of all actions doth not barre him of his right, because he hath another remedy, viz. to enter. And this is agreeable with the authoritie of our [f] bookes. But where [f] 18. E. 3. 34. 19. E. 3. title 35. his entry is not lawful, there a release of all actions is by consequence a barre of his right, because he hath released the mean whereby he might recover his right. As if the disseisee release all actions to the heire of the disseisor, which is in by descent, he hath no remedy to recover the land; but yet the disseisee hath a right, for that hee hath released his action, and not his right, as shall be said hereafter in the chapter of *Remitter* in his proper place. If the heire of the disseisor make a feoffment in fee to two, and the disseisee releaseth to one of the feoffees all actions, and

he dieth, the survivour shall not plead this release for the causes abovesaid. And hereby also again appeareth another diversity between a release of a right, and a release of actions.

It

* &c. added L. and M. and Rob.

Lib. 3.

Cap. 8. Of Releases. Sect. 497, 498, 499.

(8. Rep. 150.)
19. Aff. 3. 30. E. 3. 19. 6.
19. H. 6. 4. 6. 21. H. 7. 23. b.
7. H. 6. 6.

It is to be observed, when a man hath severall remedies for one and the selfe same thing, be it reall, personall, or mixt, albeit he releaseth one of his remedies, he may use the other.

Sect. 497.

(9. Rep. 53.)

EN mesme le maner est de choses *PERSONALS*; sicome home a *PERSONALL*; as if a man by wrong
tort prent mes biens, si jeo re- take away my goods, if I release
lessa a luy tous actions personals, to him all actions personals, yet I
uncore jeo puisse per le ley pren- may by the law take my goods
der mes biens hors de son possession. out of his possession.

This of it selfe is evident.

Sect. 498.

(Coke's Ent. 170. b.)
(10. Rep. 119. b. 2. Cro. 681.)
Glanvil. lib. 10. cap. 13.
(F. N. B. 138. a.)
(1. Roll. Abr. 606.)
(2. Roll. Abr. 505.)
(Doc. Pla. 124. 125.)

41. E. 3. 2.
(1. Roll. Ab. 5. Noy

[1] 41. E. 3. 2. 8. H. 6. 18.
28. 29. 21. E. 3. 28. 3. H. 6. 19.
30. H. 6. 4. 9. H. 6. 18.

(9. Rep. 18. 78. b. F. N. B. 138.)
(10. Rep. 51. b.)

[u] 10. H. 6. 20. 21. H. 6. 1.
14. H. 6. 4. 14. H. 4. 23. 24. 27.
(Post. 295.)

[x] 20. H. 6. 45. 19 E. 3.
Severance 14. 31. E. 3. ib. 32.
42. E. 3. 13. 40. E. 3. 25.
(10. Rep. 135.)
(Doc. Pla. 125.)

BRIEF de detinue.

Breve de detentione dicitur à detinendo, because *detinet* is the principall word in the writ. And it lyeth where any man comes to goods eyther by delivery, or by finding. In this writ the plaintife shall recover the thing detained, and therefore it must bee so certaine as it may be knowne, and for that cause it lyeth not for money out of a bagge, or chest; and so of corn out of a sacke, and the like, these cannot be knowne from other. [1] A man shall have an action of detinue of charters which concern the inheritance of his land if hee

know the certainty of them, and what land they concerne, or if they be in bagge sealed, or chest locked, though he knoweth not the certainty of them: and it is good policie (if possibly he can) in that case to declare of one charter in especiall, [u] and then the defendant shall not wage his law. [x] An action of detinue for charters doth sound in the realty, for therein summons and severance lyeth; and in detinue of goods a *capias* doth lye; but for charters in speciall a *capias* lyeth not, and yet a release of actions personals in a writ of detinue of charters is a good barre.

*AUX*Y, si jeo ay * *ascun cause d'auter*

briefe de detinue de mes biens vers un auter, coment que jeo releffa a luy tous actions personals, uncore jeo puisse † per le ley prendre mes biens hors de son possession, pur ceo que nul droit de les biens est releffe a luy, mes solement l'action, &c.

ALSO, if I have any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personals, yet I may by the law take my goods out of his possession, because no right of the goods is released to him, but only the action, &c.

Sect. 499.

PER cause del statute.

That is to say, the statute of 4. H. 4. ca. 7. and 11. H. 6. ca. 4.

Car s'il vost ple-
der le release general-
ment. Here it appeareth, that when the statute had given the action reall a-

ITEM, si home soit

disseise, et le dissei-
for fait seoffment a
divers persons a son
use †, et le disseisor
continualment prist les
profits, &c. et le dis-
seisee releffa a luy

ALSO, if a man be disseised, and the disseisor maketh a seoffment to divers persons to his use, and the disseisor continually taketh the profits, &c. and the disseisee release

touts

* *ascun* not in L. and M. nor Roh.

† *per le ley* not in L. and M. nor Roh.

‡ *&c.* added L. and M. and Roh.

touts actions reals, et puis il fust vers luy breve d'entre en nature d'assise per cause de le statute, pur ceo que il prent les profits, &c. Quære, comment le disseisor sera aide per le dit releas; car s'il voile pleader le releas generalment, donques le demandant poit dire, que il n'avoit riens en le franktenement al temps del releas fait; et s'il pleda releas specialment, donques il covient * conuistre un disseisin, et donques puit le demandant enter en le terre, &c. per son conusans de le disseisin, &c. mes per adventure per especial pleader il luy poit barrer de l'action † que il fust, &c. coment le demandant poit enter.

to him all actions reals, and after hee sueth against him a writ of entrie in nature of an assise by reason of the statute, because hee taketh the profits, &c. Quære, how the disseisor shall bee ayded by the said release; for if hee will plead the release generally, then the demandant may say, that hee had nothing in the freehold at the time of the release made; and if hee plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c. by his acknowledgment of the disseisin, &c. but per adventure by special pleading he may barre him of the action which he sueth, &c. though the demandant may enter.

gainst the pernor of the profits, it enableth him to take and pleade a release of all actions reals, and yet he hath neither *ius in re*, nor *ius ad rem*, which point is worthy of observation for manifestation of the equity of the law.

Donques il covient conuistre un disseisin, &c. In a writ of dower the tenant pleaded that before the writ purchased *A.* was seised of the land, &c. untill by the tenant himselfe hee was disseised, and that hanging the writ *A.* recovered against him. &c. judgment of the writ, and adjudged a good plea, in which plea the tenant confessed a disseisin in himselfe.

Donques poit le demandant enter. So might hee have done in this case that *Littleton* putteth, albeit the tenant confessed no disseisin. And therefore it is no prejudice to the tenant to confesse a disseisin in himselfe, &c. and then, as *Littleton* here holdeth, the action shall be barred.

But the reader is to observe, that now by the statute of 27. H. 8. cap. 10. which execute the possession to the use, all the statutes against *cestuy que use*, or pernor of the profits, have lost their force.

(5. Rep. 77.)
3. H. 7. 2.
(8. Rep. 150.)
15. E. 4. 4. b.
(Doc. Pla. 343.)

28. H. 8. Dier 32. 27. H. 8. c. 10.

Sect. 500.

ITEM, si home fust appeale de felony del mort son ancester envers un auter, coment que l'appellant releffa al defendant tous maners d'actions reals et personals, ceo ne aidera my le defendant, pur ceo que cest appeal n'est pas

ALSO, if a man sue an appeale of felony of the death of his ancester against another, though the appellant release to the defendant all manner of actions reall and personall, this shall not aide the defendant, for that this appeale is not

OUR author having spoken of common pleas, now treateth of certaine pleas criminall, or pleas of the crowne, whereof it is said, [a] Item, *criminalium alia majora, alia minora, alia maxima, secundum criminum quantitatem; sunt enim crimina majora et dicuntur capitalia eo quod ultimum inducunt supplicium, &c. Minora vero, quæ suffigationem inducunt, vel pœnam pillorem, vel tumboralem, vel carceris*

(c) Bracl. lib. 3. fo. 101. b.

* de added in L. and M. and Roh.

† que il fust, &c. not in L. and M. nor Roh.

[3] Flet. lib. 1. cap. 15.

[c] Mir. ca. 1. §. 4. & ca. 4.
des paines en divers maners.

carceris inclusionem, &c.

[b] *Criminalium quædam sententialiter mortem inducunt, quædam vero minimè.* [c] *De peche est brieve division, car est mortal ou venial selonque ceo que appiert es paines.* And that crime is called mortall or corporall: mortall, because it deserveth death; and such crimes are called veniall, as may be redeemed or satisfied by some other punishment than by death.

Appeale de felo-

nie. [x] *Appellum* signifieth *accusatio*, an accusation, and therefore to appeale a man is as much as to accuse him; and in [y] ancient bookes he that doth appeale is called *accusator*, and is peculiarly in legall signification applied to appeales of three sorts. First, of wrong to his ancestor, whose heire male he is, and that is onely of death, whereof our author here speaketh. The second is

of wrong to the husband, and is by the wife only of the death of her husband to be prosecuted. The third is of wrongs done to the appellants themselves, as robbery, rape, and mayhem. The word *appellum* is derived of *appeller*, to call, because *appellans vocat reum in judicium*, he calleth the defendant to judgement, and the plaintife is called the appellant.

Appeale, Appellatio, is a removing of a cause in any ecclesiastical court to a superior; but of this there needeth no speech in this place.

De mort. *Appeale of death* is of two sorts, of murder and of homicide. Murder is when one is slaine with a man's will, and with malice prepenfed or forethought. Homicide, as it is legally taken, is when one is slaine with a man's will, but not with malice prepenfed. Chance-medly, or *per infortunium*, is when one is slaine casually, and by misadventure, without the will of him that doth the act, whereupon death insueth; but of this no appeale doth lye. Murder commeth of the Saxon word *mordreu*.

Were is an old Saxon word sometime written *wera*, and signifieth the price of the life of a man, *estimatio capitis*, that is, so much as one paid for the killing of a man; by which it appeareth, that such government was in those dayes, as slaughters of men were most rarely committed, as master *Lambard* collecteth. And you shall not reade of any insurrection or rebellion before the Conquest, when the view of frankpledge and other ancient lawes of this realme were in their right use.

Mes s'il release al defendant tous maners d'actions, &c. And the reason is, for that then all actions, as well criminall as reall, personall and mixt, be released. But a release of all actions reall and personall cannot barre an appeale of death, because that release extendeth to common or civill actions, and not to actions criminall: but releases of all actions criminall or mortall, or concerning pleas of the crowne, are good barres in an appeale of death, and so the (*&c.*) in the end of the Section is well explained.

[x] Mir. ca. 2. §. 7. Bract. lib. 3. fo. 137. Brit. ca. 22. 23. Flet. lib. 1. ca. 31, 32, 33. (4. Rep. 39.) (3. Infl. 131.) [y] Glanv. lib. 7. cap. 9. et lib. 14. ca. 1. et 3.

24. H. 8. ca. 12. 1. El. ca. 1.

(4. Rep. 40. 43. 3. Infl. 47.)

Lamb. Expos. verb. Estimatio. Flet. lib. 1. ca. 42. Hoved. o. 344.

(4. Rep. 45. 47.) (Doc. Pla. 97.) 21. H. 6. 16.

Sect. 501.

ITEM, en appeale de robbrie, si le defendant voile pleader un release de l'appellant de tous actions personals, ceo semble nul plee; car action de l'appeale, lou l'appellee aura judgement de mort, &c. est plus hault que action personal est, et n'est pas proprement dit action personal: et pur ceo si le defendant voiloit plead un release del appellant de barrer luy d'appeale, en cest case il covient d'aver un release de tous manners * d'appeals, ou tous manners d'actions, come il semble, &c.

ALSO, in an appeale of robbrie, if the defendant will plead a release of the appellant of all actions personals, this seemeth no plea; for an action of appeal where the appellee shall have judgment of death, &c. is higher than an action personal is, and is not properly called an action personal: and there if the defendant will plead a release of the appellant to barre him of the appeale, in this case hee must have a release of all manner of appeales, or all manner of actions, as it seemeth, &c.

Robberie, *Robberia*, properly is when there is a felonious taking away of a man's goods from his person: and it is called robbery, because the goods are taken as it were *de la robe*, from the robe, that is, from the person; but sometimes it is taken in a larger sense. 22. Aff. 33. W. 1. cap. 20.

Judgement de mort, &c. By this (&c.) is implied appeales of rape, of arson or burning, of felony or larceny, for therein also is judgment of death, and are within our author's reason. (3. Inst. 68. Dy. 39. a. Cro. Car. 531.)

Come il semble, &c. It is to be understood, that, first, a release of all actions criminall, mortall, or concerning pleas of the crowne; secondly, a release of all actions generally; thirdly, a release of all appeales; and lastly, a release of all demands, are good barres in all these kinds of appeales. V. Sect. 508. (Post. 291. b.)

Sect. 502.

MES en appeale de maibem un release de tous manners d'actions personals est bone plea en barre, pur ceo que en tiel action il ne recovra forsque damages, &c.

BUT in appeale of mayhem a release of all manner of actions personals is a good plea in barre, for that in such an action hee shall recover nothing but damages.

MAYHEM, *maibemium*, *membri mutilatio*, or *obtruncatio*, commeth of the French word *maibaigne*, and signifieth a corporall hurt, whereby hee loseth a member, by reason whereof hee is lesse able to fight; as by putting out his eye, beating out his foreteeth, breaking his skull, striking off his arme, hand, or finger, cutting off his legge

Mir. ca. 1. §. 9. Glan. li. 14. ca. 7. Bract. lib. 3. Tract. 2. ca. 24. Brit. fo. 48. ca. 25. Flet. lib. 1. ca. 38. Stanf. Pl. Cor. fo. 38. b.

(3. Inst. 118. 4. Rep. 43. 45. Ant. 126.)

28. E. 3. 94. 8. H. 4. 21.

or foot, or whereby he loseth the use of any of his said members.

Damages, &c. Vide Sect. 194.

Release de tous manners actions personals est bone plea, &c. And the reason is, for that every action wherein damages only are recovered by the plaintife, is in law taken for an action personal. 21. H. 6. 16. (Ant. 127. a. 9 Rep. 52.)

Sect.

* d'actions added L. and M.

Sect. 503.

V. R. 11. fo. 39. 41. in Metcalfe's case upon what judgments and awards a writ of error doth lie.

(Cro. Car. 66.)

(3 Rep. 1. Cro. Jac. 5.)

Li. 5. fo. 111. Foxley's case.
Li. 7. fo. 11. 12. Gentleman's case.

(Cro. Car. 63. Noy 68.
1. Roll. 750. 11. Rep. 38.
F. N. B. 17. Ant. 117. b.
8. Rep. 141.)

15. Eliz. Dyer. 317.
(Ant. 123. b.)

Lib. 9. fol. 119. 8. Zanchar's case.
(5. Rep. 111.)
(Ant. 114.)

28. A. 49. 12. E. 3. Utlag. 3.
38. E. 3. 13. Mich. 4. & 5. El.
Dyer to. 222. Vid. Sect. 197.
(5. Rep. 25. F. N. B. 20. b. 22. b.)

2. H. 4. 6.

(1. H. 4. 6. 8. Rep. 150. 156.
8. H. 6. c. 12. 32. H. 8. 30.
18. Eliz. 14. Cro. Car. 272. 878.
5. Rep. 41. 42.)

BRIEFE de error.

This writ lyeth when a man is grieved by any error in the foundation, proceeding, judgment, or execution, and thereupon it is called *breve de errore corrigendo*. But without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, *si iudicium redditum sit*: and that judgment must regularly be given by judges of record, and in a court of record, and not by any other inferior judges in bote courts, for thereupon a writ of false judgment doth lye. In this case of outlawry upon proceſſe, the judgment is given (in the county court, which is no court of record) by the coroners (ſaving in London judgment is given by the recorder, and not by the maior, who is coroner by the cuſtome of the city): for after the defendant

is *quinto excludus*, and maketh default, the judgment is, *ideo utlagetur per iudicium coronatorum*; and in London, *per iudicium recordatoris*: ſo as by the outlawry, the plaintife recovers nothing, but the king taketh the whole benefit thereof; for the law did intend, that the defendant would rather appeare and answer the plaintife, &c. than to forfeit all his goods and chattels, debts and duties to the king, by his default and contumacie. But *Littleton* is to be intended, that the ſherife doe returne the *exigent* whereby the outlawry appeares of record, or that the outlawry be removed by *certiorari*, for before that time that the outlawry appeares of record, the defendant doth not forfeit his goods, nor the plaintife can be diſabled, nor any writ of error doth lye in that caſe. And this is the cauſe that the goods of outlaws cannot be claimed by preſcription, becauſe they are not forfeited untill the outlawry appeares of record. *Vide Sect. 197.* where it appeareth by *Littleton*, that the plaintife cannot be diſabled by outlawry, unleſſe it appeareth of record.

Car per le dit action il recovers rien en le perſonaltie. Hereupon is to be obſerved a diverſity, when by the writ of error the plaintife ſhall recover, or be reſtored to any perſonall thing, as debt, damage, or the like; for then by the reaſon that *Littleton*, here yeeldeth, the releaſe of all actions perſonals is a good plea, for that the plaintife is to recover, or to be reſtored to ſomething in the perſonality. And ſo likewiſe when land is to be recovered, or to be reſtored in a writ of error, a releaſe of all actions reals is a good barre. But where by a writ of error the plaintife ſhall not be reſtored to any perſonall or reall thing, then a releaſe of all actions reall or perſonall is no barre; and therefore *Littleton* here putteth his caſe with great caution. If a man (ſaith he) by proceſſe upon the originall be outlawed, there in deed he ſhall be reſtored to nothing in the perſonality againſt the plaintife. But where by the outlawry he forfeited all his goods and chattels to the king, he ſhall be reſtored to them; alſo thereby he ſhall be reſtored to the law, and to be of ability to ſue, &c. But if the plaintife, in a perſonall action, recover any debt, &c. or damages, and be outlawed after judgment, there in a writ of error brought by the defendant upon the principall judgment, a releaſe of all actions perſonals is a good plea. And ſo it is where a judgment is given in a reall action, a releaſe of all actions reals is a good barre in a writ of error brought thereupon.

ITEM, si home
ſoit utlage en action perſonal per proceſſes ſur le original, et port breve d'error, si celuy a. que ſuit il ſuit utlage, voile pleader envers luy un releas de tous maners d'actions perſonals, ceo ſemble nul plea; car per le dit action il ne recovers rien en perſonaltie forſque tantſolement de reverſer le utlagarie: mes un releaſe de briefe d'error eſt bone plea.

ALSO, if a man bee outlawed in an action perſonall by proceſſe upon the originall, and bringeth a writ of error, if he at whoſe ſuit he was outlawed, will pleade againſt him a releaſe of all manner of actions perſonals, this ſeemeth no plea; for by the ſaid action, hee ſhall recover nothing in the perſonaltie, but only to reverſe the outlawrie: but a releaſe of the writ of error is a good plea.

If the tenant in a reall action release to the demandant after recovery his right in the land, 9. H. 6. 47. he shall not have a writ of error, for that he cannot be restored to the land.

And so it is if debt, &c. or damages be recovered in a personall action by false verdict, and the defendant bringeth a writ of attaint, a [a] release of all actions personal is a good barre of the attaint; for thereby the plaintife is to be restored to the debt, &c. or damages which he lost: the like law is if a judgement be given upon a false verdict in a reall action, a release of all actions real is a good barre in an attaint. For both the writ of error and the writ of attaint doe infue the nature of the former action, &c.

And so it is if a writ of *audita querela* be brought by the defendant in the former action to discharge himselfe of an execution, a release of all actions personal is a good barre, because he is to discharge himselfe of a personall execution.

Mes un release de briefe de error est bone plea, &c. So as in this speciall case here put by *L. iiii. ton*, wherein the plaintife is to recover or be restored to nothing against the party; yet for that the plaintife in the former action is privy to the record, a release of a writ of error to him is sufficient to barre the plaintife in the writ of error of the suit, and vexation by the writ of error. And so note that an action reall or personall doth imply a recovery of something in the realty or personalty, or a restitution to the same, but a writ (1) implyeth neither of them, which is worthy of observation.

Sect. 504.

ITEM, si bone recovera debt ou damages, et il release al defendant tous maners d'actions, uncore il puit loialment fuer execution per capias ad satisfaciendum, ou per elegit, ou fieri facias: car execution per tiel briefe ne poit estre dit action.

ALSO, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet hee may lawfully sue execution by *capias ad satisfaciendum*, or by *elegit*, or *fieri facias*: for execution upon such a writ cannot bee said an action.

HERE appeareth a diversity betweene an action and an execution. For regularly an action is said in its proper sense to continue until judgement bee given, and after judgement then doth processe of execution begin; and therefore a release of all actions regularly is [b] no barre of execution, for the execution doth beginne when the action doth end. And therefore the foundation of the first is an originall writ, and doth determine by the judgement; and writs of execution are called judiciall, because they are grounded upon the judgement.

Per cap. ad satisfaciendum. This is a judiciall writ for the taking of the body in execution untill hee hath made satisfaction: where a *capias ad satisfaciendum* lyeth at the common law; and where it is given by statute, you may reade at large in my Reports.

I have read two ancient records touching the taking of the body in execution, whereof, to my remembrance, I never read any touch in our bookes, yet will I recite them, and leave them to the judicious reader. *William de Walton* brought an action of trespassse of breaking his close against *John Martin*, and upon not guilty pleaded, hee was found guilty and damages assessed; whereupon judgement was given that the plaintife should recover his damages, *et quoddam predictus Johannes capiatur*. And the record saith, *Quoddam predictus Johannes venit coram domino rege et reddidit se prisonem, et quia constat curie per inspectionem corporis ipsius Johannis, quoddam idem Johannes est talis etatis quoddam penam imprisonmenti subire non potest, ideo dictum est ei, quoddam eat inde sine die.* The other record is, That *Ellen Allot* brought an appeal of robbery against *John Boskiseleke* clerke, *Richard Charta*, and others, who pleaded not guilty, and were not found guilty: whereupon judgement was given that they should goe quite, *et predicta Elena pro falso appello suo committatur prisonem, &c.* (for [b] by the statute she ought to be imprisoned in that case for a yeare.) But the record saith, *Quia eadem Elena pregnant fuit, et in periculo mortis, ipsa dimittitur per manucaptionem, &c. ad habendum corpus usque quind. Michaelis, &c.* (2)

Vide Sect. 233.
(5. Rep. 88, 89.
8. Rep. 153. a)

8. E. 3. 9. 4. E. 3. Attorney 18. 33. H. 6. 29.
34. H. 6. 51.
[b] 13. H. 4. Release 53.
19. H. 6. 3. 26. H. 6. Execution 7.

Sir William Herbert's case, lib. 3. fol. 11, 12.

Pasch. 14. E. 3. Rot. 106.
coram Rege in Thesaur. Surrey.
(Cro. Jac. 356.)

Mich. 41. E. 3. Rot. 27. coram Rege Cornub. in Thesaur.

[b] W. 2. cap. 12.
(Siderf. 236. Hutton 118.)

7 I

There

(1) That is, a writ of error.

(2) The record at large is stated in 12 Rep. fol. 126.

There be certaine maximes in the law concerning executions, as taking some instead of many. *Ea quæ in curiâ nostrâ ritè acta sunt, debitæ executioni demandari debent. Parum est latam esse sententiam nisi mandetur executioni. Executio juris non habet injuriam. Executio est fructus et finis legis. Juris effectus in executione consistit. Prosecutio legis est gravis ex-atio, executio legis coronat opus. Boni judicis est judicium sine dilatione mandare executioni. Favorabiliores sunt executiones aliis processibus quibuscunque.* But now let us heare what Littleton saith.

(5. Rep. 88. a.)

[c] W. 2. cap. 18.
(Plowd. 178. b.)

Per elegit. This is also a judicall writ, and is given by the statute eyther upon a recovery for debt or damages, or upon a recognizance in any court. And it is called a writ of *elegit*, for that according to the statute that saith, [c] *Sit de cæterò in electione illius, &c. sequi breve quoddam vicecomes fieri faciat, &c. vel quod liberet ei, &c.* The words of the writ bee, *Elegit sibi liberari, &c.* And thereupon it is called an *elegit*. By this writ the sherife shall deliver to the plaintife *omnia catalla debitoris, (exceptis bobus & asinis caruæ) et medietatem terræ.* And this must be done by an inquest to be taken by the sherife.

[d] 11. E. 1. Stat. de Action
Burnell. 13. E. 1. de mercato-
ribus. 27. E. 3. cap. 22. Vide
Fleta, li. 2. cap. 57. 25. E. 3.
53.
(6. Rep. 44.)
[*] 23. H. 8. cap. 6.

[e] 32. H. 8. cap. 5.
(5. Rep. 86. b.)
2. Iust. 677. b.)

When Littleton wrote, by force of certaine acts [d] of parliament, execution might bee had of lands (besides by force of the *elegit*) upon statutes merchant, statutes staple, and recognizances taken in some court of record; and since he wrote, upon a recognizance or bond taken by force of the statute [*] of 23. H. 8. before one of the chief justices, or the maior of the staple, and recorder of London out of terme, which hath the effect of a statute staple. The manner of the executions upon body, lands, and goods, appeareth in the statutes quoted in the margin.

Since Littleton wrote, a profitable statute hath been made [e] concerning executions of lands, tenements, and hereditaments, whereby it is provided, that if after such lands, &c. be had and delivered in execution upon a just or lawfull title, wherewithall the said lands, &c. were liable, tied, or bound at such time, as they were delivered or taken into execution, shall be recovered, devided, taken, or evicted out of, or from the possession of any such person, &c. before such times, as the said tenants by execution, their executors or assignees, shall have fully levied their debt and damages, for the which the said lands, &c. were taken in execution; then every such recoveror, obligee, and recognizee, shall have a *scire facias* out of the same court from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heires, executors or assignes, to have execution of other lands, &c. liable and to be taken in execution for the residue of the debt or damages. *Sed opus est interprete.*

Lib. 4. fol. 66. Fulwood's case.

(4. Rep. 81. 2. Inst. 678.)

(Cro. 338.)

Therefore, first, it is to be knowne, that where the tenant by execution hath remedy given to him by law after eviction, there the statute extendeth not to it; for the act saith, by reason whereof the said recoverors, obligees, and recognizees, have been clearly set without remedy, &c. and the body referreth to the preamble, and the party ought not to have double satisfaction, one by the former lawes, and another by this statute.

And therefore if part of the land, &c. be evicted from the tenant by execution, this statute extendeth not to it; because he should hold the residue, till he be fully satisfied, and he must be contented if all be evicted saving one acre to hold that, though it be but a poore remedy: for no new execution in that case hee can have upon this statute. Therefore if the conusee hath remedy *in presenti* for part, or *in futuro* for all, or part, this statute extendeth not to it.

Secondly, if a man be bound to A. in a statute of a thousand pounds, and by a latter statute to B. in a hundred pounds, and B. first extendeth, and then A. extendeth and taketh the land from B. yet B. shall have no aide of the statute, because after the extent of A. B. shall re-enjoy the land, by force of his former execution.

Thirdly, If the wife of the conusor recover dower against the tenant by execution, he shall hold over, and shall have no aide of this statute.

Fourthly, If a man put out his lessee for yeares, or disseise his lessee for life, and after knowledge a statute and execution is sued against him, and the lessee re-enter, the tenant by execution after the leases ended, shall hold over, and have no aide of this statute.

Fifthly, This statute must not be taken literally, but according to the meaning; therefore where the letter is untill he, &c. or his assignes shall fully and wholly have levied the whole debt or damages; if he hath assigned severall parcels to severall assignes, yet all they shall have the land but till the whole debt be paid.

Sixthly, where the words be, for the which the said lands, &c. were delivered in execution. A disseisor conveys lands to the king, who granteth the same over to A. and his heires to hold by fealty, and twenty pound rent, and after granteth the feignior to B. B. knowledgeth a statute,

statute, and execution is sued of the feignory. *A.* dieth without heire, and the conusee entereth, and is evicted by the disseisee; he shall have the aide of this statute; and yet it is out of the letter of the law, for the feignory was delivered in execution and not the tenancy; but he was tenant by execution of those lands, and therefore within the statute. But the perquisite of a villeine being evicted is out of the statute, for he is tenant in fee simple thereof, and not tenant by execution.

Seventhly, Where the words be (delivered and taken in execution), yet if after the *liberate*, the conusee entereth (as he may) so as the land is never delivered, yet is he within the remedy of this statute, for he is tenant by execution.

Eighthly, Where the statute saith, then every such recoveror, obligee, and recognizee shall, &c. and saith not, their executors, administrators, or assigns, but they are omitted in this material place, yet by a benigne interpretation this statute shall extend to them, because they are mentioned in the next precedent clause of the eviction, and the remedy must by construction be extended to all the persons that appear by the act to be grieved; a point worthy the observation. (Ant. 268. b.)

Ninthly, Where the statute giveth a *scire fac'* out of the same court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution that is evicted shall have a *scire fac'* by the equity of this statute out of that court, because the *scire fac'* must be grounded upon the record. *Et sic de similibus.* (F. N. B. 265. d.)

Tenthly, Where the statute giveth the *scire fac'* against such person or persons, &c. that were parties to the first execution, their heires, executors or assigns, &c. this must not be taken so generally as the letter is; for if the first execution were had against a purchaser, &c. so as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *scire fac'* shall be awarded against him, his heires, executors, or assigns. But if he hath other lands subject to the execution, then a *scire fac'* lyeth against him or his assigns, but not against his executors; neither in that case can he have a *scire fac'* upon this statute against the first debtor or recognizor, because it giveth it onely against him, &c. that was party to the first execution, his heires, executors, or assigns. But if there be severall assigns of severall parcels of lands subject to the execution, one *scire fac'* upon this statute shall lye against all the assigns. *Sed est modus in rebus.* This little taste shall give a light to the diligent reader, not only to see into the secrets of this statute, but to others also of like nature.

And by the statute of 23. H. 8. cap. 6. it is provided, that the obligee, &c. shall have in every point against such recognisor, &c. like proces, execution, commodity and advantage in every behalfe, as hath been had or made upon the statute staple, and under such maner and forme, as is for the same statute staple provided: by force of which branch, if the tenant by execution by force of the act of 23. H. 8. be evicted, he shall have the remedy provided for tenants by execution upon a statute staple by the act of 32. H. 8. In like manner by force of that clause of 23. H. 8. if the extendors upon a statute staple, &c. doe extend the lands, &c. at too high a rate, the obligee may pray that the extendors themselves may take the lands, &c. at that rate, &c. by force of the said statutes of *Aston Burnel* and *De Mercatoribus*. Also no execution shall be sued against the heire within age.

But note, that upon a writ of *elegit* the plaintife cannot make any such prayer, because those ancient statutes doe extend to a statute merchant, or a statute staple only, and neither to a recovery of debt or damages, nor to a recognizance in court; and so hath it been resolved [f].

Nota, it appeareth by the preamble of the said act of 32. H. 8. and by divers [g] bookes, that after a full and perfect execution had by extent returned and of record, there shall never be any re-extent upon any eviction; but if the extent be insufficient in law, there may goe out a new extent.

[b] If a man have a judgement given against him for debt or damages, or be bound in a recognizance, and dieth his heire within age, or having two daughters, and the one within age; no execution shall be sued of the lands by *elegit* during the minority, albeit the heire is not specially bound, but charged as *terre tenant* [i]; and so against an heire within age no execution shall be sued upon a statute merchant or staple, nor upon the obligation or recognizance upon the statute of 23. H. 8. for it is excepted in the proces against the heire. Neither if the heire within age indow his mother shall execution be sued against her during his minority. (1)

Note, that by the statute [k] of 27. E. 3. the execution of lands upon a statute staple is referred to the statute merchant, and by the statute *De Mercatoribus* no execution shall be had against the heire so long as he is within age.

Also since *Littleton* wrote, there is a right profitable statute [l] made against fraudulent feoffments, gifts, grants, &c. judgements, and executions, as well of lands and tenements,

40. E. 3. 26. b. 44. E. 3. fol. 10.
2. H. 4. 17. 15. H. 7. 15.

[f] Mich. 4. & 5. Ph. and Mar. Bendloes, by all the Justices of the Common Pleas.

(Plowd. 82. b. 205. b.)

[g] 15. E. 3. Extent. 7.

22. E. 3. Recovery in value 22.

31. E. 3. Extent. 13. 17. E. 3. 76.

15. E. 3. *scire fac.* 115.

7. H. 4. 19. 22. Aff. 44. 22. E. 3.

fol. ult. 44. E. 3. 10. 9. H. 7. 9.

15. H. 7. 15. 13. Eliz. Dier 299.

29. H. 8. Stat. Merchant Br. 40.

(2. Cro. 13.)

[h] 11. E. 3. age 4. 15. E. 3.

age 95. 24. E. 3. 28. 29. Aff. 37.

29. E. 3. 50. 47. Aff. 4. 47. E. 3. 7.

lib. 3. fol. 13. Sir William Herbert's case. Brooke, age 33.

(2. Cro. 838. 694. Siderf. 184.)

[i] Temps E. 1. Aff. 402. 417.

16. H. 7. 6. Livre d'enr. 545.

Brooke, age 33.

(1. Cro. 295.)

[k] 27. E. 3. cap. 22.

[l] 13. E. 3. cap. 5.

Li. 3. fo. 80. &c. Twyne's case.

Li. 5. fo. 60. Gooche's case.

(1) *B. R. Crevill and Bracebridge's case*.—*Nota*, p. 1656, the point of a special verdict was as follows: The conuser leased for years, and died, his heir within age, whether the execution (which was admitted on all sides to be void against the infant), was good to bind the term for years. Glyn, chief justice, and the court, and also Windham, at the bar, denied peremptorily the case of lord Coke to be law, unless it is understood that the marriage was held before the statute; for then it is true that it shall not be extended, sed non quia est privilegium for the infancy of the heir; but because the wife is in by her husband, and therefore has the better possession, and thus comes in paramount to the statute; but if the statute was before the marriage, then clearly the dower of the wife is extendible; for the endowment breaks the descent, and she is in by her husband of a possession charged, and there is no prejudice to the infant heir; so that the freehold is out of him, without any rent being incident to his reversion. *Nota*, the possibility that the wife might die during the minority, and before the extent was satisfied, was not regarded. And *nota*, M. 6. 7. Eliz. C. B. in Egerton's Reports (cited by Noy in his lecture in Lincoln's-Inn), a like case was adjudged. Feme tenant in tail confessed a judgment, took husband and died. The baron was tenant by the curtesy, and the statute was extended, and then he surrendered to the heir, and was extended still, and well, per curiam, for the reversion was not prejudiced. And afterwards Trin. 1656. resolved, that an extent lay well against the lessee, because the infancy of the heir is a personal privilege. (Query, if the rent is gone. It seems so; but the rent was not regarded.) Lord Nott. MSS.

Lib. 6. fo. 18. Pakeman's case.
Lib. 10. fo. 56. the Chanc. of
Oxford's case. See the Statutes
of 3. H. 7. cap. 4. & 50. E. 3.
cap. 6. Mich. 12. & 13. Eliz.
Dier 295. 18. Eliz. 351. Dier.
(8. Rep. 132.)

W. 2. cap. 18.

[m] Lib. 3. fo. 11. fir William
Herbert's case.
(Hob. 283.)
(F. N. B. 104.)

ments, as of goods and chattels, to delay, hinder, or defraud creditors and others of their just and lawfull actions, suites, debts, damages, penalties, forfeitures, heriots, mortuaries, and releases, for the exposition of which and other statutes, see the authorities quoted in the margin. (1)

And it is to be observed, that the words of the said act of 13. Eliz. are, *Be it therefore declared, ordained, and enacted*; and therefore like cases in semblable mischief shall be taken within the remedy of this act, by reason of this word (*declared*); whereby it appeareth, what the law was before the making of this act. But let us now returne to *Littleton*.

Fieri facias. This is a writ mentioned in the said statute, but is a writ of execution at the common law. And it is called a *fieri facias*, because the words of the writ directed to the sherife be, *quod fieri facias de bonis & catallis, &c.* and of those words the writ taketh its denomination.

But note, that a *capias ad satisfaciendum* is not mentioned in the said statute, because no *capias ad satisfac'* did lye at the common law upon a judgement for debt, &c. or damages, but only when the originall action was *quare vi & armis, &c.* But latter statutes have given a *capias ad satisfac'* where debt, &c. or damages are recovered; as it appeareth at large [m] in fir William Herbert's case, whereunto I referre the reader.

And it is to be observed, that these three writs of execution ought to be sued out within the yeare and the day after judgement; but if the plaintife sueth out any of them within the yeare, he may continue the same after the yeare untill he hath execution. And to none of these writs of executions the defendant can pleade; but if he hath any matter since the judgement to discharge him of execution, he may have an *audita querela*, and relieve himselfe that way, but pleade he cannot. As if the plaintife after release unto the defendant all executions, yet in none of these three writs he shall pleade it, but is driven to his *audita querela*, as hath been said.

Sect. 505.

SCIRE facias.

This is a judiciall writ, and properly lyeth after the yeare and day after judgement given; and is so called, because the words of the writ to the sherife be, *quod scire facias prefat' T.* (being the defendant) *quod sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat, quare, &c.* So as by the writ it appeareth, that the defendant is to be warned to plead any matter in barre of execution; and therefore albeit it be a judiciall writ, yet because the defendant may thereupon pleade, this *scire facias* is accounted in law to be in nature of an action; and therefore [n] a release of all actions is a good barre of the same, and likewise a release of executions is a good barre in a *scire facias*. This writ was gi-

MES si apres l'an et jour le plaintife voit suer un scire facias, * a sacher si le defendant poit rien dire pur que le plaintife n'avera execution, donques il semble que tiel releas de tous actions ferra bon plee en barre. Mes ascuns ont semble contrary, entant que le brieve de scire facias est un brieve d'execution, et est d'aver execution, &c. Mes uncore entant que sur mesme le brieve le defendant poit pleader divers matters puis le judgement rendue de luy ouster d'execution, come utlagary, † &c. et divers au-

BUT if after the yeare and day the plaintife will sue a *scire facias*, to know if the defendant can say any thing why the plaintife should not have execution, then it seemeth that such release of all actions shall be a good plea in barre. But to some seemes the contrary, in as much as the writ of *scire facias* is a writ of execution, and is to have execution, &c. But yet in as much as upon the same writ the defendant may plead divers matters after judgement given to oust him of execution, as outlawry, &c. and divers other matters, this

ters

* a sacher si le defendant poit rien dire pur que le plaintife n'avera—d'aver, L. and M. and Roh. nor Roh.

† &c. not in L. and M.

(1) It was observed before, that one of the principal objects of the legislature, in passing the statute of uses, was to restore in some measure the notoriety of the old common law conveyances; but that their views in this respect were almost totally defeated, by the introduction of conveyances by lease and release, and by the preservation of uses, under the appellation of trusts. The legislature has, at different times, attempted to remedy the mischief arising from the secret transfer of property to such conveyances by lease and release has given rise. Among these attempts may be reckoned the statutes against fraudulent conveyances and devises, 13. Eliz. c. 5. 27. Eliz. c. 4. and 3. W. & M. c. 14. but particularly the statute of 29. Car. 2. c. 3. commonly called the Statute of Frauds and Perjuries, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See ant. 48. a. not. 3. With the same views have been passed the acts for registering deeds respecting lands in the West, East, and North Ridings of the county of York, and in the county of Middlesex.—2. & 3. Ann. c. 4. 6. Ann. c. 35. 7. Ann. c. 20. and 8. G. 2. c. 6. Upon a similar principle was passed, the salutary and beneficial act of the 17th of his present Majesty, c. 26. for registering the grants of life annuities. With respect to the last statute, it is to be wished, that the legislature would enable persons redeeming or repurchasing annuities granted by them, to enter an account of such redemption or repurchase upon the register; for as it is an impeachment of a person's credit that annuities of this nature should be recorded against him, it is but reasonable, that when he has redeemed or repurchased them, that should be as publicly known and ascertained as his grant of them. But for want of some regulation of this kind, persons lie under the imputation of being subject to the payment of annuities, after they are liberated from them. On the statute of the 29. Car. 2. c. 3. the courts have decided, that as it was made with a design to prevent, either in marriage or in any other treaties, uncertainty, perjury, and contrariety of evidence, the cases not liable to these inconveniences are not within it. See 1. Eq. Ca. Ab. 19. The courts seem to have favoured a like equitable construction of the statutes for the registration of deeds. Thus in the case of *Le Neve v. Le Neve*, 1. Vez. 64. lord Hardwicke decreed, that if a deed respecting lands in any of the register counties is not registered, and afterwards the same lands are sold or mortgaged, by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, tho' it is not registered, shall be preferred to him. The general doctrine of these decisions is founded on principles both just and equitable, when applied to particular cases; yet it may be doubted whether a more rigid adherence to the letter of these statutes, particularly that of the 29. Car. 2. c. 3. would

ters matters *, *ceo bien* may bee well said an
poit estre dit action, &c. action, &c.

had surceased to sue execution by *feri facias*, or *levari facias*, a yeare and a day, hee had been driven to his new originall.

Ceo bien poit estre dit action. Here is to be observed, that every writ whereunto the defendant may plead, be it originall or judiciall, is in law an action.

ven in this case by the statute of W. 2. for at the common law if the plaintife William Herbert's case. Fleta li. 2. cap. 12.

Sect. 506.

ET jeo croy, que en un scire facias hors d'un fine, un releas de tous maners d'actions est bon plee en barre.

AND I take it that, in a *scire facias* upon a fine, a release of all manner of actions is a good plea in barre.

This upon that which hath been said, is evident of it selfe.

Sect. 507.

MES lou home recouvrera debt ou damages, et est accorde perenter eux que le plaintife † ne suera execution, donques il covient que le plaintife fait un releas a luy de tous maners d'executions ‡.

BUT where a man recovereth debt or damages, and it is agreed betweene them that the plaintife shall not sue execution, then it behoveth that the plaintife make a release to him of all manner of executions.

IL covient. Albeit Littleton here saith, hee ought or must, &c. yet there bee other words which will release an execution without expresse words of a release of execution.

As if a man release all suites, the execution is gone; for no man can have execution without prayer and suit, but the king only; and therefore if the king releaseth all suites, it is no barre of his execution, because in the

19. H. 6. 4. 26. H. 6. Execution 7. Li. 8. fo. 153. Ed. Altham's case. Vid. Brooke, tit. Releases, 87.

king's case the judges ought to award execution *ex officio* without any suite; but a release of executions doth barre the king in that case. And so note a diversity between a release of all actions, and a release of all suites.

So if the body of a man be taken in execution; and the plaintife releaseth all actions, yet shall he remaine in execution; but if he release all debts or duties, he is to be discharged of the execution, because the debt or duty it selfe is discharged.

In the same manner if execution be sued upon a recognizance by *elegit*, and the consuee by deed make a defeasance, that if the consuee doth such an act, that then the recognizance shall be void; by this the execution is discharged.

So it is if judgement be given in an action of debt, and the body of the defendant is taken in execution by a *capias ad satisfaciendum*; and after the plaintife releaseth the judgement, by this the body shall be discharged of the execution.

If the plaintife after judgement release all demands, the execution is discharged, as shall appeare by that which next hereafter shall be said.

If *A.* be accountable to *B.* and *B.* releaseth him all his duties, this is no barre in an action of account, for duties extend to things certaine, and what shall fall out upon the account is incertaine; and albeit the Latine word is *debita*, yet duties doe extend to all things due that is certaine, and therefore dischargeth judgements in personall actions, and executions also.

26. H. 6. tit. Executi in 7.

20. Aff. p. 7. (6. Rep. 13. b.) (10. Rep. 47.)

26. H. 6. ubi supra.

20. H. 6. 6. per Passor.

Sect.

* *et per* added L. and M. and Roh.

† *&c.* added L. and M.

‡ *ne suera execution*—ferrois ouste d'action, L. and M. and Roh.

would not have been more beneficial to the public. The French have shewn a much more rigid and pertinacious adherence to the letter of their laws respecting the registration of deeds and wills. By laws of that kingdom as ancient as the 16th century, particularly an ordonnance of Henry II. of the year 1553, it was ordered, that all wills and deeds, containing substitutions of estates, should be registered within a particular period of time. If they were not registered within that time, the courts seem to have doubted whether they were binding even on the parties, in whose favour the substitutions were made; but it was always settled, that the substitutions were of no force against creditors or purchasers. Several points of the laws respecting substitutions being unsettled, and the laws respecting them being different in different parts of the kingdom, they were all reduced into one law, by the celebrated ordonnance of August 1747. That ordonnance was framed by the chancellor D'Aguesseau, after taking the sentiments of every parliament in the kingdom upon forty-five different questions proposed to them upon the subject. The thirty-ninth question is, "Whether a creditor or purchaser, having notice of the substitution, before his contract or purchase, is to be admitted to plead the want of registration?" All the parliaments, except the parliament of Flandres, agreed, that he was; that to admit the contrary doctrine would make it always open to argument, whether he had or had not notice of the substitution; that this would lead to endless uncertainty, confusion, and perjury; and that it was much better that the right of the subject should depend upon certain and fixed principles of law, than upon rules and constructions of equity, which must be arbitrary, and consequently uncertain. The ordonnance of August 1747 was framed accordingly. Those who have commented upon that ordonnance lay it down as a fixed and undeniable principle, that nothing, not even the most actual and direct notice, countervails the want of registration; so that if a person is a witness, or even a party, to the deed of substitution, still, if it is not registered, he may safely purchase the property substituted, or lend money upon a mortgage of it. See *Questions concernant les Substitutions*, Toulouse 1776, and *Commentaire de l'Ordonnance de Louis XV. sur les Substitutions*, par Mr. Fargoles a Paris, 1767.—The preservation of uses, under the appellation of trusts, is another circumstance that has contributed to defeat the intended effect of the statute of uses. This is not the place for a discussion of every branch of the law of trusts. But some observations will be offered to shew in what manner the courts have remedied the mischiefs arising from the secret nature of that species of property, both with respect to the *cestuy que trust*, and the public at large.—I. As to the manner in which the courts have remedied the mischief arising from the admission of trusts, with respect to the *cestuy que trust*. This has been effected in some degree by the courts of equity having held, that persons paying money to trustees, with notice of the trust, are, generally speaking, obliged to see it properly applied. Lord Mansfield, in his very distinguished argument in the great case of *Burgess v. Wheate*, observes, "that the *cestuy que trust* is actually and absolutely seized of the freehold, in the consideration of a court of equity; that the trust is the land, in that court; and that the declaration of the trust is the disposition of the land." It is, perhaps, to be wished, that the operation and consequences of trusts had been confined to the trustee and *cestuy que trust*. There is no doubt but the doctrine in question is in many instances of great service to the *cestuy que trust*, as it preserves his property from the speculations and other disasters to which, if it were left

Sect. 508.

(5. Rep. 56. a.)
(Cro. Jac. 623.)
(Sid. 141.)

TOUTS manners de demands.

Demande, Demandum, is a word of art, and in the understanding of the common law is of so large an extent, as no other one word in the law is, unless it be *clameum*, whereof *Littleton* maketh mention *Señ. 445*. And here is to be observed, that there be two kinde of demands or claimes, viz. a demand or claime in deed, and a demand or claime in law; or an expresse, and an implied demand or claime.

Lit. Sect. 445. Brañt. li. 1. cap. 10. Pl. Com. Steill's case, 399, &c.

(8. Rep. Altham's case, fol. 151.)

Littleton here putteth examples of both: and first he speaketh of reall actions, wherein hee that bringeth his action maketh his demand, and therefore hee is properly called a demandant; and hee that defendeth is called tenant, because hee is tenant of the freehold of the land.

(2. Cro. 487.)

38. H. 8. tit. Releas. Br. 9.
6. H. 7. 15. 19. H. 6. 3. 4.
20. Aff. Pl. 5. 40. E. 3. 22.
49. E. 3. 7. b. 50. Aff. Pl. 6.
14. H. 4. 8. 13. R. 2. tit.
Avow. 89. Lib. 8. fo. 153. Ed.
Altham's case.
Lit. 170. Sect. 748.
Dyer 5. El. 217.
(Yelv. 214.)
(Cro. Jac. 170, 171.)
(10. Rep. 51. b.)

Of demands implied, or in law, *Littleton* putteth examples: First, of all actions personals: secondly, of appeales: for in both those cases he that bringeth the suit is called plaintiff, and not demandant, and he that defendeth is called defendant. Thirdly, of executions. Fourthly, of title or right of entry, eyther by force of a condition, or by any former right, which merely is a demand or claime in law; but otherwise it is in the king's case. Fifthly, of a rent service, rent charge, common of pasture, &c. which also are meere demands or claimes in law. (1) All which *Littleton* here, and in the two next Sections following, putteth but for examples; for by the release of all demands, other things also be released, as rents seck, all mixt actions, a warranty which is a covenant reall, and all other covenants reall and personall, estovers, all manner of commons and profits apprender, conditions before they be broken or performed, or after, annuities, recognizances, statutes merchant or of the staple, obligations, contracts, &c. are released and discharged. (2)

Sect. 509.

ET si home ad title de entry en ascuns terres ou tenements, per tiel release son title est ale.

|| Sed quære de hoc; car Fitz-James chiefe justice de Engleterre tient le contrary, pur ceo que entre ne poit properment estre dit demande, P. 19. H. 8. *

(10. Rep. 47.)
(1. Lev. 99.)
(3. Lev. 274.)

AND if a man hath title of entry into any lands or tenements, by such a release his title is taken away.

Sed quære de hoc; for Fitz-James chiefe justice of England holdeth the contrary, because an entrie cannot be properly said a demand.

Title

* de not in L. and M. nor Roh.
§ de not in L. and M. nor Roh.

† a luy—que celuy. L. and M. and Roh.
|| This paragraph not in L. and M. nor Roh.

† que il, not in L. and M. nor Roh.

(1) Nota the diversity. If A. releases to B. all his demands generally, or all his demands out of the manor of D. there, rent and common is released, whether present or future: but if he releases to B. all demands which he has upon him, there, no rent or common, present or future, is released, quia release est tantum personel. Trin. 5. Ja. Hancock v. Field.—Adjudged contra, that a release of all demands is not a bar to a covenant before breach;—but it is agreed, that it bars warranty, for that lies properly on demand, because he may have warrantia chartæ. So also reservation of rent, by indenture, is a covenant in law, viz. covenant real; for it runs with the land, and does not lie, after a duration, but against the tenant of the land: and it is agreed that by a release of all demands a covenant real is released; for the rent itself, upon which the covenant in law rises, is released.—So 14. H. 8. 9. But however the law may be of covenants real, it seems to be contrary of covenants personel;—and so there is good difference. Sed forsan, these passages are not to be understood of covenants before the breach, though covenants before the breach are expresse. Ld. Nott. MSS.

(2) But a release of all demands does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent at the time was not only not due, but the consideration, viz. the future enjoyment of the lands, for which the rent was to be given, was not executed. 1. Sid. 141. 1. Lev. 99. 3. Lev. 274. Note to the 12th edition.

left solely to the discretion of the trustee, it would necessarily be subject. Yet it may be questioned, whether the admission of it is not in general productive of more inconvenience than real good; for if the *cestuy que trust* is a married woman, an infant, or otherwise incapable of giving assent to the payment of the money to the trustee, the persons paying it cannot be indemnified against the trustee's misapplication of it, but by paying it under the sanction of a court of equity. This retards, and often absolutely impedes the progress of the business, involves the parties in an expensive and intricate litigation, and puts them to a very great, and, in other respects, an useless expence. To avoid this, it is become usual to insert a clause in deeds or wills, that the receipts of the trustees shall, of themselves, discharge the persons to whom they are given, from the obligation of seeing to the application of the money paid by them. In some instances, without any clause of this nature, a person paying money to a trustee is not answerable for the misapplication of it, tho' he has notice of the trust. Perhaps the following distinctions and observations will be found of use towards obtaining an accurate knowledge of the rules of equity upon this complex subject.—1stly, With regard to personal estate, it is every where admitted, that if a testator, possessed of personal estate only, dies indebted, having by his will directed his estates to be sold for the payment of his debts, whether he specifies them or not, the mortgagee or purchaser of any part of his personal assets, is not bound to see to the application of his mortgage, or purchase-money. See Elliott and Merryman, Barnardiston Rep. in Cha. page 78. But

TITLE. Here title is taken in the largest sense, including right also.

34. H. 8. 41. Release. B. 9.
Chauncey's case. Lib. 8. 10. 153.
Ed. Altham's case.

* Sed quære, &c. This is an addition, and no part of *Littleton*, and the opinion here cited cleerely against law.

Sect. 510.

ET si home ad rent service AND if a man hath a rent service or rent charge, or common de pasture, &c. per tiel mon of pasture, &c. by such a release de tous manners de lease of all manner of demands fait al tenaunts de la made to the tenants of the land terre dont le service ou le rent out of which the service or the rent est issuant, ou en † que le common is, the service, the rent, and common est, le service, le rent, et the common, is taken away and le common, est ale et extinct, &c. extinct, &c.

This upon that which hath been said, needeth no further explication.

Sect. 511.

ITEM, si home ALSO, if a man releaseth to another all manner of quarrels, or all controversies or debates entre eux, &c. quære, betweene them, &c. a quel matter et a quære, to what matter quel effect tiels parols soy extendont, and to what effect such words shall extend &c. themselves, &c.

QUARRELS, *Quærela, à querendo.* This properly concerneth personall actions, or mixt, at the highest; for the plaintife in them is called *querens*, and in most of the writs it is said, *queritur*. And yet if a man release all *querels* (a man's deed being taken most strongly against himself) it is as beneficiall as all actions; for by it all actions, reall and personall, are released. And by the release of all quarrels, all causes of actions are released thereby, albeit no action be then depending for the same.

Quarrels. Controversies and debates are *synonima*, and of one signification. *Litis nomen omnem actionem significat, sive in rem, sive in personam sit.* If a man release *omnes loquelas*, it is as large as *omnes actiones*; for *omnis actio est loquela*, and it extendeth as well to actions in courts of record, as base courts; for the writ of error saith, *in recordo et processu*, &c. *loquela quæ fait inter*, &c. And so the writ of false judgement saith, *recordari facias loquelam*, where the judgement was given in the county court. *Omnes actiones* seeme to be large words; for *ex actio derivatur ab exigendo*, and *exigere* signifieth to enquire or demand.

Sect. 512.

ITEM, si home per ALSO, if a man by **RELESSA** al ob- (Dyer. 307. a. Cro. Car. 496.)
son fait soit ob- his deede bee **ligor** tous ac-
lige a un auter en bound to another in a tions, &c. The reason of

† que—quelle terre, L. and M. and Roh.

But if he charges a specific part of his personally with the payment of a specific debt or legacy, it is a matter of doubt how far the purchaser of that specific part is answerable. In the case of *Bell v. Humble*, 2 Vern. 444. the master of the rolls decreed, that a mortgagee of a term of years from an executor (which term of years was specifically bequeathed) was not answerable for the misapplication of his purchase-money.—This decree was reversed in the house of lords in 1703-4. Two cases in *Peere Williams, Ever v. Corbett*, and *Bunting v. Stonard*, vol. 2. p. 148. & 150. coincide with the master of the rolls against the house of lords. And see *Gilbert's Reports*, 113. It should, however, be observed, that the principle on which the courts have founded their opinion, that the purchaser or mortgagee of any part of the testator's assets specifically bequeathed is not answerable for the misapplication of his purchase or mortgage money, is, that the whole of the personal estate being bound to pay the debts of the testator, that specific part (though specifically charged) is liable with the rest: it has therefore been held, that the purchaser must not have notice that there are no debts, or that the debts are paid. Yet it seems clear from *Ever v. Corbett*, that though by such notice of there being no debts, or of the debts being paid, he makes himself answerable for his purchase or mortgage money; yet he is not bound, previously, to enquire and satisfy himself, that there are debts unpaid, or that the parts of the assets not specifically bequeathed are sufficient to pay the debts and legacies. 2dly, With respect to the devise of a real estate for the payment of debts: It must first be observed, on the authority of the cases of *Cutler and Coxeter*, 2 Vern. 302. *French and Chichester*, 2 Vern. 568. and 2. Vez. 590. that if a person charges both his real and personal estates with the payment of his debts, the personal estate must be first applied; and that it is therefore immaterial, whether the testator charges the personal estate in the first instance, or not.—Now, if a person devises to trustees to sell for the payment of his debts, all the books agree (see particularly the case above cited of *Elliott v. Merryman, Spalding and Shalmer*, 1. Vern. 301. *Culpepper v. Aston*, 2. Chan. Cases 115. 221. 1. Vez. 173. and 215. *Cottrell v. Hampson*, 2. Vern. 5. *Smith v. Guyon, Bro. Ca. in Cha.* 186.) that if the debts are specified or scheduled, the purchaser or mortgagee is bound to see to the application of his money; but that if they are not specified, or scheduled, he is not bound to see to such application; it being considered, that his specifying them is an evidence of his intention that the purchaser should be obliged to see to the application; and that his not specifying them is an evidence of the contrary. For this distinction is not to be considered as taking its rise from any fundamental principle of equity or justice, that when the testator devises in one manner, the purchasers or mortgagees should be answerable; and that if he devises in another manner, they should not be answerable; but merely as a rule of construction: for it is clearly in the testator's power to make the purchaser or mortgagee either answerable or not answerable. Where there is not any positive clause, or expression, to denote his intention one way or the other, recourse must be had to implication; and when there is no contrary implication, the courts consider the modes of the devise in this respect, to amount to an implication. As to legacies, they, from their nature, must be considered so far as specified or scheduled debts, that the purchaser or mortgagee from a devise of a real estate in trust

(2. R. II. 410. 412.)
 41. H. 4. 41. 43.
 (9. Rep. 37, 38. 2. Inst. 398.)

[5] Trin. 2. Ja. in Com. Banco,
 inter Middleton & Rinnot.
 18. H. 6. 23. b. Pl. Com. 277.
 278. in Greibroke's case per
 Weston.

5. Eliz. Dier. 217.

Altham's case ubi supra.

(10. Rep. 51. b. 1. Rep. 112. b.
 2. Cro. 222. 571. Sid. 85.
 Hob. 216.)

of this case is, for that the debt is a thing consisting merely in action; and therefore albeit no action lyeth for the debt, because it is *debitum in presenti, quatenus sit solvendum in future*, yet because the right of action is in him, the release of all actions is a discharge of the debt it selfe. [6] And so may an executor before probate release an action; and yet before probate he can have no action, because the right of the action is in him, and so it was adjudged. And some say, that an ordinary may release an action, and yet he can have none. But if a man by deed doth covenant to build an house or make an estate, and before the covenant broken, the covenantee releaseth to him all actions, suits, and quarrels, this doth not discharge the covenant it selfe, because at the time of the release, *nihil fuit debitum*, there was no debt or duty, or cause of action in being. But in that case a release of all covenants is a good discharge of the covenant before it be broken.

*certainne somme de certaine somme of money, a payer al money, to pay at the feast de S. Michael feast of Saint Michael prochain ensuant, * el next ensuing, if the si le obligee devant le obligee before the dit feast releffa al said feast release to obligor tous ac- the obligor all actions, tions, il serra barre del he shall be barred dutie a tous temps, of the duty for ever, et uncore il ne puis- and yet hee could not soit aver action al have an action at the temps de release time of the release fait. made.*

Sect. 513.

RELEASE tous actions.

This release shall not barre the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent become due, the rent is avoyded; for it is to be paid out of the profits of the land, and it is a thing not merely in action, because it may be granted over. But the lessor before the day may acquite or release the rent. But if a man be bound in a bond or by contract to another to pay a hundred pounds at five severall daies, he shall not have an action of debt before the last day be past: and so note a diversity between duties

MES si home leffa terre a un auter pur terme d'un an, rendant a luy al feast de S. Michael prochain ensuant 40 s. et puis devant mesme le feast il releffa al lessee tous acts, uncore apres mesme le feast il avera act de debt pur non payment de les 40 s. nient obstant le dit releas. Stude causam diversitatis enter les deux cases.

BUT if a man letteth land to another for a yeare, to yeeld to him at the feast of S. Mich. next insuing 40s. and afterwards before the same feast hee releaseth to the lessee all actions, yet after the same feast hee shall have an action of debt for the non payment of the 40 s. notwithstanding the said release. *Stude causam diversitatis* betweene these two cases.

which touch the realty, and the meere personalty. But if a man be bound in a recognizance to pay a hundred pound at five severall dayes, presently after the first day of payment he shall have execution upon the recognizance for that summe, and shall not tarry till the last be past, for that it is in the nature of severall judgements. And so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise, after the first default an action of covenant, or an action upon the case doth lie, for they are severall in their nature. Lastly, note a diversity between debts and covenants, or promises.

If a man hath an annuity for terme of yeares, or for life, or in fee, and he before it be behind doth release all actions, this shall not release the annuity, for it is not merely in action, because it may be granted over.

Sect.

* &c. added L. and M. and Roh.

trust to sell it for the payment of debts and legacies, must see his money applied in the discharge of them, unless there is an expresse clause, or sufficient implication from other parts of the will, that the deviser intended to free him from that obligation.—11. As to the manner in which courts of equity have attempted to prevent the mischiefs arising from the admission of trusts, with respect to the public at large:—This has been effected in some measure, by its having been laid down as a general rule, that in any competition of claims, where the equity of the parties is equal, he who has the law shall prevail. See Francis's Maxims of Equity, 61. If a person has the legal estate or interest of the subject matter in contest, he must necessarily prevail at law over him whose right is only equitable, and therefore not even noticed by the courts of law. This advantage he carries with him, so far, even into a court of equity, that if the equitable claims of the parties are of equal force, equity will leave him who has the legal right in full possession of it, and not do any thing to reduce him to an equality with the other, who has the equitable right only.—Perhaps the following illustration of this very important rule of equity, by an enquiry into the doctrines of courts of equity respecting terms of years, attendant upon the inheritance, will not be unacceptable to the reader.—At common law, leases for years were not supposed to transfer any property to the lessee, and were generally of very short duration; for, as they tended to prevent the crown of its forfeitures, and the lord of the fruits of his tenures, they were considered with a very jealous eye. Besides, the possession of the lessee was considered as the possession of the freeholder; and if his lease was defeated or disturbed, though he could recover for damages, he had no means to recover the possession. Moreover, leases for years were subject to be absolutely defeated, either by a real or fictitious recovery against the freeholder; but in the reign of Henry IV. or, at least, in that of Henry VII. the courts resolved, that the lessee should not only recover damages, as a recompence for the loss of the possession, but should also recover the possession itself. Afterwards the 21st Hen. 8. c. 15. protected the lessee against the effect of fictitious recoveries. These alterations of the common law gave the lessee for years an interest and stability which he had not before. Still, in the eye of the law, particularly before the demolition of the feudal tenures, terms of years were in every respect but pecuniary emolument, far inferior to estates of freehold. This stability on the one hand, and subordinate state of property on the other, made them very proper and convenient modifications of property, for securing money or any other charges upon the fee, or for giving a partial or temporary right to the profits or beneficial property of the land, in those cases where the owner wished to have, not only the remainder or reversion,

Sect. 514.

*ITEM, ou home voile
suer brieve de droit,
il covient que il counta
del seisin de luy, ou de
ses ancestors, et auxy
que le seisin fuit en temps
de mesme le roy, come
il counta en son count.
Car cest un ancien ley
use, come appiert per le
report d'un plee en le
eire de Nottingham *,
titulo Droit en Fitz-
herbert, cap. 26. entiel
serme que ensuist. John
Barre port son brieve
de droit envers Rey-
nold de Assington, et
demaunda certaine te-
nements, &c. † ou le
mise est joyne en le bank,
et originall et le proces
fueront demandes de-
vant justices errants,
oules parties viendront,
et les ‡ 12 chiva-
lers fieront leur sere-
ment sans challenge
des parties, d'estre al-
lowes, sur ceo que elec-
tion fuit fait per as-
sent des parties, ove
les quater chivalers,
et le serement fuit tiel:
Que jeo verity dirre,
&c. lequel R. de A. ad
plus mere droit a te-
ner les tenements que
John Barre demanda
vers luy per son brieve
de droit, ou John de*

*ALSO, where a man
will sue a writ of
right, it behoveth that
he counteth of the seisin
of himselfe, or of his an-
cestors, and also that the
seisin was in the same
king's time, as he plead-
eth in his plea. For this
is an ancient law used,
as appeareth by the re-
port of a plea in the eire
of Nottingham, tit. Droit
in Fitzherbert, cap. 26 in
this forme following.
John Barre brought his
writ of right against
Reynold of Assington,
and demanded certaine
lands, &c. where the
mise is joyned in banke,
and the originall and the
processe were sent be-
fore the justices errants,
where the parties came,
and the twelve knights
were sworne without
challenge of the par-
ties, to be allowed, be-
cause that choise was
made by assent of the
parties, with the four
knights, and the oath
was this: That I shall
say the truth, &c. whe-
ther R. of A. hath more
meere right to hold the
tenements which John
Barre demandeth against
him by his writ of
right, or John to have*

*IL covient que
il counta del
seisin de luy ou de
ses auncestors.*

For (Ant. 279. a.)
if neyther hee nor any of
his ancestors were seif-
ed of the land, &c. with-
in the time of limitation,
hee cannot maintaine a
writ of right; for the
seisin of him of whom
the demaundant himselfe
purchased the land, &c.
availeth not.

And so it is in a writ of
right of advowson. (8. Rep. 65. Hob. 240.)
F. N. B. 30. a. 2. E. 3. 27.
Litl. 112. a.

*Auxy que le sei-
sin fuit en temps de
mesme le roy come
il counta.* Hereby it
appeareth, that not onely
a seisin (as hath beene
said) is requisite, but al-
so that the seisin be had in
the time of the same king,
according to his count.

Report commeth
of the Latine word *Re-
portare, à re et porto,
id est, referre, à re et fe-
ro.* And in the common
law, it signifieth a pub-
like relation, or a bring-
ing againe to memory
cases judicially argued,
debated, resolved, or ad-
judged in any of the
king's courts of jus-
tice, together with such
causes and reasons as
were delivered by the
judges of the same; and
in this sense *Littleton*
useth the word in this
place.

*En le eire de
Nottingham. Eire,
Iter.* And it signifieth (4. Inst. 184.)
the court of the justices
in eire, and thereupon
they were called *justitarii
itinerantes*, in respect that
the justices residing at
West-

* titulo Droit en Fitzherbert, cap. 26. not in L. and M. nor Roh.
L. and M. nor Roh.

† ou not in L. and M. nor Roh.

‡ 12 not in

reversion, but the actual freehold. Hence we find mortgages for long terms of years very frequent in the reign of queen Elizabeth. Now, according to our notions of mortgages, if the mortgage debt is not paid at the time appointed, the estate mortgaged is absolutely forfeited to, and becomes the property of, the mortgagee, at law; but courts of equity permit the mortgagor to redeem, on payment to the mortgagee of his principal, interest and costs. Still this is merely a right in equity, the legal estate continuing in the mortgagee. Thus if an estate be demised for a term of years, with a proviso making the term void on payment of a sum of money with interest, before or upon a certain day, the condition is not considered at law as complied with, unless the money is paid on or before that very day; if it is not paid then, the estate belongs at law to the mortgagee, for the remainder of the term. And though a court of equity allows the mortgagor to redeem it, by paying the principal, interest and costs, after that time, this subsequent payment, though it gives the mortgagee the equitable right to the estate, does not affect the legal continuance of the term. In this respect our law differs from the civil law; in which a mortgage is considered only as an accessory of the debt; and payment at any time, by annulling the debt, extinguishes the mortgage. To apply this doctrine to terms of years. After payment of the mortgage debt, the term of years for which the mortgage is made, is in law in the mortgagee; but, in equity, the mortgagor is entitled to the benefit of it. By an analogy to the case of mortgages, when terms of years are created for securing the payment of jointures, portions for children, or for any other purpose, they do not determine (unless there is a special proviso) by the performance of the trusts for which they are raised. Thus in all these cases, the legal interest during the continuance of the term, is in the trustee; but the owner of the fee is entitled to the equitable interest, or rather to all the benefit or advantage which can be made of the term during its continuance. As the courts of common law had determined, that the possession of the lessee for years was the possession of the owner of the freehold, courts of equity determined, that where the tenant for years was but a trustee for the owner of the inheritance, he should not oust his *cestuy que trust*, or obstruct him in doing any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance. It follows the descent to the heir, and all the alienations made of the inheritance, or of any partial estate or interest carved out of it by deed, by will, or by act of law. *Whitchurch v. Whitchurch*, 2. P. W. 236. 9. Mod. 124. *Gilb. Rep.* 168. *Villiers and Villiers*, 2. Atk. 7. *Hoole v. Sales*, 2. Will. 329. Still, tho' the trust or benefit of the term is annexed to the inheritance, yet the legal interest of the term remains distinct and separate from it at law, and the whole benefit and advantage to be made of the term arises from this separation. For if two persons, or more, have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it, that if any one of them obtains an assignment of it, then (unless he is affected by any of the circumstances which equity considers as fraudulent) he will be entitled, both at law and in equity, to the estate for the whole continuance of the term, to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of every kind of benefit in the land. Supposing, therefore, A. purchases an estate, which, previous to his purchase, had been sold, mortgaged, leased, and charged with every kind of incumbrance to which

[p] Mirror cap. 2. sect. 3. and
sect. 15. and ca. 4. le office des
Justices in Eire. Glanv. li. 9.
cap. 11. Li. 8. cap. primo. Britt.
fol. 1. b. 7. 8. &c. Braet. lib. 3.
fo. 115. &c. Flet. li. 1. ca. 15.
&c. 4. E. 3. 32. 6. E. 3. 35.
23. E. 3. 21. 15. H. 7. 5.
Vide Sect. 442. 233. 234.

Westminster were called
justitiiarii residentes, and
were much like in this
respect to the justices
of assise at this day, al-
though for authority and
manner of proceeding
(whereof you shall reade
[p] in the ancient au-
thors of the law) farre
different. And as the
power of the justices of
assises by many acts
of parliament and other
commissions increased,
so these justices itine-
rant by little and little
vanished away. And it
is certaine, that the
authority of justices of
assises itinerant through
the whole realme, and
the institution of jus-
tices of peace in every
county being duely
performed, are the moit
excellent meanes for
the preservation of the
king's peace, and quiet
of the realme, of any
other in the Christian
world.

De Nottingham.

This should bee *North-
ampton*, according to the
originall.

This report whereof
Littleton here maketh
mention, you shall finde
an abstract of it in 3. E. 3.
since *Littleton's* time,
put in print by *Fitzher-
bert* when he was ser-
jant in 11. H. 8. and is
not in the Reports or
bookes at large. And
yet here it appeareth,
that they be of great au-
thority, and vouched by
Littleton himselfe for the
prooffe of a maine point
in law. And hereby it
also appeareth how ne-
cessary it is to reade re-
cords and pleas reported
or recorded, though they
were never printed. For
those and the like records
are *veritatis et iustitias
vestigia*.

Tit. droit in enquires ouster del †† And after the grand as-
Fitzherbert, 26. is *briefe*. Et puis le life came in with their

* *ne—jeo*, L. and M. and Roh.
‡ *vous—home*, L. and M. and Roh.
†† *briefe—droit*, L. and M. and Roh.

† *en—le*, L. and M. and Roh.
§ *John* not in L. and M. nor Roh.

‡ *al entent—et ceo fert*, L. and M. and Roh. and in MSS.
** *vous—home*, L. and M. and Roh. and MSS.

real property is subject; in this case *A.* and the other purchasers, and all the incumbrancers, have equal claims upon the estate. This is the meaning of the expression, that their equity is equal. But if there is a term of years subsisting in the estate, which was created prior to any of the purchases, mortgages, or other incumbrances, and *A.* procures an assignment of it in trust for himself, this gives him the legal interest in the lands during the continuance of the term, absolutely discharged from, and unaffected by, any of the purchases, mortgages, and other incumbrances, subsequent to the creation of the term, but prior to his purchase. This is the meaning of the expression in assignments of terms, that they are to protect the purchaser from all mesne incumbrances. But it is to be observed, that *A.* to be entitled in equity to the benefit of the term, must have all the following requisites: he must be a purchaser for a valuable consideration; his purchase must in all respects be a fair purchase, and free from every kind of fraud; and at the time of his purchase he must have no notice of the prior conveyance, mortgage, charge, or other incumbrance. It is to be observed, that mortgages, annuities, judgment creditors, lessees, and all other incumbrancers, are purchasers in this sense, to the amount of their several charges, interests, or rights. If any person of this description, unaffected by notice or fraud, takes a defective conveyance or assignment of the fee, or of any estate carved out of it, defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also takes an assignment of a term to a trustee for himself, or to himself, where he takes the conveyance of the inheritance to his trustee; in each of these cases, he is entitled to the full benefit of the term; that is, he may use the legal estate of the term to defend his possession during the continuance of the term, or, if he has lost the possession, to recover it at common law, in preference to all claimants prior to his purchase, but subsequent to his term. All this was laid down and explained by lord Hardwicke, in the case of *Willoughby and Willoughby in Cha. Trin. 30. Geo. 2. 1756*. Upon the same principles was decided the case of *Stanhope v. earl Verney*, before lord Northington, in chancery, July 27, 1761. The case there was, that Henry Sayer, being seised in fee of certain estates subject to an outstanding term of years, in Rigby and Eyre, by indenture of lease and release, bearing date the 4th and 5th days of June 1732, conveyed them to lady Dyfart and her heirs, for securing the payment of 1000*l.* and interest, and covenanted to produce the deeds respecting the terms of years. Afterwards Rigby and Eyre assigned the term to Cunningham and Clayton in trust for Sayer, his heirs and assigns; and then Sayer, by indenture dated the 19th day of Dec. 1732, conveyed the same estates to mrs. Nash (under whom lord Verney claimed) by way of mortgage, for securing to her 3000*l.* and interest, with a declaration that Cunningham and Clayton should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to lady Dyfart. Lady Dyfart brought an ejectment; lord Verney defended, and set up the term, with a declaration of the trust of it in favour of mrs. Nash, under whom he claimed. Upon this lady Dyfart brought her bill in equity. The question was, which should be preferred? lady Dyfart, who had the first declaration of the trust of the term, or lord Verney,

graund assise reviendrait
ove lour verdict, et di-
font, que Rafe * ne fuit
pas seise en temps le roy
H. per que fuit agard
que Reynold tiendrait
les tenements vers luy
demandes, a luy et ses
heires quites de John
Barre et ses heires a
remnant. Et John en
le mercie, &c. Et le
cause pur que jeo aye
monstre icy a toy, mon
fils, cest plee, est, pur
prover le matter pre-
cedent que est dit en brieve
de droit, &c. car il sem-
ble per cest plee, que si
Reynold n'avoit pas ten-
due demy marke pur en-
quiere del temps, &c.
donques le graund assise
duisoit estre chargetant-
selement del mere droit,
et nemy del possession,
&c. † Et issint que tous
foits en brieve de droit,
si le possession dont le
demandant counta soit
en temps le roy, come
il avoit counte, donques
le charge del grande as-
sise serra tantselement
sur le mere droit, coment
que le possession fuit en-
counter le ley, come il
est dit adevant en cest
chapter, &c.

verdict, and said, that
Rafe was not seised in
the time of king Henry,
whereby it was awar-
ded that Reynold should
hold the tenements de-
manded against him, to
him and his heires quite
of John Barre and his
heires to the remnant.
And John in mercy, &c.
And the reason why I
have shewed to thee,
my son, this plea, is, to
prove the matter prece-
dent which is said in a
writ of right; for it see-
meth by this plea, that
if Reynold had not ten-
dred the halfe marke to
enquire of the time, &c.
then the grand assise
ought to be charged
onely to enquire of the
meere right, and not of
the possession, &c. And
so alwayes in a writ of
right, if the possession
wherof the demandant
counteth bee in the
king's time, as hee hath
pleaded, then the charge
of the grand assise shall
be only upon the meere
right, although that the
possession were against
the law, as it is said
before in this chapter,
&c.

of a new addition; and
therefore though it bee
true, yet not to bee al-
lowed.

*Et le original et
le proces fuera de-
mande devant jus-
tices itinerants.* For
it is to be understood,
that all pleas either in
the realty or personalty
that were begunne and
not determined before
justices in cire, were
adjourned by them into
the court of common
pleas.

4. E. 3. 41. Peverel's case.
Mirror,
Glanvil,
Bracton,
Britton,
Fleta; } ubi supra.

*Les 12 chiva-
lers fieront lour se-
rement sauns chal-
lenge, &c. pur ceo
que le election fuit
fait per assent des
parties ove les 4
chivalers.*

Here are foure things
to be observed.

First, that *omnis con-
sensus tollit errorem*, and
against his owne consent
he cannot challenge the
twelve.

Secondly, that the
foure knights electors
of the grand assise are
not to be challenged, for
that in law they bee
judges to that purpose,
and judges or justices
cannot bee challenged.
And that is the reason
that noblemen, that in
case of high treason are
to passe upon a peere
of the realme, cannot be
challenged, because they
are judges of the fact,
and the *Magna Charta*
saith, *per judicium parium
suorum*.

30. E. 1. tit. challenge 172.
21. E. 4. 77. 39. E. 3. 1.
44. E. 3. 6. 11 H. 6. 13.
(Cro. El. 664.)

4. E. 3. 13.

Magna Charta cap. 29.

Thirdly, that the
twelve before any assent

39. E. 3. 2. 7. H. 4. 20.

7. H. 4. 20.

may be challenged before the foure knights electors, but after assent or return of the pannell
before the justices, there shall be no challenge to the pannell nor to the polles.

Fourthly, if there be not foure knights for electors in that county, the next to them in
that county shall be taken; *ne curia regis deficeret in justitiâ exhibendâ*.

Sauns dire a lour escient. And here it appeareth, that where the judgement is
finall, there the oath of the grand assise or jury is absolute, and not to their knowledge, as
here

* ne not in L. and M. nor Roh.

† et not in L. and M. nor Roh.

Verney, who had the subsequent declaration of the trust, but had the custody of the deed.—Lord Northington held, that a decla-
ration of trust in favour of an incumbrancer, was tantamount to an actual assignment, unless a subsequent incumbrancer, *bona
fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust
of it in favour of a second incumbrancer, was *equivalent to an actual assignment*; and therefore gave him an advantage over the
first incumbrancer, which equity would not take from him. Such being the advantages to be derived from terms of years, it is an
object of great consequence to ascertain, when it is safe for the purchaser to leave them in the trustee in whom he finds them, and
when it is necessary or prudential to require them to be assigned to a trustee of his own.—But it is more easy to say where it is unsafe,
than to say where it is safe, for him to be satisfied without such an assignment of it.—1st, It may be laid down, as a general rule, that
whenever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person intitled to re-
ceive, to a trustee for the person obliged to pay, the money, is the best possible evidence of the payment of the money, it may be reason-
ably required as such.—2dly, In case a term of years has been assigned to attend the inheritance, if, upon a purchase (taking it in the
above

here in the writ of right, in the attainr, and in wager of law, for the judgement in every of these three is final.

Vide Sect. 193.

Reg. from.

33. H. 8. ca. 13. 3. E. 6. ca. 36.

10. E. 3. 20. 31. E. 3. droit 11.
22. E. 3. 17. 18. H. 3. droit 62.
33. E. 3. 1b. 39. Lamb. explicat.
verborum verbo Mancusa.

F. N. B. 31. c. 3. 1. E. 3.
droit 15. 6. E. 3. ibid. 24.

Mirror, ca. 1. §. 17. ca. 3. de
Attaint. ca. 5. §. 1. Bract. fo.
288, 289. &c. 292. Brit. fol. 241.
245, 246. &c. Flet. li. 5. ca. 21.
& 34. Fortescue ca. 26.

(3. Inst. 163. 222.)

[a] 23. H. 8. ca. 7. 3. Eliz.
Dyer. 201. 7. E. 6. ibidem 81.
3. Mar. ibidem 129. 7. Eliz. ibi-
dem 235. 24. H. 8. Br. Attaint.
96. 4. Mar. ib. 127. 20. H. 7. 5.
42. E. 3. 26.
F. N. B. 107. D.
Mirror ca. 1. §. 3. ca. 3. §. ca. 5.
4. 1. Bracton lib. 3. 141. b. &
fo. 320. 331. Glanvil. lib. 2.
cap. 3. 4. 5. Lib. 8. ca. 9. Lib. 4.
ca. 1. Brit. fo. 40. 42, 43. 81.
175. 190. Fleta lib. 1. ca. 32. &
lib. 2. cap. 48.
[b] 4. E. 3. 41. 17. E. 3. 19. H. 6.
35. 1. H. 4. 3. 30. E. 3. 20.
29. E. 3. 12. 12. H. 4. 4. Stan.
174. 178. 17. Eli. Dyer. 9. E. 4.
35. 1. H. 6. 6. 3. H. 6. 55.
Vid. li. 9. fo. 32. b. & 33. b.
Mirror ca. 4. del office des jus-
tices, &c.
Glanvil. li. 1. cap. 9. lib. 8.
cap. 8.

Le mise est joyne. *Mise* is a word of art appropriated only to a writ of right, so called because both parties have put themselves upon the mere right to be tried by grand assise or by bataille: so as that which in all other actions is called an issue, in a writ of right in that case is called a mise. And in this sense *Littleton* taketh it here. But in a writ of right if a collateral point is to be tried, there it is called an issue; and is derived of this word (*missum*), because the whole cause is put upon this point. It is also taken for expences, as *mise & castagia*. And sometime it signifieth a customary grant to the king, or lord's marchers of Wales by their tenants at their first coming to their lands.

Tender di marke al roy. Master *Lambard* saith, that *mancusa & marca* Saxonic *Mancup. 7. Meare. Nominus 30 vaicns denarios.* And this *meare*, now called a marke, being an old Saxon word, is the cause that England most commonly reckoned by markes. *Libra Saxonica* is a pund, à pondo, which is called so until this day. *Solidus, qui apud nos est pars librae vicesima, denarios per id temporis continebat quinque. nunc duodecim;* and *scilling* is a Saxon word, and with us used to this day. *Pennye, Saxonice pennig, i atinè denarius;* but the value of these have not been alwayes one.

In a writ of right of advowson brought by the king, the tenant shall not tender the *di-marke*, because *nullum tempus occurrit regi*; and therefore the king shall alledge, that hee or his progenitor was seised, without shewing any time.

En attainr. *Attinela* is a writ that lyeth where a false verdict in court of record upon an issue joyned by the parties is given. And of ancient writers it is called *brevé de convictione*; and is derived of the participle *vinctus*, or *attinens*, for that if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever; for the judgement at the common law in the attainr importeth eight great and grievous punishments. 1. *Quòd amittat liberam legem imperpetuum*, that is, he shall be so infamous as he shall never be received to be a witnesse, or of any jury. 2. *Quòd foris faciant omnia bona & catena sua.* 3. *Quòd terræ et tenementa in manus domini regis capiantur.* 4. *Quòd uxores & liberi extra domus suas ejicerentur.* 5. *Quid domus suæ profrentur.* 6. *Quòd arbores suæ extirpentur.* 7. *Quòd prata sua aventur.* Et 8. *Quòd corpora sua carceri mancipentur.* So odious is perjury in this case in the eye of the common law, and the severity of this punishment is to this end, *ut pœna ad paucos, metus ad omnes perveniat*; for there is *misericordia puniens*, and there is *crudelitas parcens*. And seeing all tryals of reall, personall, and mixt actions depend upon the oath of 12 men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury.

But since *Littleton* wrote, a statute hath beene made in mitigation of the severity of the common law, in case when the petite jury is attainted, and therefore it is taken by equity. For where the statute saith, that the party grieved shall have an attainr against the party which shall have judgement upon the verdict, yet an attainr shall be maintained upon that statute against the executors of the party. *Et sic de similibus.* [a] But see the statute and authorities quoted in the margent. Only I thought good to observe three things.

First, that no attainr can be maintained upon this statute but between party and party.

Secondly, that no confuance can be granted upon any attainr, because all attainrs are to be taken either before the king in his bench, or before the justices of the common place, and in no other courts, &c.

Thirdly, consider what pleas may bee pleaded in an attainr by force of this act, and what not.

En bataille. *Duellum, monomachia*, and it signifieth in the common law a tryall by single fight, by bataille or combat, *monomachia* (1). [b] And in the writ of right neither the tenant or demandant shall fight for themselves, but finde a champion to fight for them: because if either the demandant or tenant should be slaine, no judgement could be given for the lands or tenements in question. But in an appeale the defendant shall fight for himselfe, and so shall the plaintife also; for there if the defendant be slaine, the plaintife hath the effect of his suite, that is, the death of the defendant; the order and solemnity whereof you may reade in our ancient and latter bookes. And this the law did institute when the tenant failed of his wittnesses, or evidences, or other proofes; and the presumption of law is, that God will give victory to him that hath right.

Ley gager, Vadiare legem; and there is also *facere legem*, by making of his law. That is, to take an oath (for example) that hee oweth not the debt demanded of him upon a simple contract, nor any penny thereof. And it is called wager of law, because of ancient time

* ne not in L. and M. nor Roh.

† Et, not in L. and M. nor Roh.

(1) Upon this subject, see 3. Black. ch. 22. sect. 5. and 6. and the notes to the 1st vol. of Dr. Robertson's History of Charles the Vth.—The reader will also find some curious and interesting particulars upon this head, in *Pere le Brun, Traité de quelques pratiques superstitieuses qui ont séduit le peuple, et embarrassé les juges*.

above extensive sense) all the deeds (as well originals as counterparts) by which the term was created or assigned, are delivered to the purchaser, and he is satisfied, that the trustee in whom it is then said to be vested, has made no prior assignment of it; it is difficult to say what possible use can be made of the term against him, or what good end can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate.—3dly, But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee's not having previously assigned it; it seems prudent to require an actual assignment of it to a trustee for him.—Few general rules, besides these, can be laid down upon this subject.—And these must from their nature be subject to an endless variety of modifications. In all cases of this description, it is infinitely better to err by an excess of care, than to trust any thing to hazard. There is no doubt but the precautions used for the security of purchasers appear sometimes to be excessive, and satisfactory reasons cannot always be given for requiring some of them: yet the more a person's experience increases, the more he finds the reason and real utility of them; and the more he will be convinced that very few of the precautions required by the general practice of the profession are without their use, or can be safely dispensed with.

time he put in surety to make his law at such a day; and it is called making of his law, because the law doth give such a special benefit to the defendant to barre the plaintife for ever in that case. [r] But he ought to bring with him eleven persons of his neighbours that will avow upon their oath, that in their consciences he saith truth, so as he himselfe must bee sworne *de fidelitate*, and the eleven *de credulitate*.

And wayer of law lieth not when there is a specialty, or deed to charge the defendant, but when it groweth by word, so as he may pay or satisfie the party in secret, whereof the defendant having no testimony of witnesses may wage his law, and thereby the plaintife is perpetually barred; as *Littleton* here saith; for the law presumeth that no man will forswear himselfe for any worldly thing; but mens consciences doe grow so large (specially in this case passing with impunity) as they choose rather to bring an action upon the case upon his promise, wherein (because it is *trespasse sur le case*) hee cannot wage his law, than an action of debt.

A man outlawed or attainted in an attainr, or upon an inditement of conspiracy; or of perjury, or otherwise, whereby he become infamous, shall not wage his law.

A man under the age of 21 yeares shall not wage his law; but a feme covert, together with her husband, shall wage her law.

When the suite is for the king, or for his benefit, as in a *quo minus*, the defendant shall not wage his law.

If an infant be plaintife, the defendant shall not wage his law. An alien shall wage his law in that language he can speake.

In no case where a contempt, trespassse, deceit, or injury is supposed in the defendant, he shall wage his law, because the law will not trust him with an oath to discharge himselfe in those cases; only in some cases in dett, detinue, accompt, the defendant is allowed by law to wage his law.

In an action of account against a receiver, upon a receipt of money by the hand of another person for account render (unlesse it be by the hands of his wife, or of his commoigne) the defendant shall not wage his law, because the receipt is the ground of the action, which lyeth not in privity betweene the plaintife and defendant, but in the notice of a third person, and such a receipt is traversable. [d] But in an action of debt upon an arbitrament, or in an action of detinue by the bailement of another's hand, the defendant shall wage his law, because the *debet* and the *desinet* is the ground of those actions, and the contract or bailement, though it be by another hand, is but the conveyance, and not traversable. In an action of account against a bailife of a mannor, the defendant cannot wage his law, because it foundeth in the realty. In an action of debt which concerns the realty, as for debt for a rent upon a lease for yeares, or an action of detinue for detaining an indenture of a lease for yeares, the defendant shall not wage his law, much lesse for charters or deedes which concerne inheritance.

In an action of debt for a fine or amerciament in a leete, the defendant shall not wage his law, because the leete is a court of record; but in an action of debt for an amerciament in a court baron the defendant shall wage his law, for that it is no court of record.

In debt upon an account, before auditors, the defendant shall not wage his law, and this by construction of the statute of *W. 2. cap. 11.* which giveth them great authority, and saith, *coram auditoribus*, and therefore of an account before one auditor the law lyeth. So if the lord before auditors be found in surplussage, in an action of debt brought by the accomptant, the lord shall not wage his law by construction also upon this statute, as an incident rising upon the account.

In an action of debt by a gaoler against the prisoner for his victuals, the defendant shall not wage his law, for he cannot refuse the prisoner, and ought not to suffer him to die for default of sustenance; otherwise it is for tabling of a man at large.

In an action of debt brought by an attorney for his fees, the defendant shall not wage his law, because he is compellable to be his attorney. And so if a servant be retained according to the statute of labourers in an action of debt for his salary, his master shall not wage his law, because he was compellable to serve; otherwise it is, if he be not retained according to the statute. (1)

Wheresoever a man is charged as executor or administrator, he shall not wage his law, for no man shall wage his law of another man's deed, but in case of a successor of an abbot, for that the house never dyeth.

In debt upon a penalty given by statute, the defendant shall not wage his law. There is another kinde of wayer of law in a reall action, of *non summons*, but thereof *Littleton* speaketh not.

Et sur ceo Herle justice dit, &c. Hereby it appeareth, that it is the office of

Lib. 10. cap. 5. Braet. li. 3. traet. 2. ca. 37. & li. 5. fol. 410. Britton fol. 56. Fleta lib. 2. ca. 56. 63. [r] Magna Carta ca. 28. Bracon lib. 5. fol. 410. Fleta lib. 2. ca. 63. Diversities des Courts. 33. H. 6. 8. (4. Rep. Slade's case 93.)

33. H. 6. 32.

11. H. 6. 40. 15. E. 4. 2. (Cro. Eliz. 161.)

32. H. 6. 24. 8. H. 5. Ley 66. 35. H. 8. Ley. Br. 102.

26. E. 3. 63. b. 21. H. 6. 42.

44. E. 3. 32. 18. E. 3. 4. 24. E. 3. 39. (4. Rep. 95. b.)

15. E. 4. 16. 10. E. 4. 5. (3. Cro. 790. 919.)

[d] 33. H. 6. 24. 13. H. 7. 3. 2. 22. H. 6. 41. 1. H. 6. 1. b. 8. H. 6. 11. 18. H. 8. 3. 3. E. 3. 28. 11. H. 4. 54. 5. H. 5. 13. 21. H. 6. 30. 24. E. 3. Ley 63. 30. E. 3. 19. 9. E. 4. 1.

34. H. 8. Ley Gager. Br. 97.

10. H. 6. 7. 1. H. 7. 25. 6. Eliz. Bendloes.

9. H. 5. 5. 8. H. 6. 15. 22. H. 6. 35. 38. H. 6. 6.

14. H. 6. 62. 38. H. 6. 6.

28. H. 6. 4. 19. H. 6. 20. 22. H. 6. 13. 39. H. 6. 18.

21. H. 6. 4.

38. H. 6. 22. 39. H. 6. 18.

5. H. 6. 38. 1. H. 7. 25. 13. H. 7.

10. H. 7. 18.

(1) Otherwise of a counsellor at law, for he cannot bring any action; for he is not compellable to be counsellor, and his fee is honorarium, not a debt. *Ammianus*, lib. 3.—Lord Nott. MSS.

(2) At Rome the functions of the bar were divided between, I. The Patrons, or Orators: II. The Advocates, who attended to inform or instruct the patrons upon the points of law, which arose in the cause: III. The Procurators: And, IV. the Cognitors. The two last nearly resembled the Attornies of our courts. Besides these, were the *Juris-consulti*, who gave their opinions and advice upon matters of law. Till the time of Augustus every person had this liberty; but he confined it to some particular individuals selected by him, and made a regulation, that in future no one should enjoy that privilege but under the authority of the prince. The opinions of the *Juris-consulti*, called the *Responsa Prudentum*, were of great weight; and a considerable part of the Roman law is founded upon them. See *Gravina de Ortu et Progressu Juris Civilis*, lib. 1. sect. 42, 43, 44. In the Summary of the Roman Law, taken from Dr. Taylor's Elements of the Civil Law, page 26, it is observed, that the *Responsa Prudentum* seem to amount to what we call Precedents, or Reports; that it is common to them both to be the determinations of lawyers to explain the law: but that there is this difference between them, that our precedents owe their authority to their being the judgment of the court; but the *Responsa Prudentum*, though admitted as law, were nothing more than the private opinions of lawyers. See *Cod. lib. 1. tit. 17.* and the *Cod. Theo. lib. 1. tit. 4.* with the notes of Gothofred. It is supposed, that, in the early days of the Roman Empire, the practice of the law was merely honorary; but it soon became an object of gain. The Cincian law, which was passed about the time of the second Punic war, was intended to revive the primitive custom of honorary advocacy. But it was so often evaded, that the emperor Claudius thought it more advisable to moderate, than to attempt to destroy entirely, the salaries or emoluments of advocates. He accordingly inhibited them from taking a larger fee than ten sesterces, about 80l. 14s. 7d. English. The advocates, however, thought it an indignity, that their fees should be considered as wages, and therefore dignified them by the honourable title of presents, or gratuities; but as they might demand, and even maintain an action for their fees, this distinction was merely nominal. See Gothofred *de Salario*, and Doctor Bever's History of the Civil Law, page 444. In England the fees of counsel are honorary, in the strict acceptation of the word. Thus in *Moor v. Row*, Cha. Rep. 38. a counsellor brought a bill for fees due to him from the defendant, a solicitor. The defendant demurred; the demurrer was allowed, and the bill dismissed. Sir John Davies thus expresses himself upon this subject, in his preface to his Reports, pag. 22, 23. "The fees to counsellors are not in nature of wages, or pay, or that which we call salary, or hire, which are duties certain, and grow due by contract, for labour or service, but what is given him is honorarium, not merces; being a gift which gives honour as well to the taker as the giver: nor is it certain or contracted; for no price, or rate, can be set upon counsel, which is invaluable and inestimable, so as it is more or less, according to the circumstances, namely, the ability of the client, the worthiness of the counsellor, the weight-

of the judges to instruct the grand assise or jury in points of law; for as the grand assise or other jurors are triers of the matters of fact, *ad questionem facti non respondent iudices*, so *ad questionem juris non respondent juratores*. And accordingly the judge in this case directed the grand assise, viz. if they found that, &c.

Glanc. li. 12. cap. 1. &c.
Bracton li. 5. fo. 328.

Lib. 5. fol. 85. Penrin's case.

34 E. 3. Judgm. 256. adjudge
accord. 13. H. 4. Judgm. 245.
10. H. 6. 8. 20. H. 6. 38. b.
11. H. 6. 34. b. 26. H. 8. 8. b.
1. Mar. Dy. 98. li. 5. fo. 85.
Penrin's case. F. N. B. 5. 11. 31.

Per que fuit agard. Here are two things to be observed. First, the form of a judgement finall. Secondly, that a judgement finall is to bee given in this particular case. For the forme of the finall judgement for the tenant is here expressed, that the tenant shall hold the tenements demanded against him, to him and his heirs quite of the demandant and his heirs for ever, and the demandant in the mercy. *Quod tenens teneat terram illam sibi et hæredibus suis in pace versus petentem, et hæredes suos in perpetuum.*

For the second point, seeing the mise is joyned upon the meer right, albeit the verdict of the grand assise be given upon another point, yet judgement finall shall be given. And so it is if the tenant after the mise joyned make default, or confesse the action, or if the demandant be non-suite; and yet in none of these cases they of the grand assise gave their verdict upon the meer right.

Come est avantdit. Vid. Sect. 478.

CHAP. 9. Of Confirmation. Sect. 515.

Bract. li. 2. fol. 32. b. & 58. 59.
Brit. 235.

* Lit. pag. sequen.

Bract. li. 2. 58.

Bract. li. 2. fol. 27. 58.
58. H. 6. 34. 37. Pl. Com.
Count de Leicester's case.
(3. Rep. 64. b.)
10. E. 2. Confirm. 24. 32. E. 3. 9.

[c] Fleta lib. 3. cap. 14. & lib. 3.
cap. 3.

44. Aff. 3.

Li. 9. fo. 142. Beaumont's case.
Flet. li. 3. cap. 14.

HERE first our author shewes what a confirmation is:

Confirmation. *Confirmatio* commeth of the verbe ** confirmare*, quod est firmum facere; and therefore it is said, that *confirmatio omnes supplet defectus*. licet id quod actum est ab initio, non valuit. A confirmation is a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased.

A confirmation doth not strengthen a voide estate.

Confirmatio est nulla ubi donum præcedens est invalidum, & ubi donatio nulla omnino nec valebit confirmatio: for a confirmation may make a voidable or defeasible estate good, but it cannot worke upon an estate that is voide in law. *Non valet confirmatio nisi ille qui confirmat sit in possessione rei, vel juris unde fieri debet confirmatio, & eodem modo nisi ille cui confirmatio fit, sit in possessione.* And another saith, [c] *Confirmare est id quod prius infirmum fuit firmare. Et donationum alia incepta, & defectiva, & post tempus confirmata, confirmatio enim omnem supplet defectum, poterit enim esse in pudenti donec per ratificationem hæredis cum ad ætatem pervenerit roboretur.* (1)

Ratificasse. *Ratificare est ratum facere*, and is æquipollent to *confirmare*, which, as hath been said, is *firmum facere*.

Approbasse cometh of *ad* and *probo*, which is to make perfect and good.

Confirmasse. Here it is to be observed, that there bee two kindes of confirmations, viz. confirmations expresse or in deed, whereof Littleton hath here put these three examples, and confirmations implied, or in law, whereof Littleton hereafter speaketh in this chapter. *Qualibet confirmatio, aut est perficiens, crescens, aut diminuens;* and of all these Littleton putteth examples in this chapter. And hereof Fleta saith, *carta autem de confirmatione est illa que alterius factum consolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit.* (2)

A DEEDE of confirmation is commonly in this forme, or to this effect: *Know all men, &c. that I A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which I have, of, and in one messuage, &c. with the appurtenances in F. &c.*

Sect.

(1) A confirmation is an approbation of, or assent to, an estate already created; by which the confirmor strengthens and gives validity to it, as far as it is in his power. It has this operation only, with respect to estates voidable or defeasible; but it has no operation upon estates which are absolutely void. Such words may be used in a confirmation as may encrease or enlarge the estate; but that, as lord chief baron Gilbert observes, is by the force of those words, and, strictly speaking, is foreign to the confirmation. Gilb. Ten. 75.

(2) See 9. Rep. 142. where sir Edward Coke brings examples of these different operations of a confirmation.

"weightiness of the cause, and the custom of the country. It is a gift of such a nature, that the able client may not neglect to give it without ingratitude, for it is but a gratuity, or taking of thankfulness; yet the worthy counsellor may not demand it without doing wrong to his reputation, according to that moral rule, *multa honesta accipi possunt que tamen peti non possunt.*" In France the Roman law respecting the fees of advocates formerly prevailed. Many instances are found in their law books, of advocates bringing actions for their fees, and recovering upon them: but this has long fallen into disuse. In the contest, in 1775, between Mr. Linguet and the Order of Advocates, one of the charges against him was, that he had written to the duke d'Aiguillon, to demand his fees; and threatened him with an action for them; and that his demands upon the duke had been referred to arbitration. See *Journal Historique du Retablissement de la Magistrature*, tom 7. p. 190. Ordonnances have been made at different times enjoining the advocates to subscribe, at the foot of their pleadings, a receipt for their fees; but the advocates never would obey them. The leading ordonnance upon this head is that of Blois. In 1602, the parliament of Paris gave an arret, enforcing the observance of that ordonnance. This gave the advocates too much offence, that three hundred of them renounced their profession upon it, with the usual formalities. This put an entire stop to the proceedings of the courts of justice. The matter was afterwards settled; and the ordonnance of Blois, in this respect, and the subsequent ordonnances enforcing it, are now considered as virtually repealed. See Loyfel, *Dialogue des Avocats*; and *Menagii Juris Civilis Amentitates*, cap. 18.

Sect. 516.

*ET en ascun case un fait de confirmation est bone et available, lou en tiel case un fait de release n'est passe bone ne available. Sicome jeo lessa terre a un home pur terme de sa vie, lequel lessa mesme la terre a un autre pur terme de xl. ans, per force de quel il est en possession; si jeo per mon fait confirme l'estate del tenant a terme d'ans, et puis le tenant a terme de vie mourust durant le terme des * ans, jeo ne puis enter en la terre durant le dit terme.*

adjudged [d], that the lease for thirty yeares was determined by the death of lessee for life, and that the lessee for sixty yeares might enter; for that albeit the lease for sixty yeares was the latter in time, yet was it of greater force in law, for that the lessor who had power to confirme which of them he would, did first confirme the second lease.

In this chapter is also to be observed eight cases, wherein a release and a confirmation have the like operation in law.

AND in some case a deede of confirmation is good and available, where in the same case a deede of release is not good nor available. As if I let land to a man for terme of his life, who letteth the same to another for terme of forty yeares, by force of which he is in possession; if I by my deed confirme the estate of the tenant for yeares, and after the tenant for life dieth during the terme of yeares, I cannot enter into the land during the said terme.

LITTLETON in this chapter putteth eight diversities between a confirmation and a release; (1) and thereof for illustration here he putteth two cases in this and the next Section, which upon that which hath beene said in the precedent chapters, is sufficiently explained. Onely in both these cases this is to be observed, that where a confirmation shall enlarge an estate, there privity is required, as well as in the case of the release, as by many examples which Littleton puts in this chapter appeareth. And note, here is the first case wherein a release and a confirmation doe differ:

Lessee for life made a lease for thirty yeares, and after the lessor and lessee for life made a lease for sixty yeares to another, which lease for sixty yeares the lessor did first confirme, and after the lessor confirmed the lease for thirty yeares, and after tenant for life dyed within the thirty yeares; and it was

(Cro. Car. 284.

1. Roll. Abr. 483. 500. Mo. 67.

Dyer 218. b. Hob. 165.

Post. 310. 2.)

[d] Inter Unwel & Lodge, temp.

Reg. Eliz.

(Hob. 7.)

Sect. 517.

UNCORE si jeo per mon fait de release avoy releas al tenant a terme d'ans en la vie le tenant a terme de vie, cel release serra voyd, pur ceo que adonques ne fuit ascun privity perenter † moy et le tenant a terme d'ans: car release n'est available al tenant a terme d'ans, mes lou est un privity perenter luy et celui que releasast.

YET if I by my deed of release had released to the tenant for years in the lifetime of the tenant for life, this release shall be void, for that then there was not any privity between me and the tenant for years: for a release is not available to the tenant for yeares, but where there is a privity between him and him that releaseth. (2)

This belongeth to the first diversity between a release and a confirmation.

* xl. added L. M. and Roh.

† moy et le tenant a terme d'ans,—luy et moy, L. M. and Roh.

(1) He also mentions eight instances in which they agree.

(2) For in this case, if the lessor released to the lessee for years, without using any further words, the operation of the release would be to enlarge the estate of the lessee by giving him an estate of freehold for his life. Now to make releases operate in this manner, it is necessary, not only that the releasee, at the time the release is made, should be in the actual possession of, or have a vested interest in, the lands intended to be released, but that there should be a privity between him and the releasor. In the case mentioned by Littleton, there is no privity between the donor and the lessee of the donee for life. A release therefore from the donor to the lessee would be void. But a confirmation by the donor is good, and gives a stability and permanency to the estate of the lessee during the whole term, which would otherwise determine by the decease of the donee. Antc 272. a. 273. b.

Sect. 518.

HERE is the second diversitie betweene a release and a confirmation. But if the disseisor make a lease for yeares to begin at Michaelmasse, and the disseisee confirme his estate, this is voide, because he hath but *interesse termini*, and no estate in him, whereupon a confirmation may enure.

4. H. 7. 16. by Read.
22. E. 4. 36.

*EN mesme le man-
ner est, si jeo soy
disseise, et le disseisor
fait un lease a un autre
pur terme d'ans, si jeo
relessa al termor, ceo est
voyde: mes si jeo confir-
ma * l'estate le termor,
ceo est bone et effectual.*

IN the same manner it is, if I be disseised, and the disseisor make a lease to another for term of yeares, if I release to the termor, this is void: but if I confirme the estate of the termor, this is good and effectually.

Sect. 519.

(5. Rep. 81.)

ITEM, si jeo soy disseise, et jeo confirma l'estate le disseisor, il ad bone et droiturel estate en fee simple, coment que en le fait de confirmation nul mention est fait de ses heires, pur ceo que il avoit fee simple al temps de confirmation. Car en tiel case si le disseisee confirma l'estate le disseisor, a aver et tener a luy et a ses heires de son corps engendres, ou a aver et tener a luy pur le terme de sa vie, uncore le disseisor ad fee simple, et est seisee en son demesne come de fee, pur ceo que quant son estate fuit confirme, donque il avoit fee simple, et tiel fait ne poit changer son estate, sans entry † fait sur luy, &c.

ALSO, if I be disseised, and I confirme the estate of the disseisor, hee hath a good and rightfull estate in fee simple, albeit in the deede of confirmation no mention be made of his heires, because hee had fee simple at the time of the confirmation. For in such case if the disseisee confirme the state of the disseisor, to have and to hold to him and his heires of his body engendred, or to have and to hold to him for term of his life, yet the disseisor hath a fee simple, and is seised in his demesne as of fee, because when his estate was confirmed, hee had then a fee simple, and such deed cannot change his estate, without entry made upon him, &c.

19. H. 6. 22. 6. E. 3.
Confirm. 4.

HERE is the first case wherein the release and confirmation doth agree, viz. a confirmation to a disseisor in taile, or for any particular estate, is of the like force as a release to a disseisor, during such estate, which in both cases is good for ever. In the same manner it is, if the disseisor make a gift in taile, and the disseisee confirme the estate of the donee for the life of the donee, this confirmation enures to the whole estate taile; for a confirmation can make no fraction of any estate, to extend but to part of the estate onely. *Et sic de cæteris.* (1)

Sect.

* *l'estate de termor*, — *son estate*, L. and M. and Roh.

† *fait* not in L. and M. nor Roh.

(1) It is to be observed, that a disseisor acquires by the disseisin a tortious fee simple, notwithstanding at the time he makes the disseisin he claims a less estate; it being a rule, that a disseisor cannot qualify his own wrong.

Sect. 520.

*EN mesme le man-
ner est, si son
estate soit confirme pur
terme de un jour, ou
pur terme d'un heure,
il ad bon estate en
fee simple, pur ceo que
* son estate en fee
simple fuits un foits
confirme. Quia confir-
mare idem est, quodd
firmum facere, &c.*

IN the same manner
it is, if his estate bee
confirmed for terme
of a day, or for terme
of an houre, hee hath
a good estate in fee
simple, for this, that
his estate in fee simple
was once confirmed.
*Quia confirmare idem
est, quodd firmum facere,
&c.*

HERE is the second case
wherein the release and
confirmation doe agree. The
reason of this is, for that
the disseisor hath a fee sim-
ple; and therefore if his
estate be confirmed but for
an houre, it is good for ever,
because (saith *Littleton*) *con-
firmare idem est, quodd firmum
facere.*

Nota, a diversity betweene
a bare assent without any
right or interest, and an assent
coupled with a right or inte-
rest; and therefore an attorne-
ment cannot be made for a
time nor upon condition;

Lib. 5. fol. 81. Forde's case.
(Ant. 274. a.)
(Post. 300. b.)

but if the person make a lease for a hundred yeares, the patron and the ordinary may con-
firme fifty of the yeares, for they have an interest, and may charge in time of vacation.
And so if a disseisor make a lease for an hundred yeares, the disseisee may confirme parcel of
those yeares; but then it must be by apt words, for he must not confirme the lease, or demise,
or the estate of the lessee, for then the addition for parcell of the terme should be repugnant
when the whole was confirmed before, but the confirmation must be of the land for part of
the terme. So may the confirmation be of part of the land; as if it be of forty acres, he may
confirme twenty, &c. So if tenant for life make a lease for an hundred yeares, the lessor may
confirme eyther for part of the terme, or for part of the land. But an estate of free-hold can-
not bee confirmed for part of the estate, for that the estate is intire, and not severall, as
yeares be (1).

(1. Roll. Abr. 412)

Sect. 521.

*ITEM, si mon dissei-
sor fait un leas a
terme de vie, le re-
mainder ouster en fee,
sijeo releas al tenant a
terme de vie, ceo urera
a celuy en le remainder.
Mes sijeo confirme l'es-
tate de le tenant a terme
de vie, uncore apres son
decease jeo puis bien
enter, pur ceo que +
riens est confirme fors-
que l'estate le tenant
a terme de vie, issint
que apres son de-
cease, jeo puis enter.
Mes quant jeo releffa*

ALSO, if my dis-
seisor maketh a
lease for life, the
remainder over in fee,
if I release to the
tenant for life, this
shall enure to him
in the remainder.
But if I confirme
the estate of the te-
nant for tearme of
life, yet after his
decease I may well
enter, because no-
thing is confirmed
but the estate of the
tenant for life, so
that after his de-

HERE is the third
case wherein the
release and confirmation
differ, for the confir-
mation to the tenant
for life doth not enure
to him in the remain-
der.

And so it is when the
severall estates be in one
person; as if the disseisor
make a gift in taile, the
remaynder to the right
heires of tenant in
taile, if the disseisee con-
firms the estate in taile,
it shall not extend to
the fee simple. no more
than if the disseisor had
made a gift in taile, the
remainder for life, the
remainder to the right
heires of tenant in taile;
this extendeth onely to
the estate taile, and not
to

* son not in L. and M. nor Roh.

+ nul added L. and M. and Roh.

(1) The distinctions taken here by sir Edw. Coke are, that a confirmation to a tenant of freehold or inheritance, cannot be so worded as to have a less operation than that of confirming his whole estate; consequently, a confirmation to such a tenant, either of the lands, or of his estate in them, for any term or period, is a confirmation of his whole fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of his whole fee. It is otherwise in the case of a term of years. A confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold or of inheritance is considered as integral and indivisible. But years are several, the term which is composed of them is necessarily fractional and divisible, and may consequently be confirmed in part only, by using proper expressions for this purpose. If a person confirms the estate of the tenant for years for part of the term, as the word estate signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary.

(Ant. 52. a.)
(Post. 310. a. 315. a. 319. a.)
(1 Roll. Abr. 302.)

to the remainder for life, nor to the remainder in fee. But if the disseisor make a lease for life to *A.* and *B.* and the disseisee confirm the estate of *A. B.* shall take advantage thereof; for the estate of *A.* which was confirmed was joynt with *B.* and in that case the disseisee shall not enter into the land, and devest the moiety of *B.*

(Sid. 83.)

If the disseisor infeoffs *A.* and *B.* and the heirs of *B.* if the disseisee confirm the estate of *B.* for his life, this shall not only extend to his companion, as hath been said, but to his whole fee simple, because to many purposes hee had the whole fee simple in him, and the confirmation shall be taken most strong against him that made it.

(1 Cro. 321.)
(Ant. 181.)

Tenant in taile discontinueth in fee and dyeth, the discontinuuee make a lease for life, and granteth the reversion to the issue, he shall not have a formedon against tenant for life; for by his formedon he must recover estate of inheritance, and the lessee for life hath not the inheritance, but the issue in taile himselfe hath it.

(Ant. 202. a.)

If feoffee upon condition make a lease for life, or a gift in taile, and the feoffor release the condition to the feoffee, he shall not enter upon the lessee or donee, because he cannot regain his ancient estate.

If the feoffee upon condition make a lease for life, the remainder in fee, if the feoffor release the condition to the lessee for life, it shall enure to him in the remainder, as well as in the case of the right, or of a rent, &c.

If a feme disseisoreffe make a feoffment in fee to the use of *A.* for life, and after to the use of herselfe in taile, and the remainder to the use of *B.* in fee, and then taketh husband the disseisee, and he releaseth to *A.* all his right, this shall enure to *B.* and to his own wife also; for by the rule of *Littleton* it must enure to all in the remainder (1).

But if *A.* letteth to *B.* for life, and *B.* maketh a lease to *C.* for his life, the remainder to *A.* in fee, *A.* releaseth to *C.* all his right, this is good to perfect the estate of *C.* for his life. But when *C.* dyeth, *A.* shall be in of his old estate, for his release could not enure to himselfe to perfect his defeasible remainder, but his ancient right remaineth. And note, that in these two cases the fee is devested and vested all at one instant; in the same manner as if tenant in taile make a lease for life, at the same instant the estate taile is devested out of the donee, and the reversion in fee out of the donor, and a new fee vested in tenant in taile. And so if the husband make a lease for life of his wife's land, he devesteth his owne estate, that he hath in her right, and the inheritance of his wife, and at the same instant vested a new reversion in fee in himselfe.

Vid. 29. Aff. 17. 30. H. 8.
Recov. en value. Br. 30.
13. E. 3. entr. cong. Br. 127.

Mes en cest case si le disseisee confirme l'estate et tittle celuy en le remaynder. Here is the third case wherein the release and confirmation doe agree, for

* et not in L. and M. nor Roll.

(1) For though a man cannot contract with his wife, or transfer any interest to her, yet she may, by construction of law, take benefit of a release made by him to a third person, and enuring by way of extinguishment. Hawk. Abr.

tout mon droit al tenant a terme de vie, ceo urera a celuy en le remainder ou en le reversion, pur ceo que tout mon droit est ale per tiel releas. Mes en cest cas, si le disseisee confirme l'estate et le tittle celuy en le remainder sans aucun confirmation fait a tenant a terme de vie, le disseisee ne poit enter sur le tenant a terme de vie, pur ceo que le remainder est dependant sur l'estate le tenant a terme de vie; et si son estate serroit defeate, le remainder serroit defeate per l'entree le disseisee, et ceo ne serra reason que il per son entre defeateroit le remainder encounter son confirmation, &c.

cease I may enter. But when I release all my right to the tenant for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release. But in this case, if the disseisee confirms the estate and title of him in the remainder without any confirmation made to tenant for life, the disseisee cannot enter upon the tenant for terme of life, for that the remainder is depending upon the state for life; and if his estate should be defeated, the remainder should be defeated by the entry of the disseisee, and it is no reason that he by his entry should defeat the remainder against his confirmation, &c.

for the confirmation made to him in the remainder shall avail the tenant for life, as much as the release shall.

Pl. Com. Delamere's case.
Vid. Sect. 374.

Pur ceo que le remainder est dependant, &c. By this some have gathered, that if a disseisor make a lease for life, reserving the reversion to himself, and the disseisee confirmeth the state of the disseisor, that he may enter upon the lessee, because the estate of him in the reversion dependeth not upon the state for life as the remainder: but all is one, for by the confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder; and he cannot by his entry avoid the estate of the lessee for life, but hee must avoid the state of the lessor, which against his owne confirmation he cannot doe; and it hath been adjudged, that if a disseisor make a lease for life, and after levie a fine of the reversion with proclamations, and the five years passe, so as the disseisee is for the reversion barred, he shall not enter upon the lessee for life.

(Mo. 91.)

Reported by sir John Popham,
chiefe justice.
(Post. 302. a.)
(6. Rep. 40.)
(Sid. 360.)
(1. Saun. 149, 150. Ant. 224. a.)

Le remainder serra defeat. It is regularly true, that when the particular estate is defeated, that the remainder thereby shall be also defeated, but it faileth in divers cases.

For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible, and the remainder by good title, there though the particular estate be defeated, the remainder is good. As if the lessor disseise *A.* lessee for life, and make a lease to *B.* for the life of *A.* the remainder to *C.* in fee, albeit *A.* re-enter, and defeat the estate for life, yet the remainder to *C.* being once vested by good title shall not be avoided; for it were against reason, that the lessor should have the remainder againe against his owne livery; and this is well warranted by the reason of *Littleton* in this case. So it is if a lease be made to an infant for life, the remainder in fee, the infant at his full age disagree to the estate for life, yet the remainder is good, for that it was once vested by good title; for in both these cases there was a particular estate at the time of the remainder created.

Vid. Pl. Com. Colthirst's case.
(Post. 333. a. b.)

If a lease be made to *A.* for the life of *B.* the remainder to *C.* in fee, *A.* dyeth before an occupant entreteth, here is a remainder without a particular estate, and yet the remainder continueth good. (1)

17. E. 3. 48.

A rent is granted to the tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular estate continued not; for *eo instante* that he took the particular estate, *eo instante* the remainder vested, and the suspension in judgement of law grew after the taking of the particular estate. (2)

3. E. 3. Abb. Aff.
(Pl. 35. a. Vaugh. 200.
Moor 664. Yelv. 9.
2. Roll. Ab. 415. 7. H. 4. 6.
1. Rep. 66. Noy 47.)
7. H. 4. 6.

If a man grant a rent to *B.* for the life of *Alice*, the remainder to the heires of the body of *Alice*, this is a good remainder, and yet it must vest upon an instant. (3)

Sect. 522.

*ITEM, si sont deux disseisors, et le disseisee releffa a un de eux, il tiendra son compaignon hors de la terre. Mes si le disseisee confirma l'estate de l'un, sans plus * dire en le fait, ascuns dient que il ne tiendra son compaignon debors, mes tiendra joyntment oveluy, pur ceo que † riens fuit confirme forsque*

ALSO, if there bee two disseisors, and the disseisee releaseth to one of them; hee shall hold his compaignon out of the land. But if the disseisee confirme the estate of the one, without more saying in the deede, some say that hee shall not hold his compaignon out, but shall hold joyntly with him, for that nothing was con-

THIS is the fourth case wherein the release and the confirmation seeme to differ, being made unto one of the disseisors.

Confirme forsque son estate, &c. Hereby it appeareth, that if the disseisee confirme the estate of the one disseisor in the lands, to have and to hold the lands or tenements, or the right of the disseisee, to him and his heires, hee shall hold out the other disseisor; and that appeareth by *Littleton*, first, upon these words (*confirme the state of one*) without more saying in the deed,

* *dire*—parlance, L. and M. and Roh.

† *nul* added L. and M. and Roh.

(1) But since the stat. 29. Car. 2. c. 3. 14. Geo. 2. c. 20. no such vacancy can happen.

(2) A rent is an incorporeal hereditament, and susceptible of the same limitations as other hereditaments. Hence it may be granted, or devised, for life, or in tail, with remainders or limitations over. But there is this difference between an entail of lands and an entail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the entail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple. This was resolved in the cases of *Smyth v. Farnaby*, *Carter* 52. Sid. 285. and 2. Keb. 29. 55. 84. *Weeks v. Peach*, *Lutw.* 1224. and *Chaplin v. Chaplin*, 3 P. Wms 229. The reason of this difference is, that it would be unjust that the conveyance of a grantee of a rent, should give a longer duration or existence to the rent, than it had in its original creation. It is true, that the barring of an estate tail in land is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property which was considered to be against common right, with a very jealous eye. Now, a rent-charge was supposed to be against common right, the grantee of the rent-charge being subject to no feudal services, and being a burthen upon the tenant who was to perform them. Upon this principle the law, in every instance, avoided giving by implication a continuation to the rent, beyond the period expressly fixed for its continuance. Thus if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So if a rent is granted to a man and his heirs generally, and he dies without an heir, the rent does not escheat, but sinks into the land. It is upon this principle, that when there is not a limitation over in fee, a tenant in tail of rent acquires, by his recovery, no more than a base fee. But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and therefore, it is doing him no injustice that the recovery should give the donee, who suffers it, an estate in fee simple. The case of *Chaplin v. Chaplin* was, that lady Hanby, the grandmother of *Porter Chaplin*, being seised in fee, conveyed diverse lands, to the use and intent that the trustees named in the deed, should receive and enjoy a rent-charge of 30l. per ann. to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for forty days; and then the rent was declared to be to the use of *Porter Chaplin* in tail; remainder to the use of the same person who had the land in fee. It is stated to have been afterwards disclosed to the court, that the legal estate of the rent in fee was in the trustees. But it is worthy of the attention of the reader, that it was not necessary that any new matter should be adduced to disclose this to the court, as it appears on the face of the deed: for a conveyance to *A.* and his heirs, to the use and intent that *B.* and his heirs may receive a rent out of the estate, gives *B.* the legal fee of the rent; so that if it is afterwards declared, that *B.* and his heirs are to stand seised of the rent to uses, the intended *cestuis que use* take only trust or equitable estates. If, therefore, it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute.

(3) Formerly the doctrine of the necessity that the remainder should rest at the very instant of the determination of the particular estate

deede, viz. to have and to hold the lands, &c. Secondly, the reason of *Littleton* in expresse words is, for that nothing was confirmed but his estate which was joynt. Thirdly, the next two Sections make it plaine where the *habendum* is added.

Hereby also it appeareth, that a release is more forcible in law than a confirmation. If the disseisee and a stranger disseise the heire of the disseisor, and the disseisee confirme the estate of his companion, this shall not extinguish his right that was suspended: so as if the heire or the disseisor re-enter, the right of the disseisee is revived. And so it is if the grantee of a rent-charge and an estranger disseise the tenant of the land, and the grantee confirme the estate of his companion, the tenant of the land re-enter, the rent is revived; for the confirmation extended not to the rent suspended, otherwise it is of a release in both cases.

Sect. 523.

*ET pur ceo ascuns ont dit, que si deux joyntenants sont, et l'un confirme l'estate l'auter, que il n'ad forsque joint estate, si come il avoit adevant. Mes s'il ad tiels parols en le fait de confirmation, a aver et tener a luy et a ses heires tous les tenements dont mention est fait en le confirmation, donques il ad estate sole en les tenements, * &c. Et pur ceo il est bone et sure chose en chescun confirmation d'aver ceux parols; a aver et tener les tenements, &c. en fee, ou en fee taile, ou pur terme de vie, ou pur terme d'ans, solonque ceo que le cas + est, ou le matter gift.*

AND for this some have said, that if two joyntenants bee, and the one confirme the estate of the other, that he hath but a joynt estate, as he had before. But if hee hath such words in the deede of confirmation, to have and to hold to him and to his heires all the tenements whereof mention is made in the confirmation, then he hath a sole estate in the tenements, &c. And therefore it is a good and sure thing in every confirmation to have these words; to have and to hold the tenements, &c. in fee, or in fee taile, or for terme of life, or for terme of yeares, according as the case is or the matter lyeth.

AND this confirmation leaveth the state as it was, and doth not amount to any severance of the joynture, as some have said.

34. E. 3. tit. Confirm. pl. 15.

Mes s'il ad tiels parols en le fait, &c.

This is plaine and evident enough.

Et pur ceo il est bone et sure chose, &c.

This is good counsell, and worthy to be observed.

Sect. 524.

HERE the diversity is apparent betweene a confirmation of the estate for life in the land to have and to hold the said state in the land to him and his heire; this cannot en-

CAR al entent d'ascuns, si home lessa terre a un auter pur terme de vie, et puis confirma son

FOR to the intent of some, if a man letteth land to another for life, and after confirme his estate which

estate

* &c. not in L. and M. nor Roh.

+ est not in L. and M. nor Roh.

estate at farthest, was extended to the case of a posthumous son. In the case of *Reeve v. Long*, 1. Salk. 227. an estate was limited to A. for life, remainder to his eldest son in tail; A. died leaving his wife *enfeint*. She afterwards had a son. It was adjudged that the son, not being *in esse* at the time of the determination of the particular estate, could not take under the limitation. This judgment was afterwards affirmed in the court of king's bench; but it was reversed in the house of lords, against the opinion of all the judges. To obviate all doubts respecting the law in this case, the statute of 10. Wil. III. c. 16. was passed, by which it was enacted, that where any estate is, by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's life-time. It is singular that this statute does not expressly mention limitations or devises made by wills. There is a tradition, that, as the case of *Reeve v. Long* arose upon a will, the lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of *Reeve v. Long*, the words of the act may be construed, without much violence, to comprize settlements of estates made by will, as well as settlements of estates made by deed.

*estate que il aden mesme la terre, a aver et tener son estate a luy et a ses heires, cest confirmation quant a ses heires est void, car ses heires ne poient aver son estate, que * ne fuit forsque pur terme de son vie. Mes s'il confirma son estate per ceux parolx, a aver mesme le terre a luy et a ses heires, cest confirmation fait fee simple en cest case a luy en la terre, pur ceo que † les parolx a aver et tener, &c. va a le terre, et nemy al estate que il ad, &c.*

hee hath in the same land, to have and to hold his estate to him and to his heires, this confirmation as to his heires is voide, for his heires cannot have his estate, which was not but for terme of his life. But if he confirme his estate by these words, to have the same land to him and to his heires, this confirmation maketh a fee simple in this case to him in the land, for that the words to have and to hold, &c. goeth to the land, and not to the estate which hee hath, &c.

large his estate, for his estate being but for life, that estate cannot bee extended to his heires. But in that case if he confirme the estate for life in the land in the premises of the deed, and the *habendum* is in this sort, to have and to hold the land to him and his heires, this shall enlarge his estate, and create in him a fee simple.

(1. Roll. Abr. 482.)

18. E. 3. 40.
(Pio. 158. a.)

Wherein is to bee noted, [c] that the *habendum* and the premises doe in substance well agree together, and that the *habendum* may enlarge the premises, but not abridge the same. (1)

[c] Vid. Pl. Com. in Throgmorton's case, fol. 147. a.
Wrottesley's case, 197.

(2. Rep. 23.)

And seeing that in conveyances, limitations of remainders are usuall and common assurances, it is dangerous by conceits or nice distinctions to bring them in question, as have in latter time bene attempted.

Son estate. Vid. Sect. 650.

Sect 525.

ITEM, si jeo lessa certaine terre a un feme sole pur terme de sa vie, laquel prent baron, et puis jeo confirma l'estate le baron et sa feme, a aver et tener † pur terme de leur deux vies; en cest case le baron ne tient jointment ove sa feme, mes tient en droit de sa feme pur terme de sa vie. Mes cest confirmation ure-ra a le baron per voy de remainder pur terme de sa vie, s'il survequist sa feme.

ALSO, if I let certain land to a feme sole for terme of her life, who taketh husband, and after I confirme the estate of the husband and wife, to have and to hold for terme of their two lives; in this case the husband doth not hold joyntly with his wife, but holdeth in right of his wife for term of her life. But this confirmation shall enure to the husband by way of remainder for terme of his life, if hee surviveth his wife.

HERE is the fourth case wherein the release and confirmation doe agree; and in this case it is to be observed, that the baron hath such an estate in the land in the right of his wife as hee is capable of a confirmation to enlarge his estate; and therefore if the confirmation had been made of his estate to him alone, to have and to hold the land to him and to his heires, this had been good to have conveyed the fee simple to him after the decease of his wife: for if in this case a release be made to the husband and his heires, this is sufficient to convey the inheritance of the land to the husband. (2)

Vid. Sect. 573.
(Sid. 83. 361.)
(2. Roll. Abr. 829.)

(Ant. 273. b.)

16. H. 6. tit. Release 45.
22. E. 3. tit. Release. Statham.

Ne tient jointment ove sa feme. For two causes. First, because the

* ne not in L. and M. nor Roh. † les parolx—le, L. and M. and Roh. ‡ la terre added L. and M. and Roh.

(1) On the operation of an habendum in a deed, see ant. 21. a. Vin. Abr. Grant. J. K. L. and M.

(2) The nature of the estate which the husband acquires by marriage in his wife's real property, will be explained in a note to fol. 325. b. With respect to his interest in her chattels real and choses in action, an accurate, and, so far as it goes, a masterly explanation of it is given in Bacon's Abridgement, vol. 1. fol. 268. It is much to be lamented, that the author did not go more fully into the subject. Mr. Viner has collected most of the cases respecting it with his usual industry. — But since the publication of that useful compilation, several cases have been determined, by which the law upon it has been greatly illustrated and explained, and, in some instances, altered. An attempt will be made to give a succinct view of it, in a note to fol. 351.

(4. Rep. 29.)

18. E. 3. 20.
 (1. Roll. Rep. 230. 317. 438.
 3. Leo. 4. a.
 Ant. 184. a. 187. a.
 Post. 351. a.)

18. Aff. p. 3. 18. E. 3.
 Confr. 17. 17. E. 3. 68.
 28. E. 3. 94. 40. E. 3.
 8. Aff. 20.

39. H. 6. 9.
 (Ant. 182. b.)

Vid. Sect. 573.

Pl. Com. Colthirll's case.
 Doct. & Stud. ca. 21.

* 16. H. 6. tit. Release 45.
 [e] 9. E. 4. 18.
 [p] 6. E. 3. 9.
 [q] 17. E. 3. 68. b.

17. E. 3. 68. b.
 Vi. Paget's Case, lib. 5. fo. 76. b.
 (Ant. 54. a.)

the wife hath the whole for her life. Secondly, joyntenants must (as hath been before said in the chapter of Joyntenants) come in by one title. But in this case if the confirmat on had been made to the husband and wife, to have and to hold the land to them two and to their heires, they had been joyntenants of the fee simple, and the husband seised in the right of his wife for her life; for the husband and the wife cannot take by moities during the coverture.

If a man letteth land to the husband and wife, to have and to hold the one moiety to the husband for terme of his life, and the other moiety to the wife for her life, and the lessor confirme the estate of them both in the land, to have and to hold to them and to their heires; by this confirmation as to the moiety of the husband, it enureth only to the husband and his heires, for the wife had nothing in that moiety; but as to the moiety of the wife, they are joyntenants, as hath bin said; for the husband hath such an estate in his wife's moiety, in her right, as is capable of a confirmation. But if such a lease for life be made to two men by severall moities, and the lessor confirme their estates in the land, to have and to hold to them and to their heires, they are tenants in common of the inheritance; for regularly the confirmation shall enure according to the quality and nature of the estate which it doth enlarge and increase.

If a lease for life be made to *A.* the remainder to *B.* for life, and the lessor confirme their estates in the land, to have and to hold to them and their heires, *A.* taketh one moiety to him and his heires, and therefore of the one moiety he is seised for life, the remainder to *B.* for life, and then to him and his heires: of the other moiety *A.* is seised for life, the immediate inheritance to *B.* and his heires; because as to the moiety which *B.* takes, the same is executed: as if the reversion be granted to tenant for life, and to a stranger, it is executed for one moiety, (as hath been said before) and therefore in this case they are tenants in common.

If lands be given to two men, and to the heires of their two bodies begotten, and the donor confirmeth their two estates in the land, to have and to hold the land to them two and to their heires: in this case some are of opinion, that they shall be joyntenants of the fee simple, because the donees were joyntenants for life, and (say they) the confirmation must enure according to the estate which they have in possession, and that was joynt. But others hold the contrary. For, first, they say, that the donees have to some purposes severall inheritances executed, though between the donees survivor shall hold for their lives. Secondly, they say, that when the whole estate, which comprehendeth severall inheritances, is confirmed, the confirmation must enure according to the severall inheritances, which is the greater and most perdurable estate, and therefore that the donees shall be tenants in common of the inheritance in this case.

Per voy de remainder, &c. Here some question hath been made of this terme remainder, without any cause at all, because in law it is in nature of a remainder. For in case of a fine, when a reversion expectant upon an estate for life in *A.* is granted to *B.* *et quæ ad ipsum reverti debet post mortem A. præfata B. & hæredibus suis remaneant, &c.* and a more colourable exception might be taken against this word *remaneant* there, than in the case of *Littleton*.

It is true, that in * 16. H. 6. it is called a reversion: in [o] 9. E. 4. it is called a remainder: in [p] 6. E. 3. it is said, that by the confirmation an estate accrued to the husband for terme of his life. In [q] 17. E. 3. the husband, living the wife, shall have nothing but in abeyance after the death of his wife. But lest there should bee *pugna verborum*, which learned and wife men ever avoide, all do resolve, that the estate of the husband is good, and that it doth enure by way of increase and enlargement of his estate. And albeit in this case of *Littleton*, the husband by the confirmation gaineth an estate for life in remainder, (as *Littleton* termeth it) yet if the husband doth waste, an action of waste shall lie against him and his wife, notwithstanding the meane remainder, because the husband himselfe committeth the waste, and doth the wrong; and therefore shall not excuse himselfe for his committing of waste, in respect he himselfe hath the remainder; no more than if a man letteth to *A.* during the life of *B.* the remainder to him during the life of *C.* if he commit waste, an action of waste shall lie against him. (1)

Sect. 526.

5. E. 3. 17. b. Pl. Com. 418. b.
 38. H. 6. 23. 14. H. 4. 12.
 38. E. 3. 35. Pl. Com. Dame
 Hale's case. 50. Aff. p. 15.
 4. H. 6. 5. 7. H. 6. 1. 9. H. 6.
 52. 37. Li. Aff. 21. H. 7. 29.
 21. E. 4. 40. 26. H. 8. 7.

THIS is the fifth case wherein the release and confirmation doe agree: and it is to be observed, that chattels reals, as leases for yeares, ward-

*MES si jeo les-
 sa al feme
 sole terre pur terme
 d'ans, le quel prent*

BUT if I let land to a feme sole for terme of yeares, who taketh husband, and a baron

(1) It is necessary to distinguish between the cases mentioned by *Littleton* and Sir Edward Coke, in this and the preceding chapter, where an estate for life is enlarged to an estate in fee, by the *release*, or *confirmation* of the reversioner, or remainder-man, and those cases where a person, being seised of an estate for life, the inheritance is afterwards conveyed or devised to his right heirs, by a subsequent deed, or will. It appears by the case of *Moore v. Parker*, 1. Lord Raym. 37. 4. Mod. 316. Skin. 558. and *Fonnercau v. Fonnercau*, Doug. Rep. 1. vol. 470. that the estate of the ancestor is not affected by the subsequent conveyance or devise to his right heirs. For though it is a rule that, where the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift, or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee, or in tail, *the heirs*, in such cases, are words of limitation of the estate, and not words of purchase; yet this applies only to those cases where both the limitations are by the same instrument. In some cases, the freehold of the ancestor has resulted to him by implication; but still the deed from which that implication resulted, was the deed in which the limitation to his heirs was expressed; so that the implied estate of freehold, and the expressed estate of inheritance, arose at the same time, and under the same deed, which brings it within the general rule. But suppose an estate is limited to *A.* for life; remainder to such uses as *B.* shall appoint, and afterwards *B.* in the life-time of *A.* appoints the estate to *A.*'s right heirs; it is difficult to say whether, in that case, the estates will unite or not. This case has sometimes occurred in practice, but has not yet been the subject of any judicial determination. To prove the union of the two estates, it may be contended, that the deed by which the power is executed, must be considered as a part of the deed by which the power is given; that the use limited by the execution of the power derives its effect, and is fed, by the seisin of the releasees or feoffees of the deed containing the power; that the uses limited in the original deed, to take effect in default of an execution of the power, are subject to that power; that the uses limited under, or by virtue of the power, precede and take place of them, in the same manner as if in the original deed, not the power, but the use executed by virtue of the power, had been inserted; and that though the uses vest at different times, yet they may be considered as virtually created at the same time. So that, in fact, it exactly resembles the case put, post. 378. b. that if lands be given to two, during their joint lives, with the immediate remainder to the right heirs of him who shall die first, there both the estates are created at the same time, but the inheritance does not vest till a subsequent period; yet Sir Edward Coke expressly says, that the heir, in that case, takes by descent. So that the case before us seems to unite all the qualities requisite for the union of these estates; as both the limitations are made by the same grantor, are created at the same time, and are contained in the same deed. But these arguments are open to some objections, particularly with respect to the position, that both the limitations are made at the same time. See ant. 276. contin. note 1. p. 271. b.

baron, et puis jeo confirma l'estate le baron et sa feme, a aver et tener la terre pur terme de lour deux vies: en cest case ils ont joynt estate en le franktenement de la terre, pur ceo que la feme n'avoit franktenement adevant, &c.

ter I confirm the estate of the husband and his wife, to have and to hold the land for term of their two lives: in this case they have a joynt estate in the freehold of the land, for that the wife had no freehold before, &c.

confirmation in this case to the husband and wife for their lives, maketh them joyntenants for life, because a chattell of a feme covert may be drowned: and so note a diversity betwene a lease for life and a lease for yeares made to a feme covert; for her estate of freehold cannot be altered by the confirmation made to her husband and her, as the terme for yeares may, whereof her husband may make disposition at his pleasure. (1)

ships, and the like, are not given to the husband absolutely (as all chattels personals are), by the intermarriage, but conditionally if the husband happen to survive her, and he hath power to alien them, at his pleasure: but in the mean time the husband is possessed of the chattels reall in her right

(Ant. 46. b. Post. 351. a.)

Secondly, that the husband hath such a possession in her right of the chattell, as is capable of a confirmation, or of a release.

(Ant. 273. b. Ant. 276. a. Ant. 299. a.)

Thirdly, that the confir-

Sect. 527.

ITEM, si mon disseisor granta a un rent charge hors de la terre dont il moy disseisist, et jeo reberisant le dit grant confirma mesme le grant, et tout ceo que est comprise deins mesme le graunt, et puis jeo enter sur le disseisor; quære, en cest case, si le terre soit discharge de le rent ou nemy.

ALSO, if my disseisor granteth to one a rent charge out of the land whereof he disseised mee, and I rehearsing the sayde grant confirme the same grant, and all that which is comprised within the same grant, and after I enter upon the disseisor; quære, in this case, if the land be discharged of the rent or no.

THIS is the fifth case wherein the release and confirmation doe differ; for a release to the grantee in this case [a] were void. It is holden by some authority since *Littleton* wrote, that the disseisee after his re-entry shall not avoide the rent charge against his own confirmation: and there a generall rule is taken, that such a thing as I may defeat by my entry, I may make good by my confirmation.

[a] 11. H. 7. 28. Lib. 1. fol. 147. Anne Mayow's case. 2. H. 4. 10.

If the feoffee upon condition grant a rent charge in fee, and the feoffor confirmeth it, and after the condition is broken, and the feoffor enter, he shall not avoide the rent charge. And so it is

Li. 1. fo. 147, 148. Anne Mayow's case. (Post. Sect. 529.)

if the heire of the disseisor grant a rent charge, and the disseisee confirmeth it, and after recover the land, he shall not avoide the rent: and yet in neither of these cases his entry was congeable at the time of the confirmation. (2)

Sect. 528.

ITEM, si un parson d'un esglise charge + le glebe de son esglise per son fait, et puis le patron et l'ordinarie

ALSO, if a parson of a church charge the glebe land of his church by his deed, and after the patron and ordinary con-

PARSON, *Persona*. In the legall signification it is taken for the rector of a church parochiall, and is called *persona ecclesiæ*, because he assumeth and taketh upon him the parson of the church, and is said

Glauv. li. 13. ca. 23, 24, 25. Bract. li. 4. ca. 285, &c. Brit. fo. 234. b. &c. Fleta li. 5. ca. 19. 20. & lib. 6. ca. 18. Reg. F. N. B. 48, 49.

* &c. added in L. and M. and Roh.

+ *le—un*, L. and M. and Roh.

(1) If a man seised of a rent-charge in fee grants it over to a feme sole for a term of years, and the tenant attorns, and she marries during the term, and the grantor confirms the rent to the husband and wife for their lives, or in fee, they become joint tenants for life or in fee of the rent, and need no new attornment. Vaugh. 46.

(2) Tenant in tail makes a lease for life, now he hath gained a new fee by wrong, and afterwards he grants a rent-charge, or makes a lease for years, and afterwards tenant for life dies, he shall not avoid his charge or lease, altho' he be in of another estate, because he had a defeasible possession and ancient right, the which, if they be in several hands, should be good; as the lease of one, and the confirmation of the other, and being in one hand, shall be as much in judgment of law. 7-Rep. 14. a.

Brit. ubi supra.

8. E. 3. 26. 43. 38. E. 3. 4.
3. Mar. Dyer. 123.7. H. 4. 15.
(Mo. 67.)(1. Roll. Abr. 479. 481.)
[6] 19. El. Dy. 356. 357.
11. H. 6. 9. 33. H. 8. tit.
Charge. Br. 58.
(Post. 329. a.)See more of these kinds of con-
firmations in my Reports.
Li. 2. 39. & 24. Li. 1. 153.
lib. 4. 23. 24. lib. 5. fol. 31. 81.
Lib. 10. 6. Lib. 11. 19. Lib. 6. 34.
(Ant. 274. b. 297. a. Sid. 75.)31. E. 3. Grant. 61. 26. Aff. 38.
8. Eliz. Dy. 252. Vid. lib. 3.
fol. 73. Le case de deane &
chapter de Norwich.
(1. Lev. 112. 1. Roll. Abr. 482.
2. Roll. Abr. 339.)12. H. 4. 11. 19. E. 3. 7.
7. Eliz. Dyer. 238. 11. H. 6. 9.
10. Eliz. Dy. 6. E. 3. 10.
2. E. 3. 29. 9. E. 4. 6. 2. H. 4. 11.
68. E. 3. 19. 25. E. 3. 54.

said to be seized *in jure eccle-
sie*, and the law had an ex-
cellent end therein, viz. that
in his person the church
might sue for and defend her
right; and also be sued by any
that had an elder and better
right; and when the church
is full, it is said to be *plena &
consulta* of such a one parson
thereof, that is, full and pro-
vided of a parson, that may
vicem seu personam ejus gerere.

Persona impersonata, par-
son, impersonce is the rector,
that is in possession of the
church parochiall, be it pre-
sentative, or impropriate, and
of whom the church is full.

Here are divers things to
bee noted. First, that the
confirmation is of the grant,
which in deed is but a meere
assent by deed to the grant;
and therefore it is holden,
that if there be a parson, pa-
tron, and ordinary, and the
patron and ordinary give licence by deede to the parson to grant a rent charge out of the
glebe, and the parson granteth the rent charge accordingly, this is good, and shall binde the
successor; and yet here is no confirmation subsequent, but a licence precedent.

Secondly, The ordinary alone, without the deane and chapter, may agree thereunto, ei-
ther by licence precedent, or confirmation subsequent; for that the deane and chapter hath
nothing to doe with that which the bishop doth as ordinary, in the life-time of the bishop.

Thirdly, [b] but if the bishop be patron, there the bishop cannot confirme alone, but the
deane and chapter must confirme also; for the advowson or patronage is parcell of the pos-
session of the bishopricke; and therefore the bishop, without the deane and chapter, cannot
make the grant good, but only during his owne life, after the decease of the incumbent,
either by licence precedent, or confirmation subsequent.

A. parson of D. is patron of the church of S. as belonging to his church, and presents
B. who by consent of A. and of the ordinary, grants a rent charge out of the glebe; this is
not good to make the rent charge perpetuall, without the assent of the patron of A. no more
than the assent of the bishop who is patron, without the deane and chapter, or no more
than the assent of the patron, being tenant in taile or for life, as *Littleton* saith.
And *Littleton* here saith,, that the patron that confirmes must have a fee simple, meaning to
make the charge perpetuall. (1) And *Littleton* after saith, that in the case of the parson the
fee is in abeyance, and seeing the consent of the patron is in respect of his interest as heire, it
appeareth by *Littleton*, he may consent upon condition; otherwise it is of an attornment, be-
cause that is a bare assent. Also if the estate of the patron be conditionall, and he confirmeth,
and after the condition is broken, his confirmation is void.

Fourthly, he that is patron must be patron in fee simple; for if hee be tenant in taile, or
tenant for life, his confirmation or agreement is not good to bind any successor, but such as
come into the church during his life. But if the patron be tenant in taile, and discontinue
the estate in taile, the lease shall stand good during the discontinuance; or if the estate taile
be barred, it shall stand good for ever.

But here is to be observed a diversity betweene a sole corporation, as parson, prebend,
vicar, and the like, that have not the absolute fee in them, for to their grants the patron must
give his consent. But if there be a corporation aggregate of many, as dean and chapter,
master, fellowes, and schollars of a colledge, abbot or prior, and covent, and the like, or
any sole corporation that hath the absolute fee, as a bishop with consent of the dean and
chapter, they may by the common law make any grant of or out of their possessions, without
their founder or patron, albeit the abbot or prior, &c. were presentable: and so it is of a
bishop, because the whole estate and right of the land was in them, and they may respective-
ly maintaine a writ of right.

* et tous ce que est comprise deins mesme le grant, not in L. and M. nor Roh.
† ne not in L. and M. nor Roh.

† n'ad—ads, L. and M. and Roh.

(1) A prebendary after admission and institution, and before induction, or instalment, granted an annuity for him and his succes-
sors, and the bishop confirmed it; it was resolved, that a writ of annuity lay not in that case, because the confirmation being made
before the induction, was void. Plow. 518. a.

*confirment mesme le
grant, * et tout ceo que
est comprise deins mes-
me le grant, donques le
grant esloyera en sa
force, selonque le pur-
port de mesme le
graunt. Mes en tiel
case covient que le
patron eit fee sim-
ple en le vowson; car
s'il † n'ad estate en la-
vowson forsque pur
terme de vie, ou en le
taile, donque le grant
† ne esloyera forsque
durant sa vie, et la vie
le parson que gran-
tast, &c.*

firmes the same grant,
and all that is compri-
sed in the same grant,
then the grant shall
stand in his force, ac-
cording to the purport
of the same graunt.
But in this case it be-
hoveth that the pa-
tron hath a fee simple
in the advowson; for
if he hath but an e-
state for life, or in taile,
in the advowson, then
the graunt shall not
stand, but during his
life, and the life of the
parson which granted,
&c.

If a bishop hath two chapters, and he maketh a grant, both chapters must confirme it, or else the successor shall avoide it. But if one of the chapters be dissolved, then the confirmation of the other sufficeth; but it needeth not the confirmation of the king, who is founder and patron of all bishopricks.

Temps R. 2. tit. grant. 104.
50. E. 3. tit. Affise Statham.
11. Eliz. Dyer 282.

And note a diversity between a confirmation of an estate, and a confirmation of a deed; for if the disseisor make a charter of feoffment to *A.* with a letter of attorney, and before livery the disseisor confirme the estate of *A.* or the deed made to *A.* this is cleerely voide, though livery be made after. But if a bishop had made a charter of feoffment with a letter of attorney, and the deane and chapter before livery confirme the deed, this is a good confirmation, and livery made afterwards is good. And so it hath been adjudged.

The like law is of a confirmation of a deed of grant of a reversion before attornment.

In the same manner it is if a bishop at the common law had granted lands to the king in fee by deed, and the deane and chapter by their deed confirme the deed of the bishop, and after the deed of the bishop is inrolled, this is good, albeit the confirmation of the deane and chapter be not inrolled; for the assent upon the matter is made to the bishop.

But this confirmation that *Littleton* here speaketh of must be made in the life, and during the incumbency of the person; and so in the life of the bishop, or of any other sole corporation. But it is to be knowne that grants made by parsons, prebends, vicars, bishops, master and fellows of any colledge, deane and chapter, master or gardeine of any hospitall, or any having any spirituall or ecclesiasticall living are restrained by [c] divers acts of parliament, so as they cannot grant any rent charge, or to make any alienation, or to make any leases other than such as are mentioned in those acts, which you may reade at large, and the expositions upon the same, in my [*] Commentaries.

33. E. 3. Confirm. 22. 31. E. 3.
Abb. 10. 21. H. 7. 1. Vid. Sect.
393. & 643.
[c] 13. Eliz. cap. 10. 1. Eliz.
cap. 19. 18. Eli. ca. 11. 1. Jac.
cap. 3.
Vid. Sect. 593. & 648.
[*] Li. 2. fo. 46. lib. 4. 76. &
120. li. 5. 9. 6. 14. li. 6. 37.
lib. 7. 8. lib. 11. 67.

Sect. 529.

ITEM, si home lessa terre pur terme de vie, le quel tenant a terme de vie charge la terre ove un rent en fee, et celuy en le reversion confirma mesme le grant, le charge est assés bone et effectuell.

ALSO, if a man letteth land for term of life, the which tenant for life charge the land with a rent in fee, and hee in the reversion confirme the same grant, the charge is good enough and effectuell.

HERE is a diversity to be observed, where the determination of the rent is expressed in the deed, and when it is implied in law. For when tenant for life granteth a rent in fee, this by law is determined by his death; and yet a confirmation of the grant by him in the reversion makes that grant good forever, without words of inlargement, or clause of distresse, which would amount to a new grant. And yet if the

26. Aff. pl. 38. 45. Aff. pl. 13.
Lib. 1. fol. 147. Anne Mayowe's case.

(1. Roll. Abr. 483.)

14. Aff. pl. 14.

tenant for life had granted a rent to another and his heires by expresse words, during the life of the grantor, and the lessor had confirmed that grant, that grant should determine by the death of tenant for life.

Tenant for life upon a condition grant a rent in fee, the lessor confirme the grant, and after the condition is broken, the lessor re-enter, he shall not avoide the grant.

Sect. 530.

ITEM, si soit un perpetual chantarie, dont l'ordinarie n'ad rien a medler ne a faire; quære, si le patron del chaunte-

ALSO, if there bee a perpetuall chanterie, wherewith the ordinary hath nothing to doe or meddle; quære, if the patron of

THIS is meant of a chauntry donative wherewith the ordinary hath not to deale, and by this grant, when *Littleton* wrote, the chauntry should have been charged for ever, because no other had any interest in this chantery save

Vid. Sect. 648.
(Cro. Jac. 63.)
(10. Rep. Lampet's case.)

(1) For the confirmation of leases made by ecclesiastical persons, see Bacon's Abr. tit. Leases.

(Post. 344.)

save only the patron and chauntry priest, and the grant is made *concurrentibus hiis quæ in jure requiruntur*. But since Littleton wrote, all, and all manner of free chapels and chauntries perpetual, whereof Littleton here

[a] 37. H. 8. ca. 4. 1. E. 6. c. 14.

speakes, are by [a] acts of parliament given to the crowne, and the bodies politike thereof dissolved. See hereafter, Section 648. more at large of all this present Section.

Sect. 531.

HERE Littleton proceedeth, according to the former division, to shew words that in law do amount to a confirmation. And here is to bee observed, that some words are large, and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi*, or *concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use to which of these purposes he will.

Bra. li. 2. fo. 59. b. 1. H. 6. feoffments & lants 103.
22. H. 6. 42. 14. H. 4. 36.
19. H. 6. 44. 7. H. 7. 16.
32. E. 3. briefe 291. Brooke tit. Confirm. 20. 14. H. 7. 2.
37. H. 6. 17. Dyer 8. Eliz.
4. H. 7. 10. 22. E. 4. 36.
40. E. 3. 41.
(Sid. 452. Plo. 106. 5. Rep. 17. a.
1. Roll. Abr. 482. Noy 66.)

Brafton lib. 2. fol. 59. b.

Est autem confirmatio quasi quedam ratihabitio, sufficit tamen quandoque per se, si etiam in se contineat donationem, ut si dicat quis, dedi et confirmavi, licet jurari possit ex aliqua donatione precedente.

(4. Rep. 80. b. 2. Cro. 169.
Mo. 34. Plo. 397, 398.)

But a release, confirmation, or surrender, &c. cannot amount to a grant, &c. nor a surrender to a confirmation, or to a release, &c. because these bee proper and peculiar manner of conveyances, and are destined to a speciall end. (1)

[e] 32. E. 3. briefe 291.
Brooke tit. Confirm. 20.
Vid. le stat. de Gloc. ca. 4.

[f] 7. E. 3. 9.

Brafton.
(Plo. 159.)

14. H. 4. 36. Lib. 5. fol. 15. in Newcomen's case.

Dedi et concessi, &c. Here is implied that there be more words than *dedi* and *concessi*, that will amount to a confirmation, as *dimisi*. [e] In ancient statutes and in originall writs, as in the writ of entry *in casu proviso, in consimili casu ad communem legem*, and many others, this word *dimisi* is not applyed only to a lease for life, but to a gift in taile, and to a state in fee. [f] Also, if a man make a lease to A. for yeares, and after by his deed the lessor *voluit quod haberet et teneret terram pro termino vite sue*; this is adjudged by this verbe (*volo*) to bee a good confirmation for terme of his life. *Benigne enim faciendæ sunt interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat.*

And he to whom such a deed comprehending *dedi, &c.* is made, may plead it as a grant, as a release, or as a confirmation, at his election. (2)

If a parson and ordinary make a lease for yeares of the glebe to the patron, and the pa-

* *ou—et*, L. and M. and Roh.
not in L. and M. nor Roh.

† *puis* added L. and M. and Roh.‡ *&c. VEL QUOD CONCESSI a le disseisor, &c.*

- (1) The effect of the word grant, in implying a warranty, will be considered in a note on the chapter of Warranty.
(2) But a lease and release cannot be pleaded as a grant of the reversion. Noy 66.

ry, et le chapleine de the chantery, and the
mesme le chauntey chapleine of the same
poient charge le chantery may charge
chauntery ove un the chantery with a
rent charge en perpe- rent charge in perpe-
tuitie. tuitie.

ITEM, en ascun
cas cest verbe
*dedi, * ou cest verbe*
concessi, ad mesme
l'effect en substance, et
urera a mesme l'en-
tent, come cest verbe
confirmavi. Sicome
jeo sue disseise d'un
carue de terre, et † jeo
face tiel fait; Sciant
præsentes, &c. quod
dedi a le disseisor, ‡ &c.
vel quod concessi a le
dit disseisor, le dit carue,
&c. et jeo deliver
tantsolement le fait
a luy sauns ascun li-
very de seisin del terre,
c'est un bone confirma-
tion, et auxy fort en
ley, sicome il avoit en
le fait cest verbe con-
firmavi, &c.

ALSO, in some case
this verbe *dedi*,
or this verbe *con-*
cessi, hath the same ef-
fect in substance, and
shall enure to the same
intent, as this verbe
confirmavi. As if I bee
disseised of a carue of
land, and I make such
a deed; *Sciant præsen-*
tes, &c. quod dedi to the
disseisor, &c. or *quod*
concessi to the said
disseisor, the said
carue, &c. and I deli-
ver onely the deed to
him without any live-
rie of seisin of the land,
this is a good confir-
mation, and as strong
in law, as if there had
beene in the deed this
verbe *confirmavi, &c.*

patron by his deede granteth it over, or if the disseisor granteth a rent to the disseisee, and he by his deed granteth it over, and after re-enter; in both these cases one and the same words doe amount both to a grant, and to a confirmation in judgement of law of one and the same thing, *ne res percat*. And so it is if a disseisor make a lease for life, or a gift in taile, the remainder to the disseisee in fee, the disseisee by his deed granteth over the remainder, the particular tenant attorneth, the disseisee shall not enter upon the tenant for life, or in taile, for then he should avoide his owne grant, which amounted to a grant of the estate, and a confirmation also. (Ant. 280. 293. 5. Rep 15, 16.)

Sect. 532.

*ITEM, si jeo lessa terre a un home pur terme d'ans, per force de quel il est * en possession, &c. et puis jeo face un fait a luy, &c. quod dedi & concessi, &c. le dit terre, a aver pur terme de sa vie, et delivra a luy le fait, &c. donques maintenant il ad estate en le terre pur terme de † sa vie.* **ALSO**, if I let land to a man for terme of yeares, by force (Sid. 453.) whereof he is in possession, &c. and after I make a deede to him, &c. *quod dedi & concessi, &c.* the said land, to have for terme of his life, and I deliver to him the deed, &c. then presently hee hath an estate in the land for terme of his life.

HERE is the sixth case wherein the confirmation and the release doe agree, and is evident, and needeth no explication.

Sect. 533.

ET si jeo die en le fait, a aver et tener a luy et a ses beires de son corps engendres, il ad estate en fee taile. Et si jeo die en le fait, a aver et tener a luy et a ses beires, il ad estate en fee simple. Car ceo urera a luy per force de ‡ confirmation d'enlarger son estate. **AND** if I say in the deede, to have and to hold to him and to his heires of his body engendred, hee hath an estate in fee taile. And if I say in the deed, to have and to hold to him and to his heires, he hath an estate in fee simple. For this shall enure to him by force of the confirmation to inlarge his estate.

THIS also is evident, and needeth no explication, saving that whensoever a confirmation doth inlarge and give an estate of inheritance, there ought to be apt words (as *Littleton* here exprelieth them) used for the same.

Sect. 534.

ITEM, si home soit disseise, et le disseisor devie seise, et son beire est eins per **ALSO**, if a man be disseised, and the disseisor die seised, and his heire is in by discent, *QUANT al beire del disseisor, &c. les tenements passent per voy de feoffment.* For the

* *en possession, &c.*—*possessione*, L. and M. and Roh. L. and M. and Roh.

† *sa* not in L. and M. nor Roh.

‡ *confirmation*—*confirmament*.

21. H. 7. 34. b. Pl. Com. 59. a.
in Wimbiſhe's caſe.
(6. Rep. 15. a.)

Pl. Com. 59. a.
Pl. Com. 140. in Browning's
caſe. 2. H. 5. 7. 13 H. 7. 14.
13. E. 4. 4. a. 27. H. 8. 13.
M. 16. & 17. Eliz. 339.
(Sid. 81.)
(1. Roll. Abr. 633.)
(Ant. 45. a.)
(1. Rep. 76. 77.)

Lib. 1. fo. 76. Bredon's caſe.
(Ant. 251. b.)

17. Eliz. Dyer 339.
(1. Leo. 31.)

(1. Leo. 37. 262.)

the land ſhall ever paſſe from him that hath the ſtate of the land in him. As if *ceſty que uſe* and his feoffees after the ſtatute of 1. R. 3. and before the ſtatute of 27. H. 8. cap. 10. had joyned in a feoffment, it ſhall be the feoffment of the feoffees, becauſe the ſtate of the land was in him.

So it is if the tenant for life, and hee in the remainder or reversion in fee, joyne in a feoffment by deede. The livery of the freehold ſhall move from the leſſee, and the inheritance from him in the reversion or remainder, from each of them according to his eſtate. For it cannot bee adjudged by law, that the feoffment of tenant for life doth draw the reversion or remainder out of the leſſor or him in remainder, or doth worke a wrong becauſe they joyned together.

If there bee tenant for life, the remainder in tayle, &c. and tenant for life and he in the remainder in tayle levie a fine, this is no diſcontinuance or deſtroying of any eſtate in remainder, but each of them paſſe that which they have power and authority to paſſe.

A. tenant for life, the remainder to B. for life, the remainder in tayle, the remainder to the right heires of B. A. and B. joyne in a feoffment by deede, albeit it may be ſaid that this is the feoffment of A. and the confirmation of B. and conſequently hee in the remainder in tayle cannot enter for the forfeiture during the life of B. but becauſe B. joyned in the feoffment, which was torcious to him in the remainder in tayle, and is *particeps criminis*, therefore they forfeited both their eſtates, and he in the remainder in tayle might enter for the forfeiture. But if he in the reversion in fee and tenant for life joyne in a feoffment by paroll, this ſhall be (as ſome hold) firſt, a ſurrender of the eſtate of tenant for life, and then the feoffment of him in the reversion; for, otherwiſe, if the whole ſhould paſſe from the leſſee, then he in the reversion might enter for the forfeiture, and every man's act (*ut res magis valeat*) ſhall be conſtrued moſt ſtrongly againſt himſelfe.

And it is to be obſerved that Littleton here putteth a diſcent, ſo as the entry of the diſſeiſee is not lawfull; for if the diſſeiſor and diſſeiſee joyne in a charter of feoffment, and enter into the land, and make livery, it ſhall be accounted the feoffment of the diſſeiſee, and the confirmation of the diſſeiſor.

*diſcent, et puis le diſſeiſee et l'heire * le diſſeiſor ſont jointment un fait a un auter en fee, et livery de ſeiſin ſur ceo eſt fait (quant al heire le diſſeiſor que enſealaſt le fait) les tenements paſſont † et uront per meſme le fait per voy de feoffment; et quant al diſſeiſee que enſealaſt meſme le fait, ceo ne urera ‡ ſinon per voy de confirmation. Mes ſi le diſſeiſee en ceſt cas port brieſe d'entre en le per et cui envers l'alienee || del heire le diſſeiſor; quære, comment il pledra cel fait envers le demandant per voy de confirmation, § &c. Et ſaches, mon ſits, que eſt un des plus honorables, laudables, et profitables choſes en noſtre ley, de aver le ſcience de bien pleder en actions reals et perſonals; et pur ceo jeo toy counſaile eſpecialment de mitter † ton courage et cure de ceo apprehender. ***

and after the diſſeiſee and the heire of the diſſeiſor make joyntly a deede to another in fee, and livery of ſeiſin is made upon this, (as to the heire of the diſſeiſor that ſealed the deed) the tenements doe paſſe and enure by the ſame deed by way of feoffment; and as to the diſſeiſee who ſealed the ſame deed, this ſhall enure but by way of confirmation. But if the diſſeiſee in this caſe brings a writ of entrie in the per and cui againſt the alienee of the heire of the diſſeiſor; quære, how he ſhall plead this deede againſt the demandant by way of confirmation, &c. And know, my ſon, that it is one of the moſt honorable, laudable, and profitable things in our law, to have the ſcience of well pleading in actions reals and perſonals; and therefore I counſaile thee eſpecially to imploy thy courage and care to learne this.

Quære

* *le diſſeiſor* not in L. and M. nor Roh.

|| *del—he*, L. and M. and Roh.

** &c. added L. and M. and Roh.

† *et uront* not in L. and M. nor Roh.

§ &c. not in L. and M. nor Roh.

‡ *ſinon—mes*, L. and M. and Roh.

† *tout* added L. and M. and Roh.

(1) Tenant for life, and he in the remainder in fee, make a leaſe for years by deed indented; the leſſee, being ejected, declared upon the demife made by the tenant for life, and the remainder-man; and adjudged againſt the plaintiff; for, living the tenant for life, it is only the leaſe of the tenant for life, and the confirmation of the remainder-man; and he ought to have ſo declared, 1. Inf. 45. b. So if two joint-tenants, two tenants in common, or tenant for life, and he in the remainder, join in the grant of a copyhold, one fine only is due, and it ſhall enure as one grant only; ſo if a ſurrender be made, and after a common recovery is had by plaint, on the nature of a writ of entrie, for better aſſurance — one fine only ſhall be paid. Co. Copyholder, 162, 163.

Quære coment il pledera cest fait, &c. Hee may pleade the feoffment of the heire of the disseisor, and the confirmation of the disseisee as it hath been pleaded and allowed. Lib. 1. fo. 146, 147. Mayowe's case.

Et saches, mon firs, que est un de pluis honorable, &c. Here is to bee observed the excellency of good pleading, and Littleton's grave advice, that the student should imploy his courage and care for the attaining thereof; which hee shall attaine unto by three meanes: first, by reading; secondly, by observation; and thirdly, by use and exercise. For in ancient time the serjeants and apprentices of law did draw their owne pleadings, which made them good pleaders. And in this sense *placitum* may be derived à *placendo, quia omnibus placet*.

See my Preface to the 9. Booke of my Reports.
(Ante 17. a. 126. b. 181. a. 283. a. Sid. 339.)

Now seeing good pleading is so honourable and excellent, and that many a good cause is daily lost for want of good and orderly pleading, it is necessary to set downe some few rules (amongst many) of the same, to facilitate this learning, that is so highly commended to the studious reader. For when I diligently consider the course of our bookes of years and termes from the beginning of the raigne of *Edw. 3.* I observe, that more jangling and questions grow upon the manner of pleading, and exceptions to forme, than upon the matter it selfe, and infinite causes lost or delayed for want of good pleading. Therefore it is a necessary part of a good common lawyer to be a good prothonotary. And now wee will performe our promise.

The order of good pleading is to be observed, which being inverted great prejudice may grow to the party, tending to the subversion of law. *Ordine placitandi servato, servatur & jus, &c.*

First, in good order of pleading a man must pleade to the jurisdiction of the court. Secondly, to the person; and therein first to the person of the plaintife, and then to the person of the defendant. Thirdly, to the count. Fourthly, to the writ. Fifthly, to the action, &c. [a] which order and forme of pleading you shall reade in the ancient authors agreeable to the law at this day; and if the defendant misorder any of these, he loseth the benefit of the former.

The count must be agreeable and conforme to the writ, the barre to the count, &c. and the judgement to the count; for none of them must be narrower or broader than the other.

A count or declaration, which anciently and yet is called *narratio*, ought to containe two things [b], viz. certainty and verity, for that it is the foundation of the suite, whereunto the adverse party must answer, and whereupon the court is to give his judgement: [c] *Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium*. But it must be understood that there be three kinde of certainties: first, to a common intent, and that is sufficient in a barre which is to defend the party and to excuse him. [d] Secondly, a certaine intent in generall, as in counts, replications, and other pleadings of the plaintife, that is to convince the defendant, and so in inditements, &c. Thirdly, a certaine intent in every particular, as in estoppels.

[e] He pleadeth a plea in abatement of the writ (which of ancient times was, and yet is called *breve*) or a plea after the latter continuance, ought to plead it certainly.

[f] The ancient formes of courts are to be duly observed, as *cum dimisit*, or *cum dedit*, and not to say, that he was seised and demised, &c. (And yet if he say so, it maketh not the count vicious) [g] but in a barre replication or other kinde of pleading, the party must alledge a feisin in the lessor or donor, and ancient formes of pleading are also to be observed.

[h] Counts, or such as be in nature of counts, (as an avowry, wherein the defendant is an actor) need not to be averred, but all other pleas in the affirmative ought to be averred, *et hoc paratum est verificare, &c.* but pleas meerly in the negative ought not to be averred, because a negative cannot be proved.

[i] Where there is but one tenant or one defendant, he cannot have two such pleas, as each of them doe goe to the whole; but where there are divers, each of them may pleade severall pleas which extend to the whole (1).

[k] That which is alledged by way of conveyance or inducement to the substance of the matter need not to be so certainly alledged, as that which is the substance it selfe.

[l] Every plea must be direct, and not by way of argument, or rehearfall.

[m] Where a matter of record is the foundation or ground of the suite of the plaintife, or of the substance of the plea, there it ought to be certainly and truly alledged; otherwise it is, where it is but conveyance. But the proceedings and sentences in the ecclesiasticall courts may be alledged summarily; as that a divorce was had between such parties, for such a cause, and before such a judge, and *concurrentibus hiis quæ in jure requiruntur*; for the judge must be alledged, to the intent the court may write to him if it be denied.

Good matter must be pleaded in good forme, in apt time, and in due order, or otherwise great advantages may be lost.

[n] Generall

(1) This is altered by 4. Ann. cap. 16. sect. 4. & 5. by which it is enacted, that it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many severall matters thereto as he shall think necessary for his defence; but it is thereby also provided, that if any such matter, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for plaintiff, or the defendant, costs shall be also given in like manner, unless the judge, who tried the said issue, shall certify that the defendant, tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. Note to the 11th edition.

[n] 35. H. 6. 35. 21. E. 4. 51.
 9. H. 4. 5. 19. H. 6. 73.
 5. E. 4. 12. 10. E. 4. 18.
 13. H. 7. 18. 36. H. 8. Plead-
 ing Br. 160.
 [o] V. Sect. 193. 3. H. 6. 47.
 41. E. 3. 22. 9. Aff. 9. 22. Aff. 45.
 2. E. 3. 42. 13. E. 3. Anc. De-
 mefine 15. 20. E. 3. ib. 45.
 7. H. 7. 8. Lib. 10. fo. 91. Li. 11.
 fo. 10.
 [p] 3. H. 7. 3. 26. Aff. 10.
 14. H. 4. 4. b. 27. H. 6. 8. b.
 21. H. 6. Debt. 43. 7. H. 6. 24. 31.
 35. H. 6. 48. 47. E. 3. 14. Pl.
 Com. 46. a. Li. 3. fo. 59. Linc.
 Col. case.
 [q] 22. E. 4. 40. 2. 3.
 20. E. 4. 10. 21. E. 4. 36.
 22. H. 6. 50.
 [r] 40. E. 3. 40. 43. 46.
 41. E. 3. 2. 18. E. 3. 16.
 26. E. 3. 68. 42. E. 3. 3. 10. 46.
 6. E. 3. 37. 8. E. 3. 20.
 10. E. 3. 60. 14. H. 4. 15.
 12. E. 4. 1. 38. E. 3. 28.
 7. H. 7. 3.
 [s] 10. E. 4. 3. 27. H. 6. 8.
 8. H. 7. 13. 9. H. 7. 26.
 37. H. 6. 1. 27. H. 8. 13.
 21. H. 7. 25. 11. H. 4. 33.
 Pl. Com. 79. 16. E. 4. 10.
 1. H. 7. 33. 20. H. 7. 1.
 6. E. 4. 4. 5. 21. E. 4. 54.
 22. H. 6. 47. 11. H. 6. 8.
 25. E. 3. 50. b. 23. Aff. 7.
 2. Eliz. Dyer 184.
 [t] Pl. Com. 149. b. & 105. a.
 37. H. 6. 38.
 [u] 18. E. 4. 16. b. 22. E. 4. 2. 76.
 5. H. 7. 13. 38. H. 6. 17. 18. 19.
 18. E. 3. 34. Pl. Com. 229. b.
 Lib. 8. 133. Turner's case.
 [w] 5. H. 7. 34. 5. E. 3. 26.
 22. H. 6. 28.
 [x] 19. H. 6. 30. 32.
 Pl. Com. 232. b. & fo. 502. per
 Dyer & 503.
 [y] 13. H. 4. 17. 10. E. 4. 18.
 33. H. 6. 54. 35. H. 6. 30.
 21. H. 7. 32. Bract. li. 3. fo. 154.
 Pl. Com. 87. b. 26. H. 6. Gard. 58.
 [a] 2. H. 7. 15. 4. H. 7. 12.
 10. H. 7. 12. 13. H. 7. 19.
 26. H. 8. 5. b.
 [b] Li. 8. fo. 133. Turner's
 case, & fo. 120. Bonham's case
 Li. 9. 25. 61. Li. 10. 100.
 [c] 12. H. 8. 6. 7. 2. R. 3. 17.
 14. E. 4. 7. 9. E. 4. 19.
 [d] 44. E. 3. 2. 34. H. 6. 5.
 10. H. 6. 6. & 17. 12. E. 4. 11. 14.
 14. H. 8. 24. 7. E. 3. 12.
 17. E. 3. 44.
 [e] 18. H. 6. 33. 22. H. 6. 53.
 36. H. 6. 17. 38. H. 6. 18. 25.
 5. E. 3. 15. 16. 22. Aff. 33.
 2. Eliz. Dyer 184.
 [f] Pl. Com. 14. 15. 2. E. 4. 18.
 39. E. 3. 14. 32. 33. 8. E. 3. 57.
 Qu. Imp. 25. 18. H. 6. 30.
 7. 4. 18. 38. Aff. 14. 24. E. 3. 48.
 22. E. 3. 13. 38. H. 6. 25.
 32. H. 6. 14. 19. H. 8. 7.
 27. H. 8. 12. b.
 [g] 7. E. 4. 26. 11. H. 7. 4.
 12. H. 7. 6. 33. H. 6. 9. 37. 43.
 [h] V. Sect. 485.
 [i] Bract. li. 5. fo. 400.
 Flet. li. 6. ca. 37.

[n] General estates in fee simple may be generally alledged, but the commencement of estates taylor, and other particular estates regularly must be shewed, unless in some cases where they are alledged by way of inducement, and the life of tenant in taile, or for life, ought to be averred.

[o] When any speciall and substantiall matter is alledged by either party, that ought to be especially answered, and not to be passed over by a generall pleading.

[p] The plea of every man shall be construed strongly against him that pleadeth it, for everie man is presumed to make the best of his owne case: *ambiguum placitum interpretari debet contra proferentem*.

[q] Every plea that a man pleadeth ought to be triable, for without triall the cause can receive no end: *et expedit reipublicæ ut sit finis litium*.

[r] The tenant before his default saved, may plead all pleas which prove the writ abated, as death, &c. or matters apparent in the writ; but no plea, which prove it abateable, as taking of husband, &c.

[s] When a man is authorised to doe any thing by the common law, by grant, commission, act of parliament, or by custome, he ought to pursue the substance and effect of the same accordingly.

[t] All necessary circumstances implied by law in the plea need not to be expressed, as in the plea of a feoffment of a mannor, livery and attornment are implied.

[u] When a count, barre, replication, &c. is defective in respect of omission of some circumstance, as time, place, &c. there it may be made good by the plea of the adverse party; but if it be insufficient in matter, it cannot be saved.

[w] Every man shall plead such pleas as are pertinent for him, according to the quality of his case, estate, or interest, as disseisors, tenants, incumbents, ordinaries, and the like.

[x] Surplusage shall never make the plea vicious, but where it is contrariant to the matter before. (1)

[y] That which is apparent to the court by necessary collection out of the record need not to be averred.

[a] A man is bound to performe all the covenants in an indenture: if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to so many he must plead specially (for a negative cannot be performed), and to the rest generally. [b] So if any be in the disjunctive, he must shew which of them he hath performed. So if any are to be done of record, he must shew that specially, and cannot involve that in generall pleading.

[c] In many cases the law doth allow generall pleading, for avoyding of prolixity and tediousnesse, and that the particular shall come on the other side.

[d] Pleadings which amount to the generall issue are not to be allowed; but the generall issue is to be entred. *Vi. Sect. 10. 485. 499.*

[e] Every plea ought to have his proper conclusion, as a plea to the writ to conclude to the writ, a plea in barre to conclude to the action, an estoppel to relie upon the estoppels; *et sic de similibus*.

[f] When the conclusion of a plea, *et issint, et sic*, is in the affirmative, it shall not wave the speciall matter, for there the speciall matter is the substance and foundation of the conclusion, and affirmed by the same. But where the conclusion is in the negative, there the speciall matter regularly is waved.

[g] Whensoever speciall matter is pleaded, and the conclusion (*et sic*) is to the point of the writ or action, the speciall matter is waved.

The names of legall records are, a writ, a count, a barre, a replication, a rejoinder, a rebutter, a surrebutter, &c.

[h] New and subtill devices and inventions of pleading ought not to alter any principle of law, whereof you have heard plentifully before.

The count or declaration is an exposition of the writ, and addeth time, place, and other necessary circumstances, that the same may be triable; and any imperfection in the count doth abate the writ.

Pleadings are divided into barres, replications, rejoinders, surrejoinders, rebutters, and surrebutters, &c. They are words of art, and are called barres, *barreæ*, so called, because it barreth the plaintife of this action. *Replicationes, à replicando; reuniones, à rejunendo; rebutter*, of the French word *rebuter*, *i. e. à repellendo*, to put backe or avoide, and so of surrebutter.

But each party must take heed of the ordering of the matter of his pleading, lest his replication depart from his count, or his rejoinder from his barre; *et sic de cæteris*.

[i] In ancient writers a barre is called *exceptio peremptoria*: a replication was then called *replicatio*, as now it is; a rejoinder, *triplicatio*; a surrejoinder, *quadruplicatio*; *et sic ulterius in infinitum*.

A de-

(1) And then it does, because the plaintiff cannot discern what to answer to in his replication. Note to the 11th edition.

A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and thereupon it is called *decessus*, because he departeth from his former plea; and therefore whensoever the rejoinder (taking one example for all) containeth matter subsequent to the matter of the barre, and not fortifying the same, this is regularly a departure, because it leaveth the former, and goeth to another matter. As if in an assise the tenant plead a discent from his father, and giveth a colour, the demandant intituleth himselfe by a feoffment from the tenant himselfe, the plaintife cannot say, that that feoffment was upon condition, and to shew the condition broken; for that should be a cleere departure from his barre, because it containeth matter subsequent. But in an assise, if the tenant pleadeth in barre, that *I. S.* was seised and infeoffed him, &c. and the plaintife sheweth, that he himselfe was seised in fee, untill by *I. S.* disseised, who infeoffed the tenant, and he re-entred, the defendant may plead a release of the plaintife to *I. S.* for this doth fortifie the barre.

If a man plead performance of covenants, and the plaintife reply, that he did not such an act according to his covenant, the defendant saith, that he offered to do it, and the plaintife refused it; this is a departure, because the matter is not pursuant; for it is one thing to doe a thing, and another to offer to doe it, and the other refused to doe it: therefore that should have been pleaded in the former plea. *Vide & cave in a quare impedit*, what plea shall be safely pleaded in *primo placito*.

When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of parliament. So when in his former plea he intituleth himselfe generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.

If a man plead an estate generally, (as for example a feoffment in fee) he in his second plea shall not maintain it by other matter *tantamount* in law, as by a disseisin and release, or by a lease and release, or a gift in tayle in barre, and in the second plea a recovery in value; for this is a departure: but he in that case shall count of a gift, and maintaine it in his replication by a recovery in value, because he could have no other count.

See more of this matter, where the plaintife varying from time or place alledged in the count of actions transitory, shall commit no departure.

The plea that containes duplicity or multiplicity of distinct matter to one and the same thing, whereunto severall answers (admitting each of them to be good) are required, is not allowable in law. And this rule you see extendeth to pleas perpetuall or peremptory, and not to pleas dilatory; for in their time and place a man may use divers of them; and hereof ancient writers * speake notably: *Sicut actor una actione debet experiri saltem illam durante, sic oportet tenentem una exceptione, dum tamen peremptoria (quod de dilatoriis non est tenendum); quia si liceret pluribus uti exceptionibus peremptoriis simul & semel, sicut fieri poterit in dilatoriis, sic sequeretur, quod si in probatione unius defecerit, ad aliam probandam possit habere recursum, quod non est permixibile, non magis quam aliquem se defendere duobus baculis in duello, cum unus tantum sufficiat.*

But where the tenant or defendant may pleade a generall issue, thereupon the generall issue pleaded, he may give in evidence as many distinct matters to barre the action or right of the demandant or plaintife, as he can. (1)

A speciall verdict may containe double or treble matter; and therefore in those cases the tenant or defendant may eyther make choice of one matter, and to plead it to barre the demandant or plaintife, or to plead the generall issue, and to take advantage of all; or he may plead to part one of the pleas in barre, and to another part another plea; and his conclusion of his plea shall avoide doubleness, and hereby neither the court nor the jury is so much inveigled, as if one plea should containe divers distinct matters. And if the tenant make choice of one plea in barre, and that be found against him, yet he may resort to an action of an higher nature, and take advantage of any other matter. And the law in this point is by them that understand not the reason thereof misliked, saying, *Nemo prohibetur pluribus defensionibus uti.*

And it is worthy of observation, that in the reignes of Edward the second, Edward the first, and upwards, the pleadings were plain and sensible, but nothing curious, evermore having chiefe respect to matter, and not to formes of words, and were often holpen with a *questum esse*, and then the questions moved by the court, and the answers by the parties were also entered into the rolle. But even in those dayes the formes of the register of originall writs were then punctually observed, and matters in law excellently debated and resolved; and where any great difficulty was, then it was resolved by all the judges and fages of the law (who were for matters in law called *concilium regis*) and their assembly and resolution was entered into the rolle. As for example, in the great case in a *quare impedit*, between the king and the prior of Worcester, concerning an appropriation, whether it were a mortmaine, the record saith, *ad quem diem venit predictus prior per attornatum suum, &c. Et examina-*

(Sid. 10. 77. 176. 277. Finch 391. 2. Cro. 264.)
39. E. 3. 13. b. 39. H. 6. 15.
6. H. 7. 8. 21. H. 6. 32. Pl.
Com. 105. 1. Mar. Dyer. 95.
28. H. 8. ib. 31.
(Doc. Pla. 119. 1. Cro. 228,
229. 257.)
6. H. 7. 8. 3. H. 6. Departure 2.

(Sid. 10. 77. 180. 404.)
8. El. Dy. 253. 23. El. Dy. 271.
6. E. 3. 3. 40. E. 3. 32. 43. E. 3.
32. 43. E. 3. 11. 1. E. 4. 4.
18. E. 4. 24. 5. H. 7. 27.
8. H. 6. 11. 33. H. 6. 14.
(Cro. Car. 257. 1. Saund. 83.
189.)
Pl. Com. 105. b. Fulmerston's
case. 21. H. 7. 25. 27. H. 8. 3.
21. H. 7. 17. 37. H. 6. 5.
38. H. 6. 25.
(Saund. 142. S. C. 1. Leo. 81. S. C.
Raym. 60. Sid. 142.)
21. H. 7. 25. 1. E. 4. 4.
3. H. 7. 5. 7. H. 7. 2.

Vid. Sect. 485.

Pl. Com. 139. 142.

* Fleta li. 6. ca. 35. Bracton
li. 5. fol. 400.

17. E. 3. 73.
(Doc. Plac. 135.)

39. H. 6. 27.

(Ante 139. 2.)

Hil. 32. E. 1. cor. Reg. in fine
rotul.

(1) It is natural to plead first to the jurisdiction, and afterwards to the writ of the count. Nota, The briefe ranked before the count, 17. Edw. 3. 74. Nota, Upon default in the count, the judgment shall be that the brief shall abate. 3. Hen. 6. 41. 9. Hen. 6. 10. Brooke Count 78. Vide 303. b. Therefore, as it seems, it is more proper to reserve the exception to the writ for the last place, if the first fails. In special cases the order of pleading is not observed; as for example, a defendant in debt, in the custody of the sheriff, was permitted to plead a plea in abatement of the writ before any count was made, and before any of the other defendants came in. 3. Hen. 6. Fitz. Debt. 20. Lord Willoughby and other defendants in assise against Wimbiſh, pleaded in abatement of the writ before any count was made. Plowd. Com. 73.—Lord Nott. MSS.

examinatis et intellectis recorde et processu coram toto concilio tam thesaurario et baronibus de scaccario, quam cancellario, ac etiam justiciariis de utroque banco inspecta causa, pro qua, pro domino rege dicunt, quod ad ipsum regem pertinet presentare, &c. consideratum est, &c. For in those dayes though the chancellor and treasurer were for the most part men of the church, yet were they expert and learned in the lawes of the realme.

As for example, in the time of the Conqueror, *Egelricus episcopus Cicestrensis vir antiquissimus, et in legibus sapientissimus*, as elsewhere I have said.

[a] Ockam, fo. 17.

[a] *Nigellus episcopus Eliensis Hen. 1. thesaurarius in temporibus suis incomparabilem habuit scaccarii scientiam, et de eadem scripsit optime.*

[b] Pasch. 5. R. 1. cor. Rege.

[b] *Henricus Cant. episcopus, H. Dunelm' episcopus, Willielmus Eliensis episcopus, G. Roffens. episcopus.*

[c] 1. H. 3. Rot. pat. Bracl. sæpe.

[c] *Martinus de Patshul clericus decanus Divi Pauli London' constitutus fuit capitalis justic' de banco, quia in legibus hujus regni peritissimus.*

[d] Bracl. sæpe.

[d] *Will'us de Raleigh clericus justiciarius domini regis.*

[e] 8. E. 3. 31.

[e] *Johannes episcopus Carliensis tempore H. 3.*

[f] Rot. pat. 24. H. 3.

[f] *Robertus Passelawe episcopus Cicestrensis tempore H. 3.*

[g] Liber ejus de legibus extat script. temp. E. 1.

[f] *Robertus de Lexintonio clericus constitutus capitalis justic' de banco.*

[h] Rot. pat. 17. E. 2.

[g] *Johannes Britton episcopus Hereford.*

[h] *Henricus de Stanton clericus constitutus fuit capitalis justiciarius ad placita*; with many others. And so were divers and many of the nobility, who when matters of great difficulty were brought into the upper house of parliament by writ of error, adjournement, or other parliamentary course, did by the assistance of the reverend judges, who ever attended in that court, judge and determine the same as by former and ancient records, and specially by the said record of 5. R. 1. doe manifestly appeare; and therefore the lords of parliament were called for those purposes, *concilium regis*; and like to the aforementioned record there be very many.

12. H. 4. 3.

In the raigne of *Edward* the third, pleadings grew to perfection both without lameness and curiosity; for then the judges and professors of the law were excellently learned, and then knowledge of the law flourished, the serjeants of the law, &c. drew their owne pleadings; and therefore truly said that reverend justice *Thirning*, in the raigne of *H. 4.* that in the time of *Edw. 3.* the law was in a higher degree than it had been any time before; for (saith he) before that time the manner of pleading was but feeble in comparison of that it was afterward in the raigne of the same king.

(Hob. 332. Ante 72. a.)

* 36. E. 3. ca. 15. 46. E. 3. 21.

Dy. 299. Li. 8. fo. 161.

Lib. 10. fo. 131.

(Doc. Pla. 116.)

Li. 10. fo. 88. Pl. Com. 421.

In the time of *Henric* the Sixth the judges gave a quicker eare to exceptions to pleadings, than either their predecessors did, or the judges in the raigne of *Edw.* the fourth, when our author flourished, or since that time have done, giving no way to nice exceptions, so long as the substance of the matter were sufficiently shewed. And as in the raigne of king *Edward* the third, by an act of parliament * it is provided, that counts or declarations should not abate so long as the matter of the action be fully shewed in the declaration and writ; so since our author wrote, in the raigne of queene *Elizabeth*, provision is made, that after demurrer the judges shall give judgement according to the right of the cause and matter in law, without regarding any imperfection, defect, or want of forme in any writ, retorne, plaint, declaration, or other pleading or course of proceeding whatsoever, except such as the party demurring shall specially shew. In which acts appeales and indictments of felony, murder, or treason concerning man's life, and the forfeiture of his lands and goods, are excepted. An excellent and a profitable law, concurring with the wisdom and judgement of ancient and latter times, that have disallowed curious and nice exceptions tending to the overthrow or delay of justice; *apices juris non sunt jura*: yet it is good for a learned professor to make all things plain and perfect, and not to trust to the after aide or amendment by force of any statute, lest his client's cause matcheth not therewith; and as it is in physicke for the health of a man's body, so it is in remedies for the safety of a man's cause. In law, *præstat cautela quam medela*.

But now let us returne to our author.

Sect. 535, 536, 537.

(Sid. 175. 176.)

(Doc. Pla. 70. 118. 136. 138. 254.)

(11. Rep. 52. a.)

*ITEM, si soyent seignior et tenant, * mesque le seignior confirma l'estate que le tenant ad en les tenements, uncore le seigniorie entierment demurt a le*

ALSO, if there be lord and tenant, albeit the lord confirme the estate which the tenaunt hath in the tenements, yet the seigniorie remaineth entire to the

* *mesme*—et, L. and M. and Roh.

a le seignior come il fuit adevant. lord as it was before.

Sect. 536.

EN mesme le manner est, si home ad un rent charge hors de certeine terre, et il confirma l'estate que le tenant ad en la terre, uncore demurt a le confirmor le rent charge. IN the same manner is it, if a man hath a rent charge out of certaine land, and hee confirme the estate which the tenant hath in the land, yet the rent charge remayneth to the confirmor.

Sect. 537.

*EN mesme le manner est, si un home ad common de pasture * en auter terre, s'il confirma l'estate de le tenant de la terre, rien departera de luy de son common; mes ceo nient obstant le common demurt a luy come fuit adevant.* IN the same manner it is, if a man hath common of pasture in other land, if he confirme the estate of the tenant of the land, nothing shall passe from him of his common; but notwithstanding this, the common shall remayne to him as it was before.

HERE is the sixth case wherein the release and confirmation doe differ; for by the release of the seigniory, rent charge or common are extinct. And so these three Sections be evident, and need no explication, saving that some doe gather upon these two last Sections and the next ensuing, that a man cannot abridge a rent charge or common pasture by a confirmation, as he may doe a rent service in respect of the privitie betweene the lord and tenant, so as (say they) a tenure may be abridged by a confirmation, but not a rent charge or common: and therefore *Littleton* beginneth the next Section with an adverb adverbative, viz. (*mes but*) &c. But a man may release part of his rent charge. or common, &c.

Sect. 538.

MES si soient seignior et tenant, lequel tenant tient de son seignior per le service de fealtie et 20 s. de rent, si le seignior per son fait confirma l'estate le tenant, a tener per 12 d. ou per un denier, ou per un maile: en cest case le tenant est discharge BUT if there be lord and tenant, which tenant holdeth of his lord by the service of fealtie and 20 shillings rent, if the lord by his deed confirme the estate of the tenant, to hold by 12 pence or by a penny, or by a halfe peny: in this case the tenant is discharged of all the

AND the reason wherefore no service of another cannot be reserved upon the confirmation is, because as long as the state of the land continueth, it cannot by the confirmation of the lord be charged with any new service. So as it is evident that the lord by his confirmation may diminish and abridge the services, but to reserve upon the confirmation new services he cannot, so long as the former estate in the tenancie continueth. And as where a confirmation doth inlarge

* *en-on*, I. and M. and Rob.

Lib. 3. Cap. 9. Of Confirmation. Sect. 539.

inlarge an estate in land, there ought to be privitie, as hath beene said; so regularly where a confirmation doth abridge services, there ought to be privitie also.

And therefore here Littleton putteth his case of lord and tenant betweene whom there is privitie. And therefore if there be lord, mesne and tenant, the lord cannot confirme the estate of the tenant to hold of him by lesser services, but this is void, for that there is no privitie betweene them, and a confirmation cannot make such an alteration of tenures.

And the case in 4. E. 3. maketh nothing against this opinion; for there the case in substance is this: John de Bonville held certaine lands of Ralfe Vernon, and before the statute of *quia emptores terrarum*, levied a fine of the same lands to the abbot of Cogshall and his successors to hold of the chiefe lord (which was Ralfe Vernon) by the services due and accustomed. Ralfe Vernon made a charter to the said abbot in these words: *Concessi etiam eidem abbati et successoribus suis relaxavi et quietum clamavi totum jus, &c. quod habeo, vel potero habere in omnibus tenementis que idem abbas habet de dono Johannis de Bonville, tenendum de me et heredibus meis in puram et perpetuam elemosinam*; and adjudged, that it was a good tenure in frankalmoigne: which case proveth nothing that the lord paramount may by his confirmation to the tenant peravaille extinct the mesnaltie (as it is abridged by master Fitzherbert in the title of Confirmation, pl. 21.) for the immediate lord did there make the said charter, and not any lord paramount. (And therefore it is ever good to relie upon the booke at large, for many times *compendia sunt dispendia*, and *melius est petere fontes, quam sectari rivulos*). And of this opinion was master Plowden upon good advisement and consideration.

And here is the seventh case wherein the release and confirmation doth agree; for if there be lord and tenant by fealty and twenty shillings rent, the lord may release all his right in the seigniorie or in the tenancie, saving fealtie and ten shillings rent; but he cannot save a new kinde of service, for he may aswell abridge his services upon a release as upon a confirmation. And as there is required privitie when the lord abridgeth the services of his tenant by his confirmation; so must there be also, when the lord by his release abridgeth the services of his tenant. And therefore the lord paramount cannot release to the tenant peravaille saving to him part of his services, but the saving in that case is void (1).

Et rendra rien a son seignior forsque ceo que est comprise, &c. Which words are thus to be understood; that the tenant shall not render any more rent or annuall service to the lord than is contained in the deed; but other things notwithstanding the said confirmation the tenant shall yeeld to the lord, as releefe, ayde *pur file marier*, and ayde *pur faire fitz chivaler*, because these are incidents to the tenure that remaine, and shall not be discharged without speciall words, by the generall words of all other actions, services and demands. And so if a man hold of me by knight's service, rent, suit, &c. and I release to him all my right in the seigniorie, excepting the tenure by knight's service, or confirme his estate to hold of me by knight's service only for all manner of services, exactions, and demands; yet shall the lord have ward, marriage, releefe, ayde *pur file marier*, et *pur faire fitz chivaler*, for these be incidents to the tenure that remaine. But it is holden, that if a man make a gift in taile by deed reserving two shillings rent *a luy et ses heires pro omnibus et omnimodis servitiis, exactionibus secularibus et cunctis demandis*, if the donee die his heire of full age, the donor shall have no releefe, because in the originall deed of the gift in taile it is expressly limited, that by the service of two shillings rent he shall be quite of all demands (and releefe lieth in demand); and by reason of those words, say they, there cannot any releefe become due; but some doe hold the contrary in that case.

Sect. 539.

MES si le seignior voile per fait de confirmation, que le tenant en cest cas doit BUT if the lord will by his deed of confirmation, that the tenant in this case shall yeeld render

7. E. 3. 19. 22. E. 3. 18. b.

4. E. 3. 19.

4. E. 3. 19. 9. E. 3. 1. 12. E. 4. 11. 16. E. 3. fines 4. 6. Eliz. Dier 230.

(Ant. 47. a.)
(Plow. 563. b.)
Britton f. 57. 177. 40. E. 3. 21.
47. 48. 18. E. 3. 26. 50. Aff.
6. 14. H. 4. 8.

(Ant. 76. a.)

13. R. 2. tit. avowrie 89.
Nota dictum. Fitzh.

(Ant. 23. a.)

(1) 3. Inst. 47. A saving will serve for any thing that is implied in the judgment, as in case of felony to save the wife's dower; but a saving will not serve against the expresse judgment, for that should be repugnant, as saving the life of the offender should be void.

*render a luy un espervier ou un rose annualment a tiel feast, &c. cest * confirmation est voide, pur ceo que il reserva a luy un novel chose que ne fuit parcel de ses services devant la confirmation: et issint le seignior poit bien per tiel confirmation abridger les services † per queux le tenant tient de luy, mes il ne poit réserver a luy novel services.*

to him a hawke or a rose yearly at such a feast, &c. this confirmation is void, because hee reserveth to him a new thing which was not parcell of his services before the confirmation: and so the lord may well by such confirmation abridge the services by which the tenant holdeth of him, but hee cannot reserve to him new services.

THIS upon that which hath beene said before in the next preceding Section is evident, and needeth no further explication.

Sect. 540.

*ITEM, si soit seignior ‡, mesne, et tenant, et le tenant est un abbe, que tient de mesne per certaine service annualment, le quel n'ad ascun cause § d'aver acquittance envers son mesne, pur porter briefe de mesne, || &c. en cest cas, si le mesne confirma l'estate que l'abbe ad en la terre, a aver et tener la terre a luy et a ses successeurs en frankalmoigne, &c. en cest cas le confirmation est bone, et adonques l'abbe tiendra de le mesne en frankalmoigne. Et la cause est, pur ceo que, nul novel service est reserve, car tous les services especialment specifies sont extincts, et nul rent est reserve ¶ al mesne, forsque** que l'abbe tient de luy la terre, et ceo fist †† il devant la confirmation; car celui que tient en frankalmoigne ne doit faire ascun corporall service; issint ‡‡ que per tiel confirmation il appiert, que le mesne ne reserva a luy ascun novel service, mes que les tenements seront tenus de luy come ceo fuit devant. Et en cest*

ALSO, if there be lord, mesne, and tenant, and the tenant is an abbot, that holdeth of the mesne by certaine services yearly, the which hath no cause to have acquittance against his mesne, for to bring a writ of mesne, &c. in this case, if the mesne confirme the estate that the abbot hath in the land, to have and to hold the land unto him & his successors in frankalmoigne, or free almes, &c. in this case this confirmation is good, and then the abbot holdeth of the mesne in frankalmoigne. And the cause is, for that no new service is reserved, for all the services specially specified bee extinct, and no rent is reserved to the mesne, but the abbot shall hold the land of him as it was before the confirmation; for he that holdeth in frankalmoigne ought to doe no bodily service; so that by such confirmation it appeareth, the mesne shall not reserve unto him no new service, but that the lands shall bee holden of him as it was before. And in this

case

* confirmation—reservacion, L. and M. and Roh.

† mesne—mesme, L. and M. but not in Roh.

¶ al mesne not in L. and M. nor Roh.

‡‡ que not in L. and M. nor Roh.

† per queux le tenant tient de luy, not in L. and M. nor Roh.

§ per cas added L. and M. and Roh.

** que not in L. and M.

|| &c. not in L. and M. nor Roh.

†† il—a lui, L. and M. and Roh.

*case l'abbe a vera un brieve de mesne, s'il soit distreine en son default, per force de le dit confirmation, lou per case il ne puisse aver * un brieve adevant, &c.*

case the abbot shall have a writ of mesne, if hee bee distrained in his default, by force of the said confirmation, where per case hee might not have such a writ before.

4. E. 3. 19. 22. E. 3. 15. b. the lord Wake's case. 10. E. 3. 5. 15. E. 3. confirmat. 8. 4. E. 3. 19. 20. F. N. B. 136. h. & q. 4. E. 4. 35. 31. E. 1. Mesne 55. 11. E. 3. Avowrie 100. 22. E. 3. 18. b. 30. E. 3. 13. 16. H. 3. Avowrie 243. (9. Rep. 130.)

HERE our author having seene the former bookes putteth his case, that the mesne maketh the confirmation to hold in frankalmoigne, and not the lord paramount.

Et en cest case l'abbe a vera brieve de mesne. Here is to bee noted, that upon a confirmation to hold in freealmoigne there lyeth a writ of mesne, albeit the cause of acquittal beginne after the seignior. And so upon such a confirmation the tenant shall have, *contra formam feoffamenti.*

Sect. 541.

HERE is to be observed a diversity betweene the custodie of the body of a ward within age, and a right of inheritance in the body of a villeine in grosse; for a man may bee put out of possession of the custodie of his ward, but not of his villeine in grosse, no more than a man can bee of his prisoner which he hath taken in warre.

Also of things that are in grant, as rents, commons, and the like, it is at the election of the party whether hee will be disseised of them or no, as shall bee said after in his proper place. (1) But of a villeine in grosse he cannot at all be disseised. [a] *Non valet confirmatio nisi ille qui confirmat sit in possessione rei vel juris unde fieri debet confirmatio, & e. d. m. modo nisi ille cui confirmatio fit, sit in possessione.*

And materially doth Littleton put his case of a villeine in grosse; for of a villeine regardant to a mannor, the lord may be put out of possession; for by putting him out of possession of the mannor, which is the principall, hee may likewise bee put out of possession of the villeine regardant, which is but accessory. And by the recovery of the mannor the villeine is recovered. But if another doth take away my villeine in grosse or regardant, he gaineth no possession of him. And this doth well appeare by the writ of *nativo habendo*, for that writ is not brought against any person in certaine (because no man

ITEM, si jeo sue seisie d'un villein come de villein en gros, et un auter luy prent hors de ma possession, enclaimant luy d'estre son villeine † la ou il n'avoit aucun droit d'aver luy come son villeine, et puis jeo confirma a luy l'estate que il ad en mon villeine, cest confirmation semble void, pur ceo que nul poit aver possession de un home come de villeine en grosse, si non celuy que ad droit de luy aver come son villein en grosse. Et issint tant que celuy a que le confirmation fuit fait, ne fuit seisie de luy come de son villeine a le temps de confirmation fait, tiel confirmation est void.

ALSO, if I be seised of a villeine as of a villeine in grosse, and another taketh him out of my possession, clayming him to bee his villein there where hee hath no right to have him as his villeine, and after I confirme to him the estate which hee hath in my villeine, this confirmation seemeth to be void, for that none may have possession of a man as of a villeine in grosse, but he which hath right to have him as his villeine in grosse. And so inas much as hee to whom the confirmation was made, was not seised of him as of his villeine at the time of the confirmation made, such confirmation is void.

45. E. 3. 10. 30. H. 6. tit. barre 59. Regilstrum 102. 1. H. 6. cap. 5.

(Post. 323. a.) Brooke tit. propertie 28.

(Sect. 589, 590, 591.)

[a] Bracton lib. 2. 59. b. 24. E. 3. tit. discont. 16. 42. E. 3. 18. 40. E. 3. 17. 43. E. 3. 4. 9. E. 4. 38. Dier. 10. Eliz. Growche's case.

* un—tiel, L. and M. and Roh.

† la ou il n'avoit aucun droit d'aver luy come son villeine, not in L. and M. nor Roh.

(1) See ant. 239. note 1.

can gaine the possession of him. But the writ is to this effect: *Rex vic' salutem. Præcipimus* (Ant. 303. a.) *tibi, quod justè et sine dilatione habere facias A. B. nativum et fugitivum suum, &c. ubicunque inventus fuerit, &c. et prohibemus super foris acturam nostram ne quis eum injustè detineat*; so as detain him one may, but to possess himselfe of him, and to dispossesse the lord, he cannot.

And if a man might have beene dispossessed of a villeine in grosse, or of a villeine regardant (unlesse he be dispossessed of the mannor also, as hath beene said), the law would have given a remedie against the wrong doer, as the law doth in the case of a ward.

Now, seeing it doth appeare by our bookes [a] (and by *Littleton* himselfe by implication speaking only of a villeine in grosse) that if a man be disseised of the mannor whereunto the villeine is regardant, he is out of possession of his villeine, and so an advowson appendant, and the like. Hereby (*Littleton* putting his case of a villeine in grosse) and by divers authorities a point controverted in our bookes [*] is resolved, viz. that by the grant of the mannor without saying *cum pertinentiis*, the villeine regardant, advowson appendant, and the like, doe passe; for if the disseisor shall gaine them as incidents to the mannor, whose estate is wrongfull, à multò fortiori the feoffee, who commeth to his estate by lawfull conveyance, shall have them as incidents. But where the entrie of the disseisee is lawfull, he may seise the villeine regardant, or present to the advowson, &c. before he enter into the mannor: otherwise it is where his entrie is not lawfull; and so are the ancient authors [b] to be intended (1).

[a] Bracton, fol. 243.
Britton, fol. 126.
(5. Rep. 11. b.)
Ant. 77. a. 121. b.)

[*] 9. E. 4. 38. 3. H. 4. 15.
18. E. 3. 44. 16. E. 3.
Quar. Imp. 146.
19. R. 2. Treps. 255.
19. H. 6. 31. 21. H. 6. 9.
33. H. 6. 33. 5. H. 7. 36. 38.
10. H. 7. 9. F. N. B. 33. 9.
22. H. 6. 33. per Moyle.
30. E. 3. 31. 39. E. 3. 21.
43. E. 3. 12.
(Plowd. 258. a. Ant. 122. b.)
Post. 349. b. 363. b.)
[b] Bracton, fol. 242, 243.
Britton, fol. 126. Fleta, acc.

Sect. 542.

*MES en cest cas, si tiels parols fueront en le fait, * &c. Sciatis me dedisse et concessisse + tali, &c. talem villanum meum, c'est bone; mes ceo urera per force et voy de grant, et nemy per voy de confirmation, &c.*

BUT in this case, if these words were in the deed, &c. *Sciatis me dedisse et concessisse tali, &c. talem villanum meum*, this is good; but this shall enure by force and way of grant, and not by way of confirmation, &c.

HERE it is to be observed, that a man hath an inheritance in a villeine, whereof the wife of the lord shall be endowed, as hath beene said; for in him a man may have an estate in fee or fee taile for life or yeeres. And therefore *Littleton* is here to be understood, that in the grant there were these words (*his heires*) or else nothing passed but for life, as of other things that lie in grant.

2. H. 6. F. N. B. 77. a. b.

24. E. 3. Discont. 16.

Sect. 543.

ET † ascun foits ceux verbs dedi et concessi ureront per voy d'extinguishment del chose done ou grant; sicome un tenant tient de son seignior per certeine rent, et le seignior granta per son fait a le tenant et a ses heires le rent, &c. ceo urera a le tenant per voy d'extinguishment, car per cel grant le rent est extinct, &c.

AND sometimes these verbs *dedi et concessi* shall enure by way of extinguishment of the thing given or granted; as if a tenant hold of his lord by certaine rent, and the lord grant by his deed to the tenant and his heires the rent, &c. this shall enure to the tenant by way of extinguishment, for by this grant the rent is extinct, &c.

And this grant of the rent shall enure by way of release.

3. E. 3. 12. & 3. Aff. 7.

Sect.

* &c. not in L. and M. nor Roh.

† tali not in L. and M. nor Roh.

‡ et—item, L. and M. and Roh.

(1) See the Chapter on Villenage.

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Sect. 544.

(s. Roll. 405.)

*EN mesme le manner est lou
* un ad un rent charge hors
de certaine terre, et il graunta al
tenant de la terre le rent charge,
Esc. Et la cause est, pur ceo que
appiert, per les parols del grant,
que le volunt le doner est, que le te-
nant avera le rent, Esc. Et entant
que il ne puit aver ne perceiver
ascun rent hors de son terre de-
mesme, pur ceo le fait serra inten-
due et pris pur le plus advantage
et availe pur le tenaunt que puit
este pris, et ceo est per voy d'ex-
tinguishment.*

IN the same manner it is where
one hath a rent charge out of
certaine land, and hee grant to
the tenant of the land the rent
charge, &c. And the reason is,
for that it appeareth, by the words
of the grant, that the will of the
donor is, that the tenant shall
have the rent, &c. And inasmuch as
hee cannot have or perceive any
rent out of his owne land, there-
fore the deed shall be intended and
taken for the most advantage and
availe for the tenant that it may
be taken, and this is by way of ex-
tinguishment.

34. H. 6. fol. 41.
(Ante 280. a.)

BUT if the grantee of the rent-charge granteth it to the tenant of the land and a stranger,
it shall be extinguished but for the moitie : and so it is of a feignorie.

Sect. 545.

*ITEM, si jeo lessa terre a un
home pur terme d'ans, et puis
jeo confirma son estate sans plus
parolx mitter en le fait, per cel
il n'ad plus greinder estate que
pur terme d'ans, sicome il avoit
adevant.*

ALSO, if I let land to a man for
terme of yeares, and after I
confirme his estate without put-
ting more words in the deed, by
this he hath no greater estate than
for terme of yeares, as hee had
before.

Sect. 546.

*MES si jeo releffa a luy
mon droit que jeo aye en
le terre sans plus † parols mitter
en le fait, il ad estate de frankte-
nement. ‡ Issint poyes entend,
mon fits, divers grands diversi-
ties perenter releases et confirma-
tions.*

BUT if I release to him all my
right which I have in the land
without putting more words in the
deed, hee hath an estate of free-
hold (1). So thou maist under-
stand (my sonne) divers great di-
versities betweene releases and
confirmations.

IN these two Sections is the seventh case wherein a release and confirmation doe differ.

Sect.

* un—home, L. and M. and Roh.

† parols not in L. and M. nor Roh.

‡ et added in L. and M. and Roh.

(1) To give a confirmation this effect, in the case of a lease at common law, the lessee must have previously made an actual entry. But no entry is necessary for the purpose, if the lease is a bargain and sale, under the statute.

Sect. 547.

ITEM, si jeo esteant deins age lessa terre a un auter pur terme de xx. ans, et puis il graunte le terre a un auter pur terme de x. ans, issint il granta forsque parcel de son terme: en cest case quant jeo fue de pleine age, si jeo releffa al grauntée de mon lessee, &c. cest release est voyd, pur ceo que il n'y ad aucun privity perenter luy et moy, &c. Mes si jeo confirme son estate, donque cest confirmation est bone. Mes si mon lessee graunta tout son estate a un auter, donques mon release fait a le grantee est bone et effectual.

ALSO, if I being within age let land to another for terme of xx. yeares, and after he granteth the land to another for term of x. years, so hee granteth but parcell of his terme: in this case when I am of full age, if I release to the grantee of my lessee, &c. this release is void, because there is no privity betweene him and me, &c. But if I confirme his estate, then this confirmation is good. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectual. (1)

HERE are two things to be observed: First, that the lease of an enfant in this case is not void but voidable. Secondly, this is the eighth case put by *Littleton*, where in the release and confirmation doe differ.

7. E. 4. 6. b. 18. E. 4. 2.
9. H. 7. 24.
(Cro. Jac. 320.
Sid. 42.
1. Roll. 729, 730.)

Sect. 548.

ITEM, si home granta un rent charge issuant hors de son terre a un auter pur terme de son vie, et puis il confirma son estate en le dit rent, a aver et tener a luy en fee taile ou en fee simple; cest confirmation est void quant a enlarger son estate, pur ceo que celui que confirme n'avoit aucun reversion en le rent.

ALSO, if a man grant a rent-charge issuing out of his land to another for terme of his life, and after hee confirmeth his estate in the said rent, to have and to hold to him in fee taile or in fee simple; this confirmation is void as to enlarge his estate, because hee that confirmeth hath not any reversion in the rent.

(Sid. 285.)
(Mo. 30.)

HERE the diversitie is apparant, betweene a rent newly created and a rent *in esse*: which needeth no explication. Only this is to be observed, that *Littleton* intendeth his deed of confirmation not to containe any clause of distress; for otherwise, as to the confirmation the deed is void, but the clause of distress doth amount to a new grant, as in the Chapter of Rents hath bene said.

(2. Roll. 415.)
21. E. 3. 47. 15. E. 4. 8. b.
Pl. Com. 35. 8. H. 4. 19.
(Ant. 148. 2. Post. 317. 2.)

Sect. 549.

MES si home soit seise en fee de rent service ou de

BUT if a man be seised in fee of rent service or rent charge,
rent

(1) So 3d Wilson 234. Henry Blencowe and Mary his wife, seised in fee, demised to William Alder for 21 years, with a proviso for re-entry on default of payment of the rent, or breach of any of the covenants. Among other covenants, there was one from William Alder, — "that he should not assign, transfer, or set over, or otherwise do or put away the indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the consent of the said Henry Blencowe and Mary his wife, their heirs and assigns, in writing, under his, her, or their hands and seals, first had and obtained for doing thereof." — William Alder, without any licence, demised to John Busby for 14 years. — It was held, that there was no *privity of contract* between the original lessor and Busby, the under-lessee. So that it was an under lease, and not an assignment; and therefore no breach of the covenant. And see Strange, 405.

*rent charge, et il grant le rent a un autre pur terme de vie, et le tenant attorna, et puis il confirma l'estate de le grantee en fee taile, ou en fee simple, cest confirmation est bone, quant a enlanger son estate selonques les parols le confirmation, pur ceo que celui que confirma * al temps de confirmation avoit un reversion del rent.*

and he grant the rent to another for life, and the tenant attorneth, and after hee confirmeth the estate of the grantee in fee taile, or in fee simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent.

HERE is the eighth case wherein the release and confirmation doth agree: and it is here to be observed, that to the grant of the estate for life, *Littleton* doth put an attornment, because it is requisite; but to the confirmation to the grantee of the rent to enlarge his estate, there is none necessary, and therefore he putteth none: but of this more shall be said in the Chapter of Attornment, *Sect.* 556, 557.

Sect. 550.

MES en cas avantdit lou home graunt un rent charge a un autre pur terme de vie, s'il voile que le grantee averoie estate en le taile, ou en fee, il convient que le fait de grant del rent charge pur terme de vie, soit surrender ou cancell, et donques de faire un novel fait d'autiel rent charge, a aver et perceiver a le grantee en le taile ou en fee, &c. Ex paucis † plurima concipit ingenium.

BUT in the case aforesaid where a man grants a rent charge to another for terme of life, if he will that the grantee should have an estate in taile, or in fee, it behoveth that the deed of grant of the rent charge for terme of life be surrendered or cancelled, and then to make a new deed of the like rent charge, to have and perceive to the grantee in taile or in fee, &c. *Ex paucis plurima concipit ingenium.*

Vid. *Sect.* 636.
(Cro. Car. 399. Ant. 148. a.
225. b. 10. Rep. 66.
Plowd. 237. a. Post. 338.
1. Ven. 297.)

SURRENDER ou cancel. (1) Note by cancellation of the deed the rent which lieth only in grant ceaseth (as here it appeareth) as well as by the surrender. And the reason wherefore (if the grantor make a new grant of the rent, and not enlarge it by way of confirmation, as *Littleton* must be intended) the deed should be surrendered or cancelled, is lest the grantor should be doubly charged, viz. with the old grant for life, and with the new grant in fee; or, as hath beene said, the grantor may grant to the grantee for life and his heires, that he and his heires shall distreine for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge, whereof you may see before in the Chapter of Rents.

Chap.

* *l'estate* added L. and M.† *plurima concipit ingenium* — *disis*, &c. L. and M.

(1) See ant. 226. note 2.

CHAP. 10.

Of Attornment.

Sect. 551.

**ATTORNE-
MENT** est,

*come si soit seignior et tenant, et le seignior voile granter per son fait les services de son tenant a un auter pur terme d'ans, ou pur terme de vie, ou en taile, ou en fee, il covient que le tenant atturna al grauntee en le vie le grantor, per force et vertue del grant, ou auterment le grant est void. Et attournement est nul auter en effect, forsque quant le tenant ad oye del grant fait per son seignior, que mesme le tenant agreea per parol a le dit grant, sicome adire a le grauntee, Jeo moy agree a le grant fait a vous, * &c. ou, Jeo sue † bien content de le graunt fait a vous; mais le plus common attournement est, adire, ‡ Sir, jeo atturna a vous per force del dit graunt, ou jeo deveigne vostre tenant, &c. ou || liverer al grauntee un denier, ou un maile, ou un farthing, per voy d'attournement §.*

**ATTORNE-
MENT** is, as

if there bee lord and tenant, and the lord will grant by his deed the services of his tenant to another for terme of yeares, or for terme of life, or in taile, or in fee, the tenant must attorne to the grantee in the life of the grantor, by force and vertue of the grant, or otherwise the grant is void. And attournement is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c. or I am well content with the grant made to you; but the most common attornment is, to say, Sir, I attorne to you by force of the said grant, or I become your tenant, &c. or to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment.

ATTORNMENT is

an agreement of the tenant to the grant of the feignorie, or of a rent, or of the donee in taile, or tenant for life or yeeres, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a turning or attorning from one to another. Wee use also *attornamentum* as a Latine word, and *attornare* to attorne. And so *Bracton* [a] useth it: *Item videndum, est si dominus attornare possit alicui hominagium et servitium tenentis sui contra voluntatem ipsius tenentis, et videtur quod non.*

*Bracton, lib. 2. fol. 81.
Britton, f. 105. b. 176, et 177.
Fleta, lib. 3. cap. 6.*

(1. Roll. Abr. 293.)

(1. Rep. 68.)

[a] *Bracton, lib. 2. fo. 81. b.
Fleta. Britton, ubi supra.*

And the reason why an attornment is requisite, is yeelded in old bookes to be, *Si dominus attornare possit servitium tenentis contra voluntatem tenentis, tale siqueretur inconveniens, quod possit eum subjugare capitali inimico suo, et per quod teneretur sacramentum fidelitatis facere ei qui eum damnificare intenderet.* (1)

*Bracton, lib. 2. fol. 81. b.
Britton, ubi supra.*

Il covient que le tenant attorna al grauntee en la vie del grantor, &c.

And so must he also in the life of the grantee; and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case if the grantor dieth before attornment, the feignorie, rent, reversion, or remainder descend to his heire; and therefore after his decease the attornment commeth too late: so likewise if the grantee dieth before attornment, an attornment to the heire is

*Vide Litt. fol. 128.
11. H. 7. 19.*

*Lib. 1. fol. 104, 105.
Shelley's case.*

*40. Ass. 19. 34. H. 6. 7.
20. H. 6. 7.
(Doct. and Stud. 86. a.)*

* &c. not in L. and M. nor Roh.
liverer—deliverer, L. and M. and Roh.

† *bien* not in L. and M. nor Roh.

‡ &c. added in L. and M. and Roh.

(1) Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his feignory without the consent of his feudatory: for the obligations of the lord and his feudatory being reciprocal, the feudatory was as much interested in the conduct and ability of the lord, as the lord in the conduct and ability of his feudatory; and that as the lord could not alien, so neither could he exchange, mortgage, or otherwise dispose of his feignory, without the consent of his vassal. See Sir Martin Wright's Introduction to the Law of Tenures, 30, 31. — It is certain that this doctrine formerly prevailed in England. But, in general, it does not appear to have prevailed (at least in an equal extent) in other countries. It seems there to have been admitted, that the lord might transfer the whole fee, without the consent of the vassal, and that the vassal immediately, by such a transfer, became the tenant of the new lord. — It seems also to have been admitted, that the lord might transfer to another the beneficial fruits of the tenure, without the consent of the vassal. But it was a great question whether the lord could transfer his vassal to another, without the vassal's consent, unless by transferring the whole fee. — See *Basnage Commentaire de la Coutume de Normandie, des Fiefs et Droits seodaux*, art. 204. — This necessity, which subsisted in our old law, that the tenant should consent to the alienation of the lord, gave rise to the doctrine of attornment. — At the common law, attornment signified only the consent of the tenant to the grant of the feignory; or, in other words, his consent to become the tenant of the new lord. But after the statute *quia emptores terrarum* was passed, by which subinfeudation was prohibited, it became necessary that when the reversion or remainder-man after an estate for years, for life, or in tail, granted his reversion or remainder, the particular tenant should attorn to the grantee; as the particular tenant must, otherwise, have held of the remainder-man, and he of the chief lord; by which a new tenure would be created. — The necessity of attornment was, in some measure, avoided by the statute of uses; as by that statute, the possession was immediately executed to the use; — and by the statute of wills, by which the legal estate is immediately vested in the devisee. — Yet attornment continued after this to be necessary, in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4. and 5. Ann. c. 16. and 11. Geo. 2. c. 19. By the former of those statutes it was enacted, "That all grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, should be good without attornment of the tenants;

(9 Rep. 84. Sect. 564.)

34. H. 6. 7. 20. H. 6. 7.

Brafton, lib. 2. fol. 81, 82. ecc.

Lib. 6. fol. 68. Sir Moyle
Finche's case.(2. Cro. 193. Post. 321. 6 Rep.
68.)27. H. 8. cap. 16.
Vide Sect. 584.(Ant. 104. b.
Post. 11. b.
5. R. 7. 113.)
Lib. 6. ubi supra.
Vide Sect. 149.

49. E. 3. 4. 34. H. 6. 8.

6. E. 4. 13.

(P. 0. 314. b.

1. Roll. Ab. 294.

Sect. 564.

1. Rep. Alton Wood's case.

8. Rep. 89.

1. Roll. R. p. 301.

1. Cro. 441.

Jones 376.)

Lib. 2. fol. 67. b. Tooker's case.

13. Eliz. Dier 302.

Tooker's case ubi supra.

Lib. 2. Tooker's case ubi supra.

is void, for nothing descended to him; and if he should take, he should take it as a purchaser, where the heirs were added but as words of limitation of the estate, and not to take as purchasers.

But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth passe to the conusee and his heirs; and the attornment to the conusee or his heirs at any time to make privie to distraine is sufficient. But all this is to be taken as *Littleton* understood it, viz. of such grants as have their operation by the common law. For since *Littleton* wrote, if a fine be levied of a feignorie, &c. to another to the use of a third person and his heirs, he and his heirs shall distraine without any attornment, because he is in by the statute of 27. H. 8. cap. 10. by transferring of the state to the use, and so he is in by act in law.

And so it is, and for the same cause, if a man at this day by deed indented and inrolled according to the statute, bargaineth and selleth a feignorie, &c. to another, the feignorie shall passe to him without any attornment; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees much altered concerning attornment since *Littleton* wrote.

But if the conusee of a fine before any attornment by deed indented and inrolled, bargaineth and selleth the feignorie to another, the bargainee shall not distraine, because the bargainor could not distraine. *Et sic de similibus*; for *nemo potest plus juris ad alium transferre quam ipse habet*. Vide Sect. 149. where upon a recovery, the recoveror shall distraine and avow without attornment.

A grant to the king, or by the king to another, is good without attornment, by his prerogative.

Attornment est nul auter en effect, &c. It is to be understood that there be two kinde of attornments, viz. an attornment in deed or expresse, and an attornment in law or implicate. Of attornment expresse or in deed *Littleton* speaketh here, and of attornment in law he speaketh after in this chapter. And to both these kinds of attornments there is an incident inseparable, that is, that the tenant hath notice of the grant; for (an attornment being an agreement or consent to the grant, &c.) he cannot agree or consent to that which he knoweth not. And the usuall pleading is, to which grant the tenant attorned. And therefore if a bayly of a manor who used to receive the rents of the tenants, purchase the manor, and the tenants having no notice of the purchase, continue the payment of the rents to him, this is no attornment. So if the lord levie a fine of the feignorie, and by fine take backe an estate in fee, the tenant continueth the payment of the rent to the first conusor without notice of the fines, this is no attornment. But it is to be knowne, that there be two kinde of notices, viz. a notice in deed or expresse, whereof *Littleton* here speaketh, when he saith, that the tenant agreeth to the grant, and a notice in law or implied, whereof *Littleton* hereafter speaketh in this chapter.

Del grant fait per son seignior. Here is to be seene when the thing granted is altered, what becommeth of the attornment.

If there be lord, mesne and tenant, and the mesne grant over his mesnaltie by deed, the lord releaseth to the tenant, whereby the mesnaltie is extinct, and there is a rent by surplussage, an attornment to the grant of this rent secke is good, although the qualitie of that part of the rent is altered, because it is altered by act in law.

If a reversion of two acres be granted by deed, and the lessor before attornment levie a fine of one of them, and the tenant attorne to the grantee by deed, this is good for the other acre.

[a] If the reversion be granted of three acres, and the lessee agree to the said grant for one acre, this is good for all three; and so it is of an attornment in law, if the reversion of three acres be granted, and the lessee surrender one of the acres to the grantee, this attornment shall be good for the whole reversion of the three acres according to the grant.

Et le tenant agreea. Hereafter in this chapter *Littleton* doth teach what manner of tenant shall attorne.

Agreea per parol, &c. And so hee may, and more safely by his deed in writing.

Sicome adire a le grantee, &c. Here is to be seene to what manner of grantees the attornment is good. Regularly the attornment must be according to the grant, either expressly or impliedly. Of the first *Littleton* hath here spoken.

Im-

tenants; provided that no such tenant should be damaged by payment of rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice given him of such grant by the conusee or grantor. By the latter statute it was enacted, that the attornments of tenants to strangers claiming title to the estate of their landlords, should be absolutely null and void to all intents and purposes whatsoever, and that the possession of their respective landlord or landlords, lessor or lessors, should not be deemed or construed to be any wise changed, altered, or affected, by any such attornment or attornments; provided that nothing therein contained should extend to vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law, or decree, or order of a court of equity, or made with the privy and consent of the landlord or landlords, lessor or lessors, or to any mortgagee, after the mortgage is become forfeited.—Till the passing of these statutes, the doctrine of attornment was one of the most copious and abstruse points of the law. But these statutes having made attornment both unnecessary and inoperative, the learning upon it is so useless, that Mr. Viner has inserted nothing respecting it in his voluminous compilation but an extract from lord chief baron Gilbert.—Mr. Bacon has not the article Attornment in his work; and the learning and industry of lord chief baron Comyn have furnished him with little material upon it, that is not to be found either in *Littleton* or sir Edward Coke.

[2] 18. E. 3. tit. Variance, 63.
22. E. 3. 18.
Tooker's case ubi supra.
(Folt. 314.)

39. H. 6. 3. Tooker's case ubi
supra.

Impliedly, as if a reversion be granted to two by deed, and the lessee attorne to one of them according to the grant, this attornment is good, but not to vest the reversion only in him to whom attornment is made; but it shall enure to both the grantees, for that is according to the grant, and for that it cannot vest the reversion only in him to whom the attornment is made. And so it is if one grantee dieth, the attornment to the survivor is good.

If the lord grant by deed his feignorie to *A.* for life, the remainder to *B.* in fee, *A.* dieth, and then the tenant attorne to *B.* this attornment is void, because it is not according to the grant; for then *B.* should have a remainder without any particular estate.

If a reversion be granted to a man and a woman, they are to have moities in law; but if they entermarrie and then attornment is had, they shall have no moities (and yet by the purport of the grant they are to have moities), because it is by act in law.

If a feme grant a reversion to a man in fee, and marry with the grantee, the lessee attorne to the husband, this is a good attornment in law to the husband.

If a reversion be granted by deed to the use of *I. S.* and the lessee hearing the deed read, or having notice of the contents thereof attorne to *cestuy que use*, this is an implied attornment to the grantee.

If a reversion be granted for life, the remainder in taile, the remainder in fee, the attornment to the grantee for life shall enure to them in the remainder, to vest the remainder in them.

And in those cases if the tenant should say, that I doe attorne to the grantee for life, but that it shall not benefit any of them in remainder after his death, yet the attornment is good to them all; for having attorned to the tenant for life, the law (which he cannot controll) doth vest all the remainder. And of this more shall be said hereafter in this chapter.

Littleton here putteth five examples of an expresse attornment, but of them the last is the best, because the ear is not only a witnesse of the words, but the eye of the delivery of the penny, &c. and so there is *dictum et factum*. And any other words which import an agreement or assent to the grant, doe amount to an attornment. And albeit these five expresse attornements be all set downe by *Littleton*, to be made to the person of the grantee [*b*], yet an attornment in the absence of the grantee is sufficient; for if he doth agree to the grant either in his presence or in his absence, it is sufficient.

(Post. 313. a.
Ant. 52. a. 297. b. 296. a.)

Tooker's case ubi supra.
11. H. 7. 12.

20. H. 6. 7.
(Ant. 298. a.)

Tooker's case ubi supra.
Pl. Com. 187. 483.
(Ant. 187. b.)

2. R. 2. tit. Attornment 8.
Lib. 4 f. 61. Hemling's case.
(Mo. 91. con. 1. Lco. 58.)

Temps E. 1. Attorn. 22.
18. E. 4. 7.
(Ant. 212. b. 312. b. 6. Rep. 63.
5. Rep. Ford's case.
1. Roll. Abr. 412. 3. Lco. 17.
4. Lco. 23.)

[*b*] Lib. 2. fol. 68, 69.
Tooker's case.
28. H. 8. tit. Attornment Br. 40.
(10. Rep. 52. Cro. Car. 440.
1. Roll. Abr. 300. Dyer 298. a.)

Sect. 552.

*ITEM, si le seignior graunt le service de son tenant a un home, et puis per un fait portant un darreme date il granta mesmes les services a un autre, et le tenant attorne a le second grantee, or le dit * grauntee ad les services; et comment que apres le tenant voile attorner a le premier grauntee, c'est clereement void, &c.*

ALSO, if the lord grant the service of his tenant to one man, and after by his deed bearing a later date hee grant the same services to another, and the tenant attorne to the second grantee, now the said grantee hath the services; and albeit afterwards the tenant will attorne to the first grantee, this is clearly void, &c.

HERE it is to be observed, that *Littleton* expresseth not what estate is granted, and very materially; for if the former grant were in fee, and the latter grant were for life, and the tenant doth first attorne to the second grantee, he cannot after attorne to the first grantee to make the fee simple passe, for that should not be according to the grant; but in that case the attornment to the first is countermanded. And so it is if a reversion expectant upon an estate for life be granted to another in fee, and after the

(Cro. Car. 284. 1. Roll. Abr. 500;
Ant. 296. a.)

grantor before attornment confirme the estate of the lessee in taile, the attornment to the grantee for the fee simple is void.

In the same manner, if a reversion upon an estate for yeeres be granted in fee, and the lessee confirme the estate of the lessee for life, he cannot afterwards attorne.

If

* dit-second, L. and M. and Roh,

11. H. 7. 19. 2. R. 2. ubi supra.

P. 3. Eliz. Bendloes. Hemling's
case ubi supra.
(1. Roll. Abr. 299.)

11. H. 7. 12.

(Ant. 190. 2. Mo. 84.)

If a feme sole maketh a lease for life or yeares, reserving a rent, and granteth the reversion in fee, and taketh husband, this is a countermand of the attornment.

Where our author putteth his case of the whole reversion, if two coparceners bee of a reversion, and one of them granteth her moiety by fine, the conusee shall have a *quid juris* clamat for the moitie.

If in the case that our author here putteth of severall grantees, if the tenant attorne to both of them, the attornment is void, because it is not according to the grant. If a reversion be granted for life, and after it is granted to the same grantee for yeares, and the lessee attorneth to both grants, it is void for the incertaintie: *à multo fortiori*, if the lord by one deed grant his feignorie to *J. bishop of London* and to his heires, and by another deed to *J. bishop of London* and to his successors, and the tenant attorne to both grants, the attornment is void; for albeit the grantee be but one, yet he hath severall capacities, and the grants are severall, and the attornment is not according to either of the grants.

But if *A.* grant the reversion of *Black-Acre* or *White-Acre*, and the lessee attorne to the grant, and after the grantee maketh his election, this attornment is good; for albeit the state was uncertaine, yet he attorned to the grant in such sort as it was made: and so pote a diversity betweene one grant and severall grants, and observe in this case an attornment good in expectation, and yet nothing passed at the time of the attornment, but by the election subsequent.

Sect. 553.

Temps E. 2. Attornment.

48. E. 3. 15.
(Sid. 310. 312. 373. Ant. 263. 2.
Post. 341. a. 3. Rep. 29.
1. Leo. 208.)

HERE it is to bee observed, that when a man maketh a feoffment of a mannor, the services doe not passe, but remaine in the feoffor untill the freeholders doe attorne; and when they doe attorne, the attornment shall have relation to some purpose, and not to other. For albeit the attornment bee made many yeares after the feoffment, yet it shall have relation to make it passe out of the feoffor *ab initio* even by the liverie upon the feoffment, but not to charge the tenants with any meane arrerages, or for waste in the meane time, or the like.

If a reversion of land bee granted to an alien by deed, and before attornment the alien is made denizen, and then the attornment is made, the king, upon office found, shall have the land: for as to the estate betweene the parties, it passeth by the deed *ab initio*. (1)

If a man plead a feoffment of a mannor, hee need not plead an attornment of the tenants; but (if it be materiall) it must be denied or pleaded of the other side.

And upon consideration had of all the bookes touching this point, whether the services of the freeholders doe passe, wherein there have beene three severall opinions, viz. some have holden that the services doe passe in the right by the livery as parcell of the mannor, but not to avow without attornment, as in the case of the fine. And others have holden, that they both passe in right and in possession to distreine without attornment. And the third opinion is, that in this case the said services passe neither in possession nor in right, but untill attornment remaine

ITEM, si home soit seigneur de un mannor, quel mannor est parcell en demesne, et parcell en service, s'il voile aliener cel mannor a un autre, il convient que per force del alienation, que tous les tenants que teignent del alienor come de son mannor attornent al alienee, ou autrement les services demurront continualment en l'alienor, forprisi tenants a volunt †; car il ne besoigne que tenants a volunt attornent sur tiel alienation, &c. ‡*

ALSO, if a man bee seised of a mannor, which mannor is parcell in demesne, and parcell in service, if hee will alien this mannor to another, it behooveth that by force of the alienation, all the tenants which hold of the alienor as of his mannor doe attorne to the alienee, or otherwise the services remaine continually in the alienor, saving the tenants at will; for it needeth not that tenants at will doe attorne upon such alienation, &c.

(2. Roll. Abr. 394. 395.
Plo. 482. b. 483. a.
Ant. 270. b. 279. b.)

Pasch. 5. E. 3. coram rege.
Suffex in Tresaur. 21. E. 3. 47.
34. E. 3. Double plea. 24.
42. Ass. p. 6. 43. Ass. p. 20.
30. E. 3. 29. E. 3.
26. E. 3. per quae servicia 21.
8. H. 4. 1. b. 12. H. 4.
20. H. 6. 7. 35. H. 6.
9. E. 4. 33. 13. H. 7. 14. a.
1. H. 7. 31.
4. E. 6. Attornment, Br. 30.

* &c. added L. and M. and Roh.

† &c. added in L. and M. and Roh.

‡ pur ceo que mesmes les terres et

tenements que ils teignent a volonte passent al aliene per force de tiel alienation, added in L. and M. and Roh. and in MSS.

(1) Here the fee is supposed to vest immediately in the grantee: but when an estate is granted upon a condition precedent, the estate does not vest, even by way of relation, till the performance of the condition. Plo. 482. b.

remaine continually in the alienor, as *Littleton* here holdeth. And so it was resolved *Pascb.* 15. *Eliz.* betweene *Brasbitch* and *Barwell*, according to the opinion of our author. And I never yet knew any of *Littleton's* cases (albeit I have knowne many of them) to be brought in question, but in the end the judges concurred with our author.

And where our author speaketh of the attornment of the freeholders, if the lord make a lease for yeares or for life of a mannor, and the freeholders attorne to the lessee, if after the reversion of the mannor be granted, the attornment of the lessee for yeares or life shall binde the freeholders: for by their former attornment, they have put the attornment into the mouth of the lessee.

Forspise tenant a volunt, &c. Here is implied tenant at will or by copie of court roll according to the custome of the mannor, so as the freehold and inheritance both of lands in the hands of tenant at will by the common law or by custome shall passe both in right and in possession without any attornment.

Sect. 554.

ITEM, si soient seignior et tenant, et le tenant lessa la terre a un autre pur terme de vie, ou dona la terre en le taile savant le reversion a luy, &c. si le seignior en tiel cas granta son seigniory a un autre, il covient que celui en le reversion atturna al grauntee, et nemy le tenant a terme de vie, ou le tenant en le taile, pur ceo que en cest cas celui en le reversion est tenant al seignior, et nemy le tenant a terme de vie, ne le tenant en le taile.

ALSO, if there bee lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in taile saving the reversion to himselfe, &c. if the lord in such case grant his seigniory to another, it behoveth that hee in the reversion attorne to the grantee, and not the tenant for terme of life, or the tenant in taile, because that in this case he in the reversion is tenant to the lord, and not the tenant for terme of life, nor the tenant in taile.

FOR it is a maxime (8. Rep. 42.) in law, that no man shall attorne to any grant of any seignorie, rent service, reversion or remainder, but he that is immediately privie to the grantor; and because in this case there is no privitie betweene the lord and the tenant for life, or donee in taile, but only betweene the lord and him in the reversion; for in this case the attornment of him in the reversion only is good.

Savant le reversion a luy, &c.

That is to say, without limitation of any remainder over; and this is but to make his opinion plaine as to the point that he putteth it.

Sect. 555.

*EN mesme le manner est lou sont seigniour, mesne et tenant, * si le seigniour voile granter les services del mesne, coment que il ne fait ascun mention en son grant del mesne, uncore il covient que le mesne atturna, † &c. et nemy le tenant*

IN the same manner is it where there are lord, mesne and tenant, if the lord will grant the services of the mesne, albeit hee maketh no mention in his grant of the mesne, yet the mesne ought to attorne, &c. and not the tenant peravaille, &c.

* *f—et*, L. and M. and Roh.

† *&c.* not in L. and M. nor Roh.

(1) For the difference between feisin and attornment, see *Brediman's case*, 6. Rep. 56. b.

peravaile, &c. pur ceo que le mesne is tenant unto him, &c.

This standeth upon the same reason that the next precedent case did.

Seēt. 556.

(6. Rep. 59. a.)

21. H. 6. 9. b.

(2. Rep. 67.)

(6. Rep. 39. a.)

(1. Leon. 265. a.)

46. E. 3. 27. 2. H. 6. 9. Vi. Lit. Seēt. 549. & 553.

HERE is to be observed a diversitie betweene a rent service and a rent charge, or a rent secke; for as to the rent service, no man (as hath beene said) can attorne, but he that is privie; so in case of a rent charge, it behooveth that the tenant of the freehold doth attorne to the grantee, without respect of any privitie. And therefore the disseisor onely, in the case of a grant of a rent charge, shall attorne, because he is (as *Littleton* saith) tenant of the freehold; but in case of a grant of a rent service, the attornement of a disseisee sufficeth.

If there be lord and tenant by homage, fealtie, and rent, the tenant is disseised, the lord granteth the rent to another, the disseisee attorneth, this is void: but if he had granted over his whole feignorie, the attornement had beene good; and the reason of this diversitie is here given by our author, for that when the rent was granted onely, it passed as a rent secke, and consequently the disseisor being terre-tenant, must attorne. But when the feignorie is granted, then the disseisee in respect of the privitie may

Covient que le tenant del franktenement, &c. And therefore if the tenant of the land charged with a rent charge or a rent secke make a lease for life, and he that hath the rent charge or rent secke granteth it over, the tenant for life shall attorne, for he is tenant of the freehold, according to the expresse saying of our author, and (as hath beene said) there needeth no privitie.

And it was holden by *Dyer* chiefe justice of the court of common pleas, and *Mounson* justice, in the argument of *Bracebridge's* case abovesaid, and not denied, that if he that hath a rent charge granteth it over for life, and the tenant of the land attorne thereunto, and after he granteth the reversion of the rent charge, that the grantee for life may attorne alone; and that these words of *Littleton* are to be understood when a rent charge or rent secke is granted in possession: and therewith agreeth 46. E. 3. where it appeareth, that the *quid juris clamat*, in that case, did lie against the grantee for life.

A man maketh a lease for life, and after grants to A. a rent charge out of the reversion, A. granteth the rent over, he in the reversion must attorne, and not the tenant of the freehold, for that the freehold is not charged with the rent; for a release made to him by the grantee doth not extinguish the rent. And *Littleton* is to be understood, that the tenant of the freehold must attorne when the freehold is charged.

MES auterment est lou certaine terre est charge d'un rent charge ou rent seck; car en tiel case si celuy que ad le rent charge ceo grant a un auter, il covient que le tenant del franktenement atturna al grantee, pur ceo que le franktenement est charge ove le rent, &c. Et en rent charge nul avowrie doit estre fait sur ascun person pur le distresse prise, &c. mes il avowera le prise bone et droiturel, come en terres ou tenements issint charges a son distresse, &c.

BUT otherwise it is where certaine land is charged with a rent-charge or rent secke; for in such case if he which hath the rent-charge grant this to another, it behooveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge no avowrie ought to be made upon any person for the distresse taken, &c. but hee shall avow the prisel to bee good and rightfull, as in lands or tenements so charged with his distresse, &c.

Et en rent charge nul avowrie doit estre fait sur aucun person, &c.

This is the reason that *Littleton* giveth of the difference betweene the rent service and the rent charge. Now it may bee said, that this reason is taken away by the statute of 21. H. 8. for by that statute the lord needs not avow for any rent or service upon any person in certaine; and then by *Littleton's* reason there needeth no privitie to the attornment of a feignorie; for (say they) *cessante causa vel ratione legis, cessat lex*, as at the common law no aid was grantable of a stranger to an avowrie; because the avowrie was made of a certaine person: but now the avowrie being made by the said act of 21. H. 8. upon no person, therefore the reason of the law being changed, the law itselfe is also changed; and consequently in an avowrie according to that act, aid shall be granted of any man, and the like in many other cases; which case is granted to be good law: but albeit the lord (as hath beene said) may take benefit of the statute, yet may he avow still at his election upon the person of his tenant. And albeit the manner of the avowrie be altered, yet the privitie (which is the true cause of the said difference) remaineth still as to an attornment.

21. H. 8. cap. 19.
Vide Sect. 454.

27. H. 8. 4. b.
(Doc. Plac. 25, 26.)

Rent charge, &c. It is to be observed, to what kinde of inheritances being granted, an attornment is requisite. And in this chapter *Littleton* speaketh of five. First, of a feignorie, rent service, &c. Secondly, of a rent charge. Thirdly, of a rent secke. And hereafter in this chapter of two more, viz. of a reversion and remainder of lands; for the tenant shall never need to attorne but where there is tenure, attendance, remainder, or payment of a rent out of land. And therefore if an annuities, common of pasture, common of estovers, or the like, be granted for life or yeeres, &c. the reversion may be granted without any attornment; and albeit sometimes in some of these cases, or the like, an attornment be pleaded, yet it is surplusage, and more than needeth, because in none of them there is any tenure, attendance, remainder, or payment out of land.

21. H. 7. 1.
(1. Roll. Abr. 292, 293.)

1. H. 5. 1. 37. Aff. 14.
36. Aff. pl. 3. 31. H. 8.
tit. Attornment Br. 59.
(Ant. 303. b.)

Sect. 557.

*I T E M, si soit seignior et tenant, et le tenant lessa son tenement a un auter pur terme de vie, le remainder a un auter en fee, et puis le seignior granta les services a un auter, &c. et le tenant a terme de vie attorna, ceo est assés bone, pur ceo que le tenant a terme de vie est tenaunt en cest case al seignior, &c. et celui en le remainder ne poit estre dit tenant al seignior, quant a cel entent, forsque apres la mort le tenant a terme de vie: uncore en cest case si celui en le remainder morust sans heire, le seignior avera le remainder per voy d'escheate, pur ceo que coment que le seignior en tiel cas * covient d'avouer sur le tenant a terme de vie, &c. uncore tout l'entier tenement, quant a tous les estates de franktenement ou de fee simple, ou auterment, &c. en tiel cas sont ensemble tenus de le seignior, &c.*

ALSO, if there be lord and tenant, and the tenant letteth his tenement to another for terme of life, the remainder to another in fee, and after the lord grant the services to another, &c. and the tenant for life attorne, this is good enough, for that the tenant for life is tenant in this case to the lord, &c. and he in the remainder cannot be said to be tenant to the lord, as to this intent, untill after the death of the tenant for life: yet in this case if hee in the remainder dieth without heire, the lord shall have the remainder by way of escheat, because that albeit the lord in such case ought to avow upon the tenant for life, &c. yet the whole entiere tenement, as to all the estates of the freehold or of fee simple, or otherwise, &c. in such case are together holden of the lord, &c.

* covient d'avouer—d'avowere, L. and M. and Rob.

* *Mes nemy de faire avowrie sur eux tous ensemble.* But not to make avowrie upon them all together. *M. 3. H. 6.*

15. E. 3. Attorn. 10. 12. E. 4. 4.
18. H. 6. 2. 9. E. 2. tit. At-
torn. 18. 18. E. 4. 7. Temps
E. 1. Attorn. 22. Vide Sect. 580.

(3. Rep. 66. Ant. 310. a.
Post. 320. b.)

(9. Rep. 134. b. Ant. 280. a.)

3. H. 6. 1. Old Tenures 107.
[a] 15. E. 4. 13. a.
(1. Leon. 225.)

M. 3. H. 6. 1.

ET le tenant a terme de vie attorna, &c. For he that is (as hath beene said) privie and immediately tenant to the lord must attorne; and that is in this case: the tenant for life, and so of the other side if a seigniorie be granted to one for life, the remainder to another in fee, the attornment to the tenant for life is an attornment to the remainder also; unless it be that they in the remainder ought to have acquittal, or other privilege (whereof they should be prejudiced); and then albeit an attornment be had to the tenant for life, and he acknowledge the acquittal, &c. yet after his decease, he in remainder shall not distreyn until he acknowledge the acquittal, notwithstanding the attornment of the tenant for life.

Avera le remainder per voy d'eschear. For the remainder is holden of the lord, but not immediately holden; and in this case, by the escheat of the remainder the seigniorie is extinct; for the fee simple of the seigniorie being extinct, there cannot remaine a particular estate for life thereof, in respect of the tenure and attendance over; and of this opinion is *Littleton* [a] himselfe in our bookes. But otherwise it is of a rent charge in fee; for if that be granted for life, and after he in the reversion purchase the land, so as the reversion of the rent charge is extinct, yet the grantee for life shall enjoy the rent during his life, for there is no tenure or attendance in this case.

* *Mes nemy de faire avowrie, &c.* This is added to *Littleton*, but it is consonant to law, and the authoritie truly cited.

Sect. 558.

ITEM, si soit seignior et tenant, et le tenant lessa les tenements a un feme pur terme de vie, le remainder ouster en fee, et la feme prent baron, et puis le seignior granta les services, &c. a le baron et ses beires; en cest case le service est mis en suspence durant le coverture. Mes si la feme devie vivant le baron, le baron et ses beires averont le rent de ceux en le remainder, &c. Et en ceo case il ne besoigne aucun attornment per parol, &c. pur ceo que le baron que doit attorne, accepta le fait del graunt de les services, &c. le quel acceptance est un attornment en la ley.

ALSO, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh husband, and after the lord grant the services, &c. to the husband and his heires; in this case the service is put in suspence during the coverture. But if the wife die living the husband, the husband and his heires shall have the rent of them in the remainder, &c. And in this case there needeth no attornment by parol, &c. for that the husband which ought to attorne, accepted the deed of grant of the services, &c. the which acceptance is an attornment in the law.

3. E. 3. 42. 15. E. 3. Attornement, 11.
(6. Rep. 63. 9. Rep. 85.
2. Roll. Abr. 424.)

LE quel acceptance est un attornment en la ley, &c. *Littleton* having spoken (as hath beene said) of attornments in deed, or expresse, now commeth to speake of attornments in law, or implied; and having before set downe five expresse attornments in deed, doth in this chapter enumerate seven attornments in law. Here it is to be understood, that the expresse attornment of the husband will binde the wife after the coverture,

* This paragraph not in L. and M. nor Roh.

coverture, and in as much as this acceptance of the grant is an attornement in law, without a word of attornement the seigniorie shall passe. And this is the first example that *Littleton* putteth of an attornement in law, which amounteth to an expresse attornement, for that it is an agreement to the grant. 44. E. 3. tit. Fines 37.
11. E. 4. 4.
(1. Roll. Abr. 303)
(Ant. 280. a. 301. 310.)

If the lord grant his seigniorie to the tenant of the land, and to a stranger, and the tenant accept the deed, this acceptance is a good attornement to extinguish the one moitie, and to vest the other moitie in the grantee, as hath beene said.

Sect. 559.

EN mesme le manner est, si soient seignior et tenant, et le tenant prent feme, et puis le seignior granta les services a la feme et ses beires, et le baron accepta le fait; en cest cas apres la mort le baron, la feme et ses beires auront les services, &c. car per le acceptance * del fait per le baron, ceo est bone attornement, &c. comment que durant le coverture les services sont mis en suspence, &c.

IN the same manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant his services to the wife and his heires, and the husband accepteth the deed; in this case after the death of the husband the wife and her heires shall have the services, &c. for by the acceptance of the deed by the husband, this is a good attornement, &c. albeit during the coverture the services shall be put in suspence, &c.

HERE is the second example that *Littleton* putteth of an attornement in law, and standeth upon the former reason. (1. Roll. Abr. 938, 939, 940.)

Sont mise en suspence. Suspence commeth of *suspendeo*, and in legall understanding is taken when a seigniorie, rent, profit apprender, &c. by reason of unitie of possession of the seigniorie, rent, &c. and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked. And they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perdurable an estate in the one as in the other. (Ant. 148. b.)
(4. Rep. 52.)
(Cro. Car. 101.)

Sect. 560.

ITEM, si soient seignior et tenant, et le tenant granta les tenements a un home pur terme de sa vie, le remainder a un autre en fee, si le seignior granta les services a le tenant a terme de vie† en fee, en cest cas le tenant a

ALSO, if there be lord and tenant, and the tenant grant the tenements to a man for terme of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee, in this case the tenant for terme of life

HERE is the third case that *Littleton* putteth of an attornement in law. And it is to be observed; that albeit a grant, as hath beene said, may enure by way of release, and a release to the tenant for life doth worke an absolute extinguishment, whereof he in the remainder shall take benefit; yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties as here (Siderf. 25.)

* del fait per not in L. and M. nor Roh.

† en fee not in L. and M. nor Roh.

here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disheerited of the rent; and therefore *Littleton* here saith, that the heirs of the grantee shall have the seigniorie after his death. And here is an attournement in law to a grant suspended that cannot take effect in the grantee so long as he liveth, but shall take effect in his heirs by descent; for the inheritance of the seigniorie was in the tenant for life, and the suspension onely during his life.

terme de vie ad fee hath a fee in the services; *mes les services sont mis en suspence durant sa vie.* *Mes les heirs* are put in suspence during his life. But the heirs of the tenant for life shall have the services after his decease, &c. And in this case there needeth no attournement; for by the acceptance of the deed by him which ought to attorne, &c. this is an attournement of it selfe.

Sect. 561.

MES lou le tenant ad cy grand et haut estate en les tenements sicome le seignior ad en le seigniorie; en tiel case, si le seignior graunta les services al tenant en fee, ceo urera per voy d'extinguishment. *Causa patet.*

BUT where the tenant hath as great and as high estate in the tenements as the lord hath in the seigniorie; in such case, if the lord grant the services to the tenant in fee, this shall enure by way of extinguishment. *Causa patet.*

(Ant. 279.)

HERE *Littleton* intendeth not onely as great and high an estate, but as perdurable also, as hath beene said; for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate, as shall make an extinguishment.

Sect. 562.

HERE in this case he in the reversion of the tenancy must attorne, because he is the tenant to the lord; and yet the seigniorie shall be suspended during the life of the grantee, because he hath an estate for life in the tenancie, but his heirs shall enjoy the seigniorie by descent.

Uncore il ne

ITEM, si soyent seignior et tenant, et le tenant fait un leas a un home pur terme de sa vie, s'avant le reversion a luy, si le seignior granta le seigniorie a le tenant a terme de vie en fee; en cest case il covi-

ALSO, if there bee lord and tenant, and the tenant maketh a lease to a man for terme of his life, saving the reversion to himselfe, if the lord grant the seigniorie to tenant for life in fee; in this case it behoveth that he in the reversion

* *le tenant a terme de vie*, not in L. and M. nor Roh.
§ *aucun* added L. and M. and Roh.

† *for* not in L. and M. nor Roh.

‡ *&c.* not in L. and M. nor Roh.
|| *&c.* added L. and M. and Roh.

*ent que celuy en le
reversion attorna al
tenant a terme de vie
per force de cel grant,
ou auterment le grant
est voide, pur ceo que
celuy en le reversion
est tenant al seignior,
&c.*

** Et uncore il ne
tiendra del tenant a
terme de vie durant sa
vie. Causa patet.*

fion must attorne to
the tenant for life by
force of this grant, or
otherwise the grant is
voide, for that hee in
the reversion is tenant
to the lord, &c.

* Yet hee shall
not hold of the te-
nant for life during
his life. *Causa pa-
tet, &c.*

fit of it; therefore during that time he shall have no rent, service, wardship, releefe, har-
riot, or the like, because these belong to the possession: but if the tenant dieth without heire,
the tenancie shall escheat unto the grantee, for that is in the right; and yet when the feig-
norie is revived by the death of the tenant, there shall be wardship: as if the tenant marry
with the seignioresse and dieth, his heire within age, the wife shall have the wardship of the
heire. Also in the case that *Linleton* here putteth, albeit the seignorie be suspended but
for life, yet some hold that he cannot grant it over, because the grantee tooke it suspended,
and it was never *in esse* in him. But if the tenant make a lease for yeares or for life to the
lord, there the lord may grant it over, because the seignorie was *in esse* in him, and the fee
simple of the seignorie is not suspended. But if the lord disseise the tenant, or the tenant
enfeoffe the lord upon condition, there the whole estate in the seignorie is suspended, and
therefore he cannot during the suspension take benefit of any escheat, or grant over his
seignorie.

tient, &c. This is added,
and not in the originall, and is
against law, and therefore to
be rejected.

Tenant al seignior,

&c. Here is to bee under-
stood a diversify when the
whole estate in the seignory
is suspended, and when but
part of the estate in the feig-
nory is suspended. And in this
case the seignorie is suspended
but for terme of life; [a] and
therefore as to all things con-
cerning the right it hath his
being; but as to the possession
during the particular estate
the grantee shall take no bene-

[a] 34. Aff. p. 15.

16. E. 3. tit. Voucher 88.

5. E. 3. Twong's case.
(Ant. 298. b.)

Sect. 563.

*ITEM, si soient seig-
nior et tenant, et
le tenant tient del
seignior per xx. ma-
ners des services, et le
seignior granta son
seignory a un auter; si
le tenant paya en fait
ascun parcel d'ascun de
les services al graun-
tee, ceo est bone attorn-
ment, de et pur tous
les services, coment que
l'entent de le tenant fuit
d'attourner forsque de
cel parcel, pur ceo que
le seignory est + entier,
coment que ils sont di-*

ALSO, if there bee
lord and tenant,
and the tenant holdeth
of the lord by xx. man-
ner of services, and the
lord grant his seignio-
ry to another; if the te-
nant pay in deed any
parcell of any of the ser-
vices to the grantee,
this is a good attorne-
ment, of and for all the
services, albeit the in-
tent of the tenant was to
attorne but for this par-
cell, for that the feig-
norie is intire, although
there bee divers man-

HERE it appear-
eth that an at-
tornement being made
for parcell, is good for
the whole; for seeing
hee hath attorned for
part, it cannot bee void
for that, and good it can-
not be unlesse it be for
the whole: but of this
sufficient hath beene said
before in this chapter.

*Paya ascun par-
cell des services.*

Here is the fourth ex-
ample of an attornement
in law; for payment of
any parcell of the ser-
vices is an agreement in
law to the grant.

*Coment que l'en-
tent del tenant
fuit d'attourner, &c,
Quia*

4. E. 3. 55. Malman's case.
29. E. 3. 23. 5. E. 4. 2.
22. Aff. 66. 7. H. 4. 10.
35. H. 6. 8. per Prisott.
(Ant. 309. b.)

40. E. 3. 34.
(4. Rep. 8.)

* This paragraph not in L. and M. nor Roh.

+ forsque un et added L. and M. and Roh.

Lib. 3. Cap. 10. Of Attornement. Sect. 564, 565.

(Siderf. 283. 4. Rep. 85. a.)

20. H. 6.
(1. Rep. 101. b. 104. a.
Doct. and Student 52. a.
1. Roll. Abr. 419.
Cro. Car. 1. 401. Dyer 4. a.
Post. 367. a.
Ant. 20. 47. b. 48. b.
2. Rep. 23. 4. Rep. 81. a.
Ant. 42. 213. a. 217. b. 222. b.
229. a. 1. Roll. Abr. 303.)

Quia intentio inferuire debet legibus, non leges intentioni. And yet as farre as it may stand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and so they ought to doe. And of this somewhat in this chapter hath beene said before.

vers maners des services que le tenant doit faire, &c.

ner of services which the tenant ought to doe, &c.

Sect. 564.

48. E. 3. 24. 3. E. 3. quod juris clamat.
4. E. 3. 28. 29.
37. H. 6. 14. per Moyle.
17. E. 3. 29.
(Ant. 248. b. 6. Rep. 64. b.)

HERE is to be observed, that this judgment in the *scire facias* (which is no more but that the demandant shall have execution, &c.) is a good attornement, albeit it is presumed that *judicium redditur in invitum*, and that an attornement in law of any part is good for the whole. And this is the fifth example that *Littleton* putteth of an attornement in law.

Note, that in case of a deede nothing passeth before attornement, as hath beene said. In the case of the fine, the thing granted passeth as to the state, but not to distraine, &c. without attornement. In the case of the king the thing granted doth passe both in estate and in privitie to distraine, &c. without attornement, unlesse it be of lands or tenements that are parcell of the dutchy of *Lancaster*, and lie out of the county palatine. (1)

*ITEM, si soit seignior et tenant, et le tenant tient del seignior per plusors maners des services, et le seignior granta les services a un autre per fine; si le grantee sue a facias hors del mesme le fine pur ascun parcel de les services, et ad judgement de recover, cel judgement est bone attornement en ley pur tous les services.**

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by many kinde of services, and the lord grant the services to another by fine; if the grantee sue a *scire facias* out of the same fine for any parcell of the services, and hath judgment to recover, this judgment is a good attornement in law for all the services.

(3. Rep. 123. Sect. 551.
Cro. Car. 284.
2. Rep. 67. b. Sect. 579.
(1. Roll. Abr. 294. Ant. 309. a.)

(1. Sid. 139. 1. Lev. 28.)

Sect. 565.

ITEM, si le seignior d'un rent service granta les services un autre, et le tenant attorna per un denier, et puis le grantee distraine pur le rent arere, et le tenant a luy fait rescous; en ceo cas le grantee n'aura assise del rent, forsque briefe de rescous, pur ceo que le done del denier per le tenant † ne fuit forsque per voy d'attornement, &c. Mes si le tenant avoit done a le grantee le dit denier come parcel de le rent, ou un maille ou un farthing per voy de

ALSO, if the lord of a rent service grant the services to another, and the tenant attorne by a penny, and after the grantee distraine for the rent behinde, and the tenant make rescous; in this case the grantee shall not have an assise for the rent, but a writ of rescouse, because the giving of the penny by the tenant was not but by way of attornement, &c. But if the tenant had given to the grantee the said penny as parcell of the rent, or a halfe penny or a farthing by way of seisin of the rent, then this

* &c. added in L. and M. and Roh.

† ne not in L. and M. nor Roh.

(1) See Pl. Com. 221. 4. Inst. 209.

seisin del rent, dunque ceo est bone attornement, et auxy est bon seisin al grauntee del rent; et donques sur tiel rescous le grauntee avera assise, &c.

is a good attornement, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assise, &c.

(Ant. 159 b. 160. a.)

HEREUPON is to be observed a diversitie betwene money given by way of attornement, and where it is given as parcell of the rent by way of seisin of the rent. For albeit the rent be not due before the day, yet a payment of parcell of the rent before-hand is an actuall seisin of the rent to have an assise. And so it is if he give an ox, a horse, a sheepe, a knife, or any other valuable thing in name of seisin of the rent before-hand, this is good. And therefore a payment in name of seisin is more beneficiall for the grantee, because that is both an actuall seisin and an attornement in law; and yet being given before the day in which the rent is due, it shall not be abated out of the rent. So as to give seisin of the rent, it is taken for part of the rent; but as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversitie is, for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actuall seisin, or a seisin in deed of a rent, whereof (as *Littleton* here speaketh) an assise doth lie; and a seisin in law which the grantee hath by attornement before actuall possession. (1)

39. H. 6. 3. 26. 5. E. 4. 2.
Vide Sect. 235.
25. E. 3. 44. 49. E. 3. 15.
37. H. 6. 39. 49. All. p. 6.
34. H. 6. 42.
15. E. 3. Execution 63.
40. E. 3. 22. 28. H. 6. 6. b.
7. H. 4. 2. tit. Attorney Br. 97.
(6. Rep. 59.)
(Ant. 281. a.)

Sect. 566.

ITEM, *si sont plusieurs jointenants * que teignent per certaine services, et le seignior graunta a un auter les services, et un de les jointenants attorna al grauntee, ceo est auxy bon, sicome tous fussent attorne, pur ceo que le seignior est entier, &c.*

ALSO, if there bee many jointenants which hold by certaine services, and the lord grant to another the services, and one of the joyntenants attorne to the grantee, this is as good as if all had attorned, for that the seignior is entire, &c.

HERE is to be observed what manner of tenants shall attorne to the grant. And first, [b] if there be two or more jointenants, and one of them attorne, it is sufficient: for, as it hath beene often said, there cannot be an attornement in part. And albeit there is great authoritie against *Littleton*, yet the law hath beene adjudged according to *Littleton's* opinion, as it hath beene in other of his cases when they have come in question: and as it is of an attornement, so it is of a seisin; a seisin of a rent by

(1. Roll. Abr. 302.)
(2. Rep. 67.)

[b] 39. H. 6. 3. 26.
See *Tooker's case* ubi supra, and the authorities there cited.

the hands of one joyntenant is good for all, and a seisin of part of the rent is a good seisin of the whole.

[c] If either the grantor or the grantee die, the attornement is countermanded; but if the tenant die, he that hath his estate may attorne at any time. If the tenant grant over his estate, his assignee may attorne.

[d] If an infant hath lands by purchase or by descent, he shall be compelled to attorne in a *per que servitia*, and no mischief to the infant; for when he cometh to full age, he may disclaim to hold of him, or he may say that he holds by lesser services: but there should be a greater mischief for the lord if the attornement of an infant should not be good, for he should lose his services in the meane time.

If an infant be a lessee, he shall be compelled to attorne in a *quid juris clamat*. The attornement of an infant to a grant by deed is good, and shall binde him, because it is a lawfull act, albeit he be not upon that grant by deed compeilable to attorne. Of baron and fem *Littleton* putteth many cases in this chapter.

[e] A man that is deafe and dumbe, and yet hath understanding, may attorne by signes: [f] but one that is not *compos mentis* cannot attorne, for he that hath no understanding cannot agree to the grant.

What conveyances shall be good without attornements more shall be said in this chapter in his proper place.

(a. Roll. Abr. 424. Ant. 297. b.)
[c] Vid. Eib. 4. fol. 8. Lib. 6.
fol. 57. Lib. 9. fol. 34.
Vid. 4. H. 6. 29. 18. E. 4. 10.

[d] 42. E. 3. Age 33.
26. E. 3. 62. 37. H. 8. tit. Attornee. Br. 26. E. 3. 63.
26. Aff. 27. 32. E. 3. tit. per que servit. o.
2. E. 2. Attorn. 78.
2. E. 2. ibid. 77. 13. H. 6. 2.
Lib. 9. f. 84. 85. *Conye's case*.
4. Mar. Dier 137.
21. E. 3. Age 85.
7. E. 2. Age 140.
[e] 26. E. 3. 63.
[f] 18. E. 3. 53.

Sect.

* que — et, L. and M. and Roh.

† ussent attorne — attornement, L. and M. and Roh.

(1) This is only to be understood of a rent at common law: but if the rent is limited, as an use under the statute; — as if lands are conveyed by lease and release to A. and his heirs, to the use that B. may receive out of them an annual rent; — the statute immediately executes the use of the rent in B.

Sect. 567.

ITEM, si home lessa tenements a terme d'ans, per force de quel lease * le lessee est seise, et puis le lessor per son fait grant la reversion a auter pur terme de vie, ou en taile, ou en fee; il covient en tiel case que le tenant a terme d'ans attorna, ou auterment rien passera a tiel grauntee per tiel fait. Et si en cest case le tenant a terme d'ans attorna al grauntee, donque maintenant passera le franketenement al grauntee per tiel attornement sauns ascun liverie de seisin, &c. pur ceo que si ascun liverie de seisin, † &c. sera ou besoigne d'estre fait en cel case, donque le tenant a terme d'ans serroit al temps de liverie de seisin ouste de son possession, ‡ le quel serroit encounter reason, &c.

ALSO, if a man letteth tenements for terme of yeares, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for terme of life, or in taile, or in fee; it behoveth in such case that the tenant for yeares attorne, or otherwise nothing shall passe to such grantee by such deed. And if in this case the tenant for yeares attorne to the grantee, then the freehold shall presently passe to the grantee by such attornement without any liverie of seisin, &c. because if any liverie of seisin, &c. should be or were needfull to bee made, then the tenant for yeares should be at the time of the livery of seisin ousted of his possession, which should bee against reason, &c.

HERE Littleton having spoken of grants of seigniories and rent charges, and rents secke issuing out of land, here treateth of a grant of a reversion of land upon an estate for yeares; seeing this grant of the reversion must be by deed, and the agreement of the lessee for yeares requisite thereunto, the freehold and inheritance doe passe thereby, as well as by liverie of seisin, if it were in possession: and the grant of the reversion by deed with the attornement of the lessee, doe countervaille in law a feoffment by liverie, as to the passing of the freehold and inheritance.

[g] 6. E. 3. 53. 25. E. 3. 53. Brook. tit. Attorn. 48. 32. E. 3. Scir. fac. 101. Dy. 1. 2.

(Ante 113. a. 181. b.)

A terme d'ans [g] And yet a tenant by statute merchant, or tenant by statute staple, or by *elegit*, must also attorne; for the grantee may have a *venire facias ad compendendum*, or tender the money, &c. and discharge the land; and if the reversion be granted by fine, they shall be compelled to attorne in a *quid juris clamor*.

And so the executors that have the land until the debts bee paid must attorne upon the grant of the reversion, although they have not any certaine terme for yeares.

Sect. 568.

HERE Littleton speaketh of a reversion expectant upon an estate for life, or a gift in taile.

Il covient que le tenant de la terre at-

ITEM, si tenements soient lesses a un home pur terme de vie, ou done en le taile, savant

ALSO, if tenements be letten to a man for terme of life, or given in taile, saving the reversion, &c. if hee in

* le lessee not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

‡ le quel—que, L. and M. and Roh.

*Le reversion, &c. si ce-
luy en le reversion en
tel case granta le re-
version a un auter per
son fait, il covient que
le ternaunt de la terre
attourna al grantee
en la vie le grantor,
ou auterment legraunt
est voyd. **

the reversion in such
case grant the rever-
sion to another by his
deed, it behooveth
that the tenant of the
land attorne to the
grantee in the life of
the grantor, or other-
wise the grant is
voyd.

torne al grauntee, &c.

Let us therefore speake first of
tenant for life: and yet in
some case albeit tenant for
life hath granted over his es-
tate, yet he shall attorne. [a]
As if tenant in dower or by
the curtesie grant over his or
her estate, and the heire grant
over the reversion, the tenant
in dower or by the curtesie
may attorne, because at the
time of the grant made they
were attendant to the heire
in reversion, and the grantee

[a] 10. H. 4. tit. Attorn. 16.
11. H. 4. 18. 30. E. 3. 16.
38. E. 3. 23. 18. E. 3. 3.
10. E. 3. quid juris clam. 41.
41. E. 3. 18. Temps E. 1. tit.
Wast. 122.

(Ant. 54. a.)
F. N. B. 55. E. Regit. f. 72.
4. E. 3. 26.

(3. Rep. 23. b.)

[b] Regit. 724

18. E. 4. 10. b. 26. E. 3. 62.

5. H. 5. 100

cannot be tenant in dower, or tenant by the curtesie. And if the reversion be granted by
fine, the fine must suppose that the tenant in dower or by the curtesie did hold the
land, albeit they had formerly granted over their estate, and albeit the reversion doth passe by
the fine; yet the *quid juris clamat* must be brought against him that was tenant at the time of
the note levied. But yet after the reversion is granted over, the grantee shall not have any
action of waste against the tenant in dower or by the curtesie, but the action of waste must be
brought against their assignee, and not against themselves; for tenant by the curtesie or te-
nant in dower cannot hold of any but of the heire: and therefore in respect of the privitie,
they shall attorne and be subject to an action of waste, as long as the reversion remaineth in the
heire, albeit they have granted over their whole estate. And it is worthy of the observation,
that if the grantee of the reversion doth bring an action of waste against the assignee of the te-
nant by the curtesie, [b] the pl. must rehearse the stat. which proveth that no prohibition of
waste in that case lay at the common law, as it did if the heire had brought it against the
tenant by the curtesie itselfe: and therefore some doe hold, that if the heire doe grant over
the reversion, that the attornment of the assignee of the tenant by the curtesie, or of tenant
in dower is sufficient, because they afterward must be attendant and subject to the action of
waste.

If the reversion of lessee for life be granted, and lessee for life assigne over his estate, the les-
see cannot attorne; but the attornment of the assignee is good, because (as *Lisleton* here
saith) it behooveth that the tenant of the land doe attorne, and after the assignement there
is no tenure or attendance, &c. betweene the lessee and him in reversion.

If lessee for life assigneth over his estate upon condition, he having nothing in him but a
condition shall not attorne; but the assignee may attorne, because he is tenant of the land.

Sect. 569.

*EN mesme le ma-
ner est, si terre soit
† done en taile, ou lesse
a un home pur terme
de vie, le remainder a
un auter ‡ en fee, si ce-
luy en le remainder voile
granter cest remainder
a un auter, &c. si le
tenant de la terre at-
turna en la vie le gran-
tor, donques le grant
de tel remainder est bon,
ou auterment nemy.*

IN the same manner
is it, if land be granted
in taile, or let to a man
for terme of life, the re-
mainder to another in
fee, if he in the remain-
der will graunt this re-
mainder to another,
&c. if the tenant of the
land attorne in the life
of the grantor, then
the grant of such a re-
mainder is good, or
otherwise not.

Lisleton also speaketh here
of an attornment by
tenant in taile; and true it
is that he may attorne; but
where the reversion is grant-
ed by fine, hee is not com-
pellable to attorn, because he
hath an estate of inheritance
which may continue for ever.
And so it is of a tenant
in taile after possibilitie of
issue extinct, he shall not be
compelled to attorne for the
inheritance which was once
in him. [c] But if tenant in
taile after possibilitie of is-
sue extinct grant over his es-
tate, his assignee shall be com-
pelled to attorn, because he ne-
ver had but a bare state for life.
But

12. E. 4. 3. 4. 3. E. 4. 11.
43. E. 3. 1. 46 E. 3. 13.
(9. Rep. 85. b.)

(Ant. 27. b.)

5. H. 5.
(11. Rep. 79.)

20. E. 3. quid juris clam. 50.

[c] See the chap. of tenant in
taile after possibilitie of issue ex-
tinct; and *Ewin's* case there
cited to be adjudged.

* &c. added L. and M. and Rob.

† done en taile ou, not in L. and M. nor Rob.

‡ en fee, — &c. L. and M.

But as to tenant in taile, note a diversitie betweene a *quid juris clamat*, and a *quem redditum reddit*, or a *per quæ servicia*; for against a tenant in taile, no *quid juris clamat* lieth, as is aforesaid. But if a man make a gift in taile, the remainder in fee, and the seigniorie or rent charge issuing out of the land be granted by fine, the conusee shall maintaine a *per quæ servicia*, or a *quem redditum*, and compell him to attorne; for herein his estate of inheritance is no privilege to him, for that a tenant in fee simple (as his estate was at the common law) is also compellable in these cases to attorne.

Sect. 570.

* P. 12. E. 4. *Et la est tenus per tout le court, que tenant en taile ne serra arēt d'attourner, mes s'il attorna gratis, c'est assēs bone.*

(41. Rep. 79.)

22. E. 4. 3, 4.

P. 12. Edw. 4. It is there holden by the whole court, that tenant in taile shall not be compelled to attorne, but if he will attorne *gratis*, it is good enough.

THIS is added to *Littleton*, and therefore though it be good law, and the booke truly cited, yet I passe it over.

Sect. 571.

IT E M, si terre soit lessē a un bome pur terme d'ans, le remainder a un auter pur terme de vie, reservant al lessour un certaine rent per an, et liverie de seisin sur ceo est fait al tenant pur terme d'ans; si cestuy en le reversion en cest casē granta le reversion a un auter, † &c. et le tenant que est en le remainder apres le terme d'ans ‡ soy attourna; ceo est bone attournement, et celuy a que cest reversion est graunt, per force de tiel attournement distreynera le tenant a terme d'ans pur le rent due apres tiel attournement, coment que le tenant a terme d'ans ne unques attournaist a luy. Et la cause est, pur ceo que lou le reversion est dependant sur l'estate del franktenement, suffist que le tenant del franktenement attourna sur tiel grant del reversion, &c.

AL S O, if land bee let to a man for years, the remainder to another for life, reserving to the lessor a certaine rent by the yeare, and liverie of seisin upon this is made to the tenant for yeares; if hee in the reversion in this case grant the reversion to another, &c. and the tenant which is in the remainder after the terme of yeares attorne, this is a good attournement, and hee to whom this reversion is granted, by force of such attournement shall distreine the tenant for yeares for the rent due after such attournement, albeit that the tenant for yeares did never attorne unto him. And the cause is, for that where the reversion is depending upon an estate of freehold, it sufficeth that the tenant of the freehold doe attorne upon such a grant of the reversion, &c.

Suffist que le tenant del franktenement attorna (1). Note, *Littleton* saith not here, that the tenant of the franktenement ought in this case to attorne, but that it

* This paragraph not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

‡ soy not in L. and M. nor Roh.

(1) Two reasons are given for this. One is, that the possession of the tenant for years, is the possession of the immediate freeholder. See *Brediman's case*, 6. Rep. 26. b. The other reason is, that as the termor for years holds of the reversioner, and pays the services to him, so the tenant for life holds also of him.—Thus, as both hold estates of the reversioner, either of them may attorn.

it sufficeth that he doth attorne. And I heard sir *James Dier* chiefe justice of the common pleas hold, that in this case if the tenant for yeares did attorne, it would vest the reversion; for seeing the estate for yeares is able to support the estate for life, he shall binde him in the remainder by his attornement in respect of his estate and privitie.

Pasch. 15. Eliz. in *Brasbrite's* case, in *Communi Banco*.

Sect. 572.

ET est asavoir, que lou un leas a terme d'ans ou a terme de vie, ou done en taile, est fait a ascun home, reservant a tiel lessor ou donor un certaine rent, &c. si tiel lessor ou donor graunta son reversion a un auter, et le tenant del terre attourna, le rent passa al grauntee, coment que en le fait del grant de reversion nul mention soit fait de le rent, pur ceo que le rent est incident al reversion en tiel case, et nemy è converso, &c. Car si home voile graunter le rent en tiel case a un auter, reservant a luy le reversion del terre, coment que le tenant attorna a le grauntee, ceo serra forsque un rent sec ke, &c.

AND it is to be understood, that where a lease for yeares or for life, or a gift in taile, is made to any man, reserving to such lessor or donor a certaine rent, &c. if such lessor or donor grant his reversion to another, and the tenant of the land attorne, the rent passeth to the grantee, although that in the deed of the grant of the reversion no mention be made of the rent, for that the rent is incident to the reversion in such case, and not è converso, &c. For if a man will grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorne to the grantee, this shall bee but a rent sec ke, &c.

(Ant. 143. a. 150. b. 247. 2, 308. a.)
(a. Roll. Abr. 60. 424.)

Of this *Littleton* hath spoken before in the chapter of Rents.

Sect. 573.

*ITEM, si home lessa terre a un auter pur terme de sa vie, et puis il confirma per son fait l'estate del tenant a terme de vie, le remainder a un auter en fee, et le tenant a terme de vie accepta le fait, donques est le remainder en fait en celuy a que le remainder est done ou limite per mesme le fait. * Car per l'acceptance del tenant a terme de vie † de le fait, ceo est un agreement de luy, et issint un attornement en ley. Mes uncore celuy en le remainder n'avera ascun ac-*

ALSO, if a man let land to another for his life, and after hee confirme by his deed the estate of the tenant for life, the remaynder to another in fee, and the tenant for life accepteth the deed, then is the remaynder in fait in him to whom the remaynder is given or limited by the same deed. For by the acceptance of the tenant for life of the deed, this is an agreement of him, and so an attornement in law. But yet hee in the remaynder shall not have any action

(Plowd. 25. b.)

* Car not in L. and M. nor Roh.

† de le fait not in L. and M. nor Roh.

*tion de waste ne auter benefit per tiel remainder, si non que il avoit le dit fait en poigne, per que le remainder fuit taile ou graunt a luy. Et pur ceo que en tiel cas le tenant a terme de vie voile per cas *reteigner le fait a luy, a cel entent, que celui en le remainder n'averroit ascun action de waste envers luy, pur ceo que il ne poit vener d'aver le fait en sa possession, † il serra bone ‡ et sure chose en tiel cas pur celui en le remainder, que un fait endent soit fait per celui que voile faire tiel confirmation, et le remaynder ouster, &c. et que celui que fait tiel confirmation delivra un part del indenture al tenant a terme de vie, et le auter part a celui que avera le remainder. Et donque il per monstrance de le part del indenture poit aver action de waste envers le tenant a terme de vie, et tous autres advantages que celui en le remainder poit aver en tiel case, &c.*

of waste nor other benefit by such remaynder, unlesse that hee hath the said deed in hand, whereby the remaynder was entayled or granted to him. And because that in such case the tenant for life peradventure will retaine the deed to him, to this intent, that he in the remaynder should not have any action of waste against him, for that hee cannot come to have the deed in his possession, it will be a good and sure thing in such case for him in the remaynder, that a deed indented bee made by him which will make such confirmation, and the remaynder over, &c. and that hee which maketh such confirmation deliver one part of the indenture to the tenant for life, and the other part to him that shall have the remaynder. And then he by shewing of that part of the indenture may have an action of waste against the tenant for life, and all other advantages that he in the remainder may have in such a case, &c.

(1. Roll. Abr. 301.)

Vid. Sect. 325. 575.

Vide Pl. Com. in Colthirst's case.

Doct. and Stud. cap. 20. fol. 93. 94. 8 R. 2. in waste, in livre elecite.

17. E. 3. Confirmat. 4.

35. H. 6. fol. 8. 14. H. 8.

Pl. Com. 149. in Throckmorton's case.

45. E. 3. 14. 15. 11. H. 4. 39.

14. H. 4. 31.

(Ant. 10. 2.)

HERE Littleton putteth a case of a remainder whereunto an attornement is requisite. And this is the sixth example of an attornement in law.

Remaynder a un auter, &c. Of this sufficient hath beene said in the chapter of Confirmation, Sect. 525.

Si non que il avoit le fait en poigne. And albeit he hath no remedy to come to the deed during the life of tenant for life, yet because he is privie in estate, he shall not maintaine an action of waste without shewing the deed; but when the remainder is once executed, he shall not need to shew the deed.

Il serra bone et sure chose, &c. Hereby it appeareth how necessary it is to use learned advice in a man's conveyance, for thereby shall be prevented many questions, and not to follow the advice of him that is experimented only. For as in phyicke, *Nullum medicamentum est idem omnibus*, so in law one forme or president of conveyance will not fit all cases.

Sect.

* reteigner—receiver, L. and M. and Roh.

† et pur ceo added L. and M. and Roh.

‡ et sure chose not in L. and M. nor Roh.

Sect. 574.

ITEM, si deux joyntenants sont, les queux lessont leur terre a un auter pur terme de vie, rendant a eux et a leur heires certaine rent per an; en cest case si un des joyntenants en le reversion releffa a l'auter joyntenant en mesme le reversion; cest releas est bone, et ce-luy a que le releas est fait avera solement le rent del tenant a terme de vie, et avera solement un brieve de waste envers luy, comment que il ne unques attorneroit per force de tiel releas, &c. Et la cause est, pur le privy que un foits fuit perenter le tenant a terme de vie et eux en le reversion.*

for life shall not be compelled to attorne in a *quid juris clamat* upon a grant of a reversion by fine holden of the king in chiefe without licence; but the reason hereof is not because the tenant for life might be charged with the fine, for his estate was more ancient than the fine levied, but because the court will not suffer a prejudice to the king, and the king may seise the reversion and rent, and so the tenant shall be attendant to another. Also it is a generall rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorne.

As if an infant levie a fine, this is defeasible by writ of error during his minoritie, and therefore the tenant shall not be compelled to attorne.

So if the land be holden in ancient demesne, and he in the reversion levie a fine of the reversion at the common law, the tenant shall not be compellable to attorne, because the estate that passed is reverfible in a writ of deceit.

So if tenant in taile had levied a fine, the tenant should not be compelled to attorne, because it was defeasible by the issue in taile.

But now the statutes of 4. H. 7. and 32. H. 8. having given a further strength to fines to barre the issue in taile, the reason of the common law being taken away, the tenant in this case shall be compelled to attorne, as it was adjudged (*) in justice Windham's case.

If an alienation be in mortmaine, the tenant shall not be compelled to attorne, because the lord paramount may defeat it.

DEUX jointenants.

And so it is (as it is here to be understood) albeit there be three or more joyntenants, and one of them releaseth to one of the other.

It is true, that there is a difference betweene these releases; for the release in the one case maketh no degree, but hee to whom the release is made is supposed in from the first feoffor; and in the other it worketh a degree, and hee to whom the release is made is in the *per* by him; yet in neither of these cases there is requisite any attornement, for both of them are within *Littleton's* reason (for the privitie, &c.)

Pur le privitie, &c.

For if one joyntenant make a lease for yeares, reserving a rent, and dieth, the survivor shall not have the rent; and therefore *Littleton* here addeth materially, for the privitie that was betweene the tenant for life and them in the reversion.

And here it is good to be seene what grantors or others that make conveyances, &c. are such as their grants or conveyances are either good without attornement, or where the tenant is no way compellable to attorn. Tenant

(6. Rep. 78. 2. Roll. Abr. 403. Ant. 193. a.)

(Ant. 238.)

2. Eliz. Dier. 176. (Ant. 185. a.)

45. E. 3. 6. b. 13. Eliz. Dier. 188. Lib. 3. fol. 86. justice Windham's case.

36. H. 6. 24. (1. Roll. Abr. 297.)

5. E. 3. 25. 31. E. 3. ancient demesne 16.

24. E. 3. 25. b. 37. H. 6. 33. 48. E. 3. 23.

(*) Lib. 3. fol. 86. justice Windham's case. 17. E. 3. 7. 22. E. 3. 18.

Sect.

* &c. not in L. and M. nor Roh.

Lib. 3. Cap. 10. Of Attornement. Sect. 575, 576.

Sect. 575.

(1. Roll. Abr. 301.)

*EN mesme le maner, et pur mesme la cause, est, lou home lessa terre a un auter pur terme de vie, le remainder a un auter pur terme de vie, reservant le reversion al * lessour; en cest cas si celuy en le reversion releffa a celuy en le remainder et a ses heires tout son droit, &c. donques celuy en le remainder ad un fee, &c. et il avera un brieve de wast envers le tenant a terme de vie sans aucun attornement de luy, &c.*

IN the same manner, and for the same cause, is it, where a man letteth land to another for life, the remainder to another for life, reserving the reversion to the lessor; in this case if hee in the reversion releaseth to him in the remainder and to his heires all his right, &c. then he in the remainder hath a fee, &c. and hee shall have a writ of wast against the tenant for life without any attornement of him, &c.

Vide Sect. 549. 553. 556.

This needeth no explication.

Sect. 576.

(6. Rep. 69. a.)

THERE have been now in all seven examples, that *Littleton* putteth of an attornement in law, and here he putteth two cases also of a notice in law. And the reason of both these are here rendred by *Littleton*. First for the notice, *Littleton* saith that the lessee shall not by law be misconusant of the feoffments that were made of and upon the same land. And the reason of the attornement is, because the whole fee simple passeth by the feoffment, and the lessee by his regresse leaveth the reversion in the feoffee, which (saith *Littleton*) is a good attornement. The same law it is of a tenant by statute merchant or staple, or *elegit*. And so it is of a lease for life, as *Littleton* here saith; and so it was resolved [e] in *Brasbrite's* case, and after in the deane of *Paul's* his case in the

ITEM, si home lessa terres ou tenements a un auter pur terme des ans, et puis il ousta son termour, et ent enfeoffa un auter en fee, et puis le tenant a terme d'ans enter sur le feoffee, en claimant son terme, &c. et puis fait wast; en cest case le feoffee avera per la ley un brieve de wast envers luy, et uncore il n'attornast pas † a luy. Et la cause est, come jeo suppose, pur ceo que celuy que ad droit de aver terres ou tenements pur terme d'ans, ‡ ou auterment, ne seroit per la ley misconusant de les feoffments que fueront faits

ALSO, if a man lett lands or tenements to another for terme of yeares, and after he oust his termor, and thereof enfeoffe another in fee, and after the tenant for yeares enter upon the feoffee, clayming his term, &c. and after doth waste; in this case the feoffee shall have by law a writ of waste against him, and yet hee did not attorne unto him. And the cause is, as I suppose, for that he which hath right to have lands or tenements for yeares, or otherwise, should not by law bee misconusant of the feoffments which were made of and upon the same

46. E. 3. 30. b. 2. H. 5. 4.
5. H. 5. 12. 34. H. 6. 6.
18. E. 3. 47. 9. H. 6. 10.

(5. Rep. 113. b.)

[e] *Brasbrite's* case.
P. 15. Eliz. deane of *Paul's*
case, 20. Eliz.

* *lessour*—*luy*, L. and M. and Roh.

† *a luy* not in L. and M. nor Roh.

‡ *ou auterment* not in L. and M. nor Roh.

*de et sur mesmes les terres, &c. Et entant que per tiel feoffment le tenant a terme d'ans fuit * mis hors de son possession, et per son entree il causast le reversion d'estre a celui a que le feoffment fuit fait, ceo est bon attornement; car celui a que le feoffment fuit fait, avoit nul reversion devaunt que le tenant a terme d'ans avoit enter sur luy, pur ceo que il fuit † en possession en son demesne come de fee, et pur l'entree del tenant a terme d'ans il y ad forsque un reversion, que est per le fait le tenant a terme d'ans, scilicet, per son entree, &c.*

Sect. 577.

MESME la ley est, *come il semble, lou un leas est fait pur terme de vie, savant le reversion al lessour, si le lessour disseist le lessee, et fait feoffment en fee, si le tenant a terme de vie enter et fait wast, le feoffee a vera brieve de waste sans ascun auter attournement, causâ quâ supra, &c.*

If a man make a lease for life, and then grant the reversion for life, and the lessee attorne, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornment in law of the grantee for life, because he doth no act, nor assent to any which might amount to an attornment in law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life the land in possession, so as he may well be misconstrued of the feoffment made upon the land, and so out of the reason of *Littleton*. But yet the reversion in fee doth passe to the feoffee.

common place. But (34. H. 6. 7.) shall the lessee in this case whether hee will or no doe an act that amounts to an attornment, viz. by his regresse, or esse lose the profit of his land? And some doe hold, that in that case if the lessee for life doe recover in an assise, this is no attornment, because hee comes to it by course of law, and not by his voluntary act. And yet in that case, as in the case of the fine, the state of the reversion is in the feoffee. [f] But others doe hold it all one in case of a recovery, and a regresse.

[g] If the lessor disseise tenant for life or ouste tenant for yeares, and maketh a feoffment in fee, by this the rent reserved upon the lease for life or yeares is not extinguished, but by the regresse of the lessee the rent is revived, because it is incident to the reversion: and so hath it beene adjudged. But if a man be seised of a rent in fee, and disseise the tenant of the land, and make a feoffment in fee, the tenant re-enteth, this rent is not revived. And so note a diversitie between a rent incident to a reversion, and a rent not incident to a reversion.

If two joynt lessees for yeares or for life be ousted or disseised by the lessor, and he enfeoffe another, if one of the lessees re-enter, this is a good attornment, and shall binde both; for an attornment in law is as strong as an attornment in deed.

[f] 18. E. 3. 48. b. Lib. 6. fol. 60. b. Sir Moyle Finche's case.

[g] 9. H. 6. 16. Deane of Paul's case, ubi supra. (Post. 321. b.)

(Ant. 297. b. 2. Rep. 67. 2.)

(6. Rep. 69. Mo. 99. Ant. 266. a.)

(2. Rep. 671.)

Sect.

* Mis hors de son possession, et per son entree il causa le reversion d'estre a celui a que le feoffment fuit, not in L. and M. nor Roh.
† en possession—seise, L. and M. and Roh.

(1) In these cases, the tenant for life enters only for a partial estate; he therefore only partially defeats the operation of the feoffment; so much of the fee as he does not defeat, necessarily remains in the feoffee.

Sect. 578.

HERE it appeareth, that where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heires, that the fee simple vesteth in himselfe, as well as if it had beene limited to him and his heires; for his right heires are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for yeares: as if a lease for yeares be made to A. the remainder to B. in tayle, the remainder to the right heires of A. there the remainder vesteth not in A. but the right heires shall take by purchase if A. die during the estate tayle: for as the ancestor and the heire are *correlativa* of inheritances, so are the testator and executor, or the intestate and administrator of chattels. And so it is if A. make a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tayle, and after to the use of the right heires of B. B. hath the fee simple in him, as well when it is by way of limitation of use, as when it is by act executed. (1)

En vaine serroit, &c. *Quod vanum et inutile est lex non requirit. Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria, et contraria prohibet;* and arguments drawn from hence are forcible in law.

ITEM, si leas soit fait pur terme de vie, le remainder a un autre en le taile, le remainder ouster a les droit beires le tenant a terme de vie; en cest case, si le tenant a terme de vie granta son remainder en fee a autre per son fait, cel remainder main-tenant passa per le fait sans ascun attournement, * &c. car si ascun doit attorne en cest case, ceo serroit le tenant a terme de vie, et en vain serroit que il atturneroit sur son grant demesne, &c.

ALSO, if a lease be made for life, the remainder to another in tayle, the remainder over to the right heires of the tenant for life; in this case, if the tenant for life grant his remainder in fee to another by his deede, this remainder main-tenant passeth by the deede without any attornement, &c. for that if any ought to attorne in this case, it should be the tenant for life, and in vaine it were that he should attorne upon his owne grant, &c.

Sect. 579.

ITEM, si soit seignior et tenant, et le tenant tient del seignior per certaine rent, et service de chivaler, si le seignior granta les services de son tenant per fine, les services sont maintenant en le grantee per force del fine; mes uncore le seignior ne poet pas distreine per ascun parcel de les services sans attournement: mes si le tenant devia (son heire deins age) le seignior avera le gard del

ALSO, if there be lord and tenant, and the tenant holdeth of the lord by certaine rent, and knights service, if the lord grant the services of his tenant by fine, the services are presently in the grantee by force of the fine; but yet the lord may not distreine for any parcell of the services, without attornement: but if the tenant dieth, his heire within age, the lord shall have the wardship
corps

* &c. not in L. and M. nor Rich.

(1) The observation of Mr. Douglas upon this point (note to page 506 of his Reports) deserves the reader's most serious attention.

*corps del heire, et de ses terres, &c. coment que il ne unque attur-
nast, pur ceo que le seignorie
fuit en le grantee maintenant per
force del fine. Et auxy en tiel cas,
si le tenant morust sans heire, le
seignior avera les tenements per
voy d'escheat.*

of the bodie of the heire, and of
his lands, &c. albeit he never attor-
ned, because that the seignorie
was in the grantee presently by
force of the fine. And also in such
case, if the tenant die without
heire, the lord shall have the te-
nancie by way of escheat.

HERE Littleton beginneth to shew what advantages the conusee of a fine may take before attornment, and what not.

[b] First, he cannot distreyne, because an avowrie is in lieu of an action; and thereupon privitie is requisite. So likewise, and for the same cause, he can have no action of waste, nor writ of entrie, *ad communem legem*, or in *consimili casu*, or in *casu proviso*, writ of customs and services, nor writ of ward, &c. (1)

But if a man make a lease for yeares, and grant the reversion by fine, if the lessee be ousted, and the conusee disseised, the conusee, without attornment, shall maintaine an assise; for this writ is maintained against a stranger, where there needeth no privitie. And such things as the lord may seise, or enter into without suing any action, there the conusee, before any attornment, may take benefit thereof; as to seise a ward or heriot; or to enter into the lands or tenements of a ward; or escheated to him; or to enter for an alienation of tenant for life or yeares; or of tenant by statute merchant, staple, or *elegit*, to his disherison.

[4] 8. E. 3. 44. 26. E. 3. 63.
10. H. 6. 16. 34. H. 6. 7.
12. E. 4. 4. 40. E. 3. 7.
5. H. 5. 12. 48. E. 3. 15. b.
3. E. 2. droit. 33.
(F. N. B. 60. Sect. 564.
4. Inst. 209, 210.)

Sect. 580, 581, 582.

*EN mesme le man-
ner est, si home
granta le reversion
de son tenant a terme
de vie a un auter
per fine, le reversion
passa maintenant al
grantee per force del
fine, mes le grantee
jammes n'avera action
de wast sans attorn-
ment, &c.*

IN the same manner
it is, if a man graunt
the reversion of his
tenant for life to ano-
ther by fine, the rever-
sion maintenant pas-
seth to the grantee by
force of the fine, but
the grantee shall ne-
ver have an action of
wast without attorn-
ment, &c.

Sect. 581.

*MES uncore si le
tenant a terme
de vie alienast en fee,
le grantee poet enter,
* &c. pur ceo que
le reversion fuit en luy
per force del fine, et
tiel alienation fuit a
son disheritance.*

BUT yet if the tenant
for life alieneth
in fee, the grantee
may enter, &c. because
the reversion was in
him by force of the
fine, and such aliena-
tion was to his dishe-
ritance.

IT is said in our books,
that if ternaunt for life
have a privilege not to be
impeachable of waste, or any
other privilege, if he doth
attorne without saving his
privilege, that hee hath lost
it; which is so to be under-
stood, where he attornes in
a *quid juris clamat* brought
by the conusee of a fine, that
if he claimeth not his privi-
lege, but attorne generally,
his privilege is lost, for that
the writ supposeth him to be
but a bare tenant for life;
and by his generall attorne-
ment, according to the writ,
he is barred for ever to claime
any privilege but a bare es-
tate for life. But if upon a
grant of the reversion by deed,
the tenant for life doth at-
torne, he loseth no privilege;
for there can be no conclusion
or barre by the attornment
in *pais*: and so it is of an at-
tornment in law. As if the
lessor disseise the lessee for
life, and make a feoffment
in fee, and the lessee re-enter;
this is an attornment in law,
which shall not prejudice him
of

40. E. 2. 7. 43. E. 3. 5.
48. E. 3. 32. 45. E. 3. 6.
21. E. 3. 48. 24. E. 3. 32.
39. H. 6. 25. F. N. B. 136. b.
(3. Rep. 86. 11. Rep. 79.
1. Roll. Abr. 412. 296.
Ant. 274. b.)

* &c. not in L. and M. nor Roh.

(1) The distinction in these cases seems to be, that the grantee is intitled, before attornment, to what the lord may seise; but not to any thing which lies in action.

of any privilege: so it is if the lessor levie a fine of the reversion, and the conusee die without heire, whereby the reversion escheateth, in this case the law doth supply an attornement, and therefore the lessee shall lose no privilege. But in the *quid juris clamat*, if the lessee shew his estate and his privilege, and is ready, saving to him his privilege, &c. to attorne, hereby either his privilege shall be allowed and entred of record, or he shall not be compelled to attorne: [b] and if the plaintiff be within age, so as hee cannot acknowledge the privilege, the tenant shall not be compelled to attorne untill his full age, when he may acknowledge it. But otherwise it is (as some hold) if a *quid juris clamat* be brought by baron and feme, the privilege shall be entred into the rolle, notwithstanding shee is a feme covert. And in a *per quæ servicia* brought by the conusee of the mesne; the tenant may shew that he held by homage auncestrell, and saving to him his warrantie and acquitall, he is ready to attorne. In the same manner, if the tenant hath any other acquitall, and the mesne levie a fine to one for life, the remainder to another in fee, the tenant for life bringeth a *per quæ servicia*, and the tenant is ready to attorne, saving his acquitall, and the plaintiff acknowledgeth it, and thereupon the tenant attorne, tenant for life dieth; in this case albeit regularly the attornement to the tenant for life is an attornement to him in the remainder, yet in this case hee in the remainder shall not distreine, till he hath acknowledged the acquitall, which must be in a *per quæ servicia*, brought by him against the tenant.

(5. Rep. 39. b.)

(Ant. 157. b.)

[2] 43. E. 3. 5.

(6. Rep. 4. a. 9. Rep. 85. b.)

45. E. 3. 11. a. Vet. N. B. in *per quæ servicia*. 5. E. 3. Mesne 56. & *per quæ servicia* 16. 37. H. 6. 33. 39. H. 6. 25. 18. E. 4. 7. (7. Rep. 4. b.)

Vid. Sect. 557.

Sect. 582.

*MES en * ceo cas lou le seignior granta les services de son tenant per fine, si tenant devie (son heire esteant de plein age) le grantee per le fine n'avera reliefe, ne unques distreynera pur reliefe, sinon que il + avoit l'attornement del tenaunt que morust: ‡ car de tiel chose que gist en distresse, sur que le breve de replevin est sue, &c. home doit et covient d'avouer le prisel bone et droiturel, &c. et la covient estre attornement del tenant, comment que le graunt de tiel chose soit per fine: mes d'aver le gard de les terres ou tenements issint tenus durant le nonage le heire, ou de eux aver per voy d'escheat, la ne besoigne ascun distresse, &c. mes un entrie en la terre per force de le droit del seigniorie que le grantee ad per force del fine, &c. Sic vide diversitatem §.*

BUT in this case where the lord granteth the services of his tenant by fine, if the tenant die (his heire being of full age) the grantee by the fine shall not have reliefe, nor shal ever distreine for reliefe, unlesse that hee hath the attornement of the tenant that dieth: for of such a thing which lieth in distresse, whereupon the writ of replevin is sued, &c. a man must and ought to avow the taking good and rightful, &c. and there there ought to be an attornement of the tenant, although the graunt of such a thing be by fine: but to have the wardship of the lands or tenements so holden during the nonage of the heire, or to have them by way of escheat, there needs no distresse, &c. but an entrie into the land by force of the right of the seigniorie, which the graantee hath by force of the fine, &c. *Sic vide diversitatem, &c.*

Alien en fee, &c. Of this sufficient hath beene said in the next precedent Section.

N'avera reliefe, &c. Of this sufficient hath beene said in the next precedent Section.

Sect.

* *ceo* not in L. and M. nor Roh.

+ *avoit l'attornement*—*faisoit attournement*, L. and M. and Roh.

‡ *&c.* added L. and

M. and Roh.

§ *&c.* added L. and M. and Roh.

Sect. 583.

ITEM, si soit seignior, mesne et tenant, et le mesne graunta per fine les services de son tenant a un autre en fee, et puis le grantee morust sans heire, ore les services del mesnaltie deviendront et escheate al seignior paramont per voy d'escheat; * et si apres les services del mesnaltie sont aderere, en cest cas celui que fuit seignior paramont poit distreiner le tenant, nient obstant que le tenant ne unques attur-nast: et le cause est, pur ceo que le mesnaltie fuit en fait en le grantee per force de le † dit fine, et le seignior paramont pouvoit avouer sur le grantee, pur ceo que il fuit son tenant en fait, comment que il ne serroit a ceo compelle, &c. Mes si le grantor en cest case devias sans heire en la vie le grantee, donque il serroit compelle d'avouer sur le grantee; et auxy entant que le seignior paramont ne claime le mesnaltie per force del graunt fait per fine levie per le mesne, ‡ mes per vertue de son seigniorie paramont, † scilicet, per voy d'escheat, il avoua sur le tenant pur les services que le mesne avoit, &c. comment que le tenant ne unques attur-na pas.

ALSO, if there be lord, mesne and tenant, and the mesne grant by fine the services of his tenant to another in fee, and after the grantee die without heire, now the services of the mesnaltie shall come and escheate to the lord paramont by way of escheat; and if afterwards the services of the mesnaltie bee behind, in this case hee which was lord paramont may distreine the tenant, notwithstanding that the tenant did never attorne: and the cause is, for that the mesnaltie was in deed in the grantee by force of the said fine, and the lord paramont may avow upon the grantee, because in deed hee was his tenant, albeit hee shall not be compelled to this, &c. But if the grantor in this case had died without heire in the life of the grantee, then he should bee compelled to avow upon the grantee; and also in as much the lord paramont doth not claime the mesnaltie by force of the grant made by fine levied by the mesne, but by vertue of his seigniorie paramont, viz. by way of escheat, he shall avow upon the tenant for the services which the mesne had, &c. albeit that the tenant did never attorne.

HERE Littleton putteth the case where one that claimeth under a conusee by fine may distraine or maintaine any action, albeit there was never any attornment made to the conusee, or to him that hath his estate.

And here is a diversitie betweene an act in law that giveth one inheritance in lieu of another, and an act in law that conveyeth the estate of the conusee only. Of the former Littleton here putteth an example of the escheat of the mesnaltie which drowneth the seigniorie paramont; and therefore reason would that the lord by this act in law should have as much benefit of the mesnaltie escheated, as he had of the seigniorie that is drowned; and the rather for that the law casteth it upon him, and hee hath no remedy to compell the tenant to attorne.

45. E. 3. 2. 34. H. 6. 7.
37. H. 6. 38. 39. H. 6. 31.
5. H. 7. 18. per Curiam.

Lib. 6. fol. 68. Sir Moyle
Finche's case.

* et not in L. and M. nor Roh.

† scilicet, not in L. and M. nor Roh.

† dit not in L. and M. nor Roh.

‡ &c. added L. and M. and Roh.

[c] Temps E. 2. Attorn. 18.
39. H. 6. 38. per Priot.

(Ant. 104. b. 309 b.)

(5. Rep. 113.)

Sir Moyle Finche's case, ubi su-
pra.

attorne. Another reason hereof *Littleton* here yeeldeth, because the lord commeth to the mes-
naltie by a feignorie paramount, and therefore there needeth no attornment. [c] As if les-
see for life be of a mannor, and he surrender his estate to the lessor, there needeth no attorne-
ment of the tenant's, because the lessor is in by a title paramount. But if the conusee dieth,
and the law casteth his feignorie upon his heire by descent, he shall not be in any better
estate than his ancestor was, because he claimeth as heire meere by the conusee.

So it is (as hath beene said) if the conusee of a fine before attornment bargaineth and
selleth the feignorie by deed indented and inrolled, the bargainee shall not distraine, because
the bargainor, from whom the feignorie moveth, had never actuall possession.

So and for the same reason if a reversion be granted by fine, and the conusee before at-
tornment disseise the tenant for life and make a feoffment in fee, and the lessee re-enter, the
feoffee shall not distraine.

Sect. 584.

(Ant. 104. b.)

[d] 45. E. 3. 2. 34. H. 6. 7.
5. H. 7. 18. per curiam.
13. H. 4. avowrie 227.

(4. Rep. 64.
1. Roll. Abr. 293.
Ant. 153. a.)

Lib. 6. fol. 68. in Sir Moyle
Finche's case.
(Mo. 92. 68.)

27. H. 8. cap. 10.

(Ant. 309. 2. Cro. 193.
5. Rep. 113. a.
6. Rep. 68. b.
10. Rep. 45.)

HERE *Littleton* expresseth two
diversities. First, be-
tweene an act in law,
and the grant of the
party. This case is
put of an [d] escheat,
which is a meere act in
law, but so it is when it
is partly by act in law,
and partly by the act of
the party; as if the co-
nusee of a statute mer-
chant extendeth a feig-
norie or rent, hee
shall distraine without
any attornment. If a
man make a lease for
life or yeares, and after
levie a fine to A. to the
use of B. and his heires,
B. shall distraine and
have an action of waste,
albeit the conusee never
had any attornment,
because the reversion is
vested in him by force
of the statute, and hath
no remedy to compell
the lessee to attorne.

And so it is of a bar-
gain and sale by deed
indented and inrolled,
but this is by force of a
statute since *Littleton*
wrote.

Secondly, where he that commeth in by act in law is in the *per*, as the heire of the co-
nusee, who setteth in his ancestor's seat, *tanquam pars antecessoris de sanguine*, and the lord
by escheat, which is an estranger, and commeth in meere in the *post*.

EN *mesme le ma-*
ner est, lou le re-
version d'un tenant a
terme de vie soit grant
per fine a un autre en
fee, et le grantee apres
morust sans heire, ore
le seignior ad le re-
version per voy d'escheat;
et si apres le tenant
fait wast, le seignior
avera brieve de wast
envers luy, nient con-
tristeant que il ne un-
*ques atturna, * causâ*
quâ supra. Mes lou un
home claime per force
del graunt fait per le fine
† scilicet, come heire,
ou come assignee, &c. la
il ne distrenera ‡ ne a-
vovera, ne avera action
de wast, &c. sans attor-
nement.

IN the same manner it
is, where the reversion
of a tenant for life is
granted by fine to ano-
ther in fee, and the
grantee afterwards dieth
without heire, now the
lord hath the reversion
by way of escheat; and
if after the tenant ma-
keth wast, the lord
shall have a writ of
waste against him, not-
withstanding that he ne-
ver attorned, *causâ quâ*
supra. But where a man
claimeth by force of the
grant made by the fine,
scil. as heire, or as assign-
nee, &c. there hee shall
not distraine nor avowe,
nor have an action of
waste, &c. without at-
tornment.

Sect. 585.

ITEM, en ancient boroughs **A**LSO, in ancient boroughs and
et cities, lou terres et tene- cities, where lands and te-
ments

† &c. added L. and M. and Roh.

‡ ne avovera not in L. and M. nor Roh. nor in MSS.

ments deins mesme les boroughes et cities sont devisable per testament per custome et use, &c. si en tiel borough ou citie home soit seise de rent service, ou de rent charge, et devisa cel rent ou service a un autre per son testament et morust; en cest cas celui a que tiel devise est fait, peut distraire le tenant pur le rent ou service adere, coment que le tenant n'attorna pas.

tenements within the same boroughes and cities are devisable by testament by custome and use, &c. if in such borough or citie a man be seised of a rent service, or of a rent charge, and deviseth such rent or service to another by his testament and dieth; in this case, he to whom such devise is made, may distrain the tenant for the rent or service arere, although the tenant did never attorne.

(F. N. B. 121. n.)

HERE doth Littleton put a case where a man may have a seignory, rent, reversion, or remainder merely by the act of the party, and may distrain, and have any action without any attornement, and that is by devise of lands devisable by custome when Littleton wrote, by the last will and testament of the owner.

34. H. 6. 6. 5. H. 7. 18.
19. H. 6. 24. 21. H. 5. 38.
F. N. B. 121. n.

Sect. 586.

EN mesme le maner est, lou home lessa tiels tenements devisables a un autre pur terme de vie, ou pur terme d'ans, et devisa le reversion per son testament a un autre en fee, ou en fee taile, et morust, et puis le tenant fait waste, celui a que le devise fut fait avera briefe de waste, coment que le tenant ne unque attorna. Et la cause est, pur ceo que la volunt le devisour fait per son testament serra performe selonque l'intent del devisour; et si l'effect de ceo girroit sur l'attournement del tenant, † donques per case le tenant ne voyle unques attourner, et donques le volunt del devisour ne serroit unque performe, ‡ &c. et pur ceo le devisee distraira, &c. ou avera action de waste, &c. sans attournement. Car si home devisa tiels tenements a un autre per son testament, habendum sibi imperpetuum, et morust, et le devisee enter, il ad fee simple,

IN the same manner is it, where a man letteth such tenements devisable to another for life, or for yeares, and deviseth the reversion by his testament to another in fee, or in fee taile, and dyeth, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste, although the tenant doth never attorne. And the reason is, for that the will of the devisor made by his testament shall be performed according to the intent of the devisor; and if the effect of this should ly upon the attornement of the tenant, then perchance the tenant would never attorne, and then the will of the devisor should never be performed, &c. and for this the devisee shall distrain, &c. or he shall have an action of waste, &c. without attornement. For if a man deviseth such tenements to another by his testament, *habendum sibi imperpetuum*, and dieth, and the

(6. Rep. 93.)

(5. Rep. 68.)

(1. Rep. 120. 3. Rep. 199.
6. Rep. 16. 81.)

(2. Rep. 94.)

(10. Rep. 46. 87.)

(4. Rep. 66.)

causa

§ cas added L. and M. and Roh.

† &c. added L. and M. and Roh.

‡ &c. not in L. and M. nor Roh.

causâ quâ supra; * *uncore* † *fi* fait de feoffment *ust este* ‡ *fait a* luy per le devisor en sa vie de mesmes les tenements, habendum sibi imperpetuum, et livery de seisin sur ceo fuit fait, il n'averait estate forsque pur terme de sa vie.

devisee enter, hee hath a fee simple, *causâ quâ supra*; yet if a deed of feoffment had beene made to him by the devisor of the same tenements, *habendum sibi imperpetuum*, and livery of seisin were made upon this, hee should have an estate but for terme of his life.

BOTH this and the precedent case stand upon one and the same reason, which *Littleton* here yeeldeth, viz. because that the will of the devisor expressed by his testament shall be performed according to the intent of the devisor; and it shall not lie in the power of the tenant or lessee to frustrate the will of the devisor by denying his attornement. Here *Littleton* mentioneth a maxime of the common law, viz. *Quod ultima voluntas testatoris est perimplenda secundum veram intentionem suam*; and, *Reipublicæ interest suprema hominum testamenta rata haberi*.

Testament, Testamentum, i. e. testatio mentis, which is made *nullo præsentis metu periculi, sed solâ cogitatione mortalitatis. Omne testamentum morte consummatum*.

Car si home devisa tiels tenements a un auter, &c. Here *Littleton* putteth a case where the intent of the testator shall be taken, viz. where a man by devise shall have a fee simple without these words (heires); and here *Littleton* putteth the diversitie betweene a will and a feoffment.

Now by the statutes of 32. and 34. H. 8. (as hath beene said in the chapter of Burgage) lands, tenements, and hereditaments are devisable, as by the said acts doe appere.

Sect. 587.

IT E M, *si home seisie d'un mannor quel est parcel en demesne et parcel en service, et ent soit disseisie, mes les tenants que teignent del mannor ne unque attournant § a le disseisor; en cest cas, coment que le disseisor morust seisie, et son heire soit eins per discent, &c. uncore poit le disseisee distreine pur le rent arere, et aver les services, &c. Mes si les tenants viendront al disseisor, et dient, Nous deveignomus vostre tenants, &c. cu auter attournement a luy fesoient, &c. et puis le disseisor morust seisie, donque le disseisee ne poit distreine pur le rent, &c. pur ceo que tout le manor discent dist al heire le disseisor, &c.*

AL SO, if a man bee seised of a mannor which is parcell in demesne and parcell in service, and is thereof disseised, but the tenants which hold of the mannor doe never attorne to the disseisor; in this case, albeit the disseisor dieth seised, and his heire is in by discent, &c. yet may the disseisee distreine for the rent behinde, and have the services, &c. But if the tenants come to the disseisor and say, We become your tenants, &c. or make to him some other attornement, &c. and after the disseisor dieth seised, then the disseisee cannot distreine for the rent, &c. for that all the mannor descendeth to the heire of the disseisor, &c.

LITTLETON having spoken of estates gained by lawful conveyances, doth now speake of estates gained by wrong; and here putteth a case of a disseisin of a mannor, where it appeareth, that the disseisor cannot disseise the lord of the rents or services without the

(1. Roll. Abr. 293.)

Vide Sect. 167.

Bracton li. 1. f. 11. & f. 60.

Fleta lib. 2. cap. 15.

Button fol. 78. & f. 212. b.

(6. Rep. 23. Ant. 9. b.)

22. E. 3. 16. 34. H. 6. 7.

15. H. 7. 12. 19. H. 8. 4.

Vide Sect. 187.

(6. Rep. 69. a.)

* *us* added L. and M. and Roh. † *fi*—*le*, L. and M. and Roh. ‡ *ust este*—*fait*, L. and M. § *a le*—*de le*, L. and M. and Roh.

the attornment of the tenants to the disseisor: for seeing an attornment is requisite to a feoffment and other lawfull conveyances, *à fortiori*, a disseisor or other wrong doer shall not gaine them without attornment. The like law is of an abator and an intruder. But albeit the disseisor hath once gotten the attornment of the tenants and payment of their rents, yet may they refuse afterwards for avoiding of their double charge. And here the attornment of the tenant of a mannor to a disseisor of the demeanes shall dispossesse the lord of the rents and services parcell of the mannor, because both demeanes, rents and services make but one entire mannor, and the demeanes are the principall: but otherwise it is of rents and services in grosse, as in this next Section our author teacheth us.

6. H. 7. 14. 11. H. 7. 28.
11. H. 4. 14. a. b.
(Cro. Car. 303. Ant. 180.)

(1. Roll. Abr. 662.)

Sect. 588.

*MES si un tient de moy per rent service, le quel est un service engrosse, * et nient per reason de mon mannor, et un auter que nul droit ad, † clama le rent, ‡ et receive et prent mesme le rent de mon tenant per cobercion de distres, ou per auter forme, et disseisist moy per tiel prendre de rent; coment que tiel disseisor mourust issint seisie en pernant de rent, uncore apres sa mort jeo puissoy bien distreiner le tenant pur le rent que fuit aderere devant le || decease del disseisor, et auxy apres son decease. Et la cause est, pur ceo que tiel disseisor n'est pas mon disseisor forsque a ma election et ma volunt. Car coment que il prent le rent de mon tenant, &c. uncore jeo puissoy a tous foits distreiner mon tenant pur le rent arere §, issint que il est a moy forsque sicome jeo voile suffer le tenant estre per tant de temps arere † pur paier a moy meme le rent, &c.*

BUT if one holdeth of mee by rent service, which is a service in grosse, and not by reason of my mannor, and another that hath no right, claimeth the rent, and receives and taketh the same rent of my tenant by coercion of distresse, or by other forme, and disseiseth mee by such taking of the rent; albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distreine the tenant for the rent which was behinde before the decease of the disseisor, and also after his decease. And the cause is, for that such disseisor is not my disseisor but at my election and will. For albeit he taketh the rent of my tenant, &c. yet I may at a'l times distreine my tenant for the rent behinde, so as it is to mee but as if I will suffer the tenant to bee so long time behinde in payment of the same rent unto me, &c.

(Cro. Car. 303.
Roll. Abr. 658.
F. N. B. 179. k.)

(Ant. 180. b.
a. Siderf. 75.)

Sect. 589.

CAR le payment de mon tenant a un auter a que il ne doit pas payer, n'est pas disseisin a moy, ne ousta moy pas de mon rent sans ma volunt ¶ et ma election, &c. Car coment que jeo puissoy aver assise envers tiel per-

FOR the payment of my tenant to another to whom hee ought not to pay, is no disseisin to me, nor shall oust me of my rent without my will and election, &c. For although I may have an assise against such pernor, yet this is at my election,

(3. Rep. 77.)

* et nient per reason de mon mannor, not in L. and M. nor Roh.

† et receive—a receiver, L. and M. and Roh.

and Roh. † per—de, L. and M. and Roh.

‡ clama—claimant mesme, L. and M. and Roh.

|| decease—distress, L. and M. and Roh.

§ &c. added L. and M.

¶ et—on sans, L. and M. and Roh.

nor, uncore ceo est a mon election, si jeo voile prendre luy come mon disseisor, ou non. Issint tiels discents de rents en gros ne ousteront pas le seignior de distreyner, mes a chescun temps ils poyent bien distreiner pur le rent arere, &c. Et en cest case si apres le distresse de luy que issint torciouement prist le rent, jeo graunt per mon fait le service a un auter, et le tenant attourna, ceo est assés bone, et les services per tiel grant et attournement maintenant sont en le grantee, &c. Mes auterment est lou le rent est parcel del manor, et le disseisor morust seisie del manor entier, come en le case procheine avant est dit, &c.

tion, whether I will take him as my disseisor, or no. So such discents of rents in grosse shall not oust the lord of his distresse, but at any time he may well distreyne for the rent behinde, &c. And in this case if after the distresse of him which so wrongfully tooke the rent, I grant by my deed the service to another, and the tenaunt attorne, this is good enough, and the services by such grant and attornement are presently in the grantee, &c. But otherwise it is where the rent is parcell of a manor, and the disseisor dieth seised of the whole manor, as in the case next before is sayd, &c.

(1. Rep. 37.
9. Rep. 51.
Hob. 322.)

* Vid. Sect. 237, 238, 239, 240.
(Cro. Car. 303.)

24. E. 3. 4. 1. E. 5. 5.
See the authorities there following in the next parolle.
5. E. 4. 1. 23. H. 3. tit. Ass. 439.
24. E. 3. 40. 31. 16. Ass. p. 15.
16. E. 3. Release 56. 1. E. 5. 5.
F. N. B. 179. E. 15. E. 4. 8.
Flet. li. 4. ca. 12.

(Ant. Sect. 541.)

HERE Littleton putteth a diversitie betweene a rent service parcell of a manor, whereof he had spoken before, and a rent service in grosse. For a man cannot be disseised of a rent service in grosse, rent charge, or rent secke, by attornement or payment of the rent to a stranger, but at his election; for the rule of law is, *Nemo redditum alterius invito domino percipere aut possidere potest*; and our author hath before * taught us what be disseisins of rents services, rents charges, and rent secks, and payment to a stranger is none of them, but at the lord's election, as our author here saith.

Pernor, i. e. the taker of my rent. But if the disseisee bring an assise against such a pernor, then he doth admit himselfe out of possession.

Discents. A discent of a rent in grosse bindeth not the right owner but that he may distreyne, albeit he admitted himselfe out of possession, and determined his election, as by bringing of an assise, &c.

If the tenant of the land pay the rent to a stranger which hath no right thereunto, and the right owner release to him, this release is good because he thereby admitted himselfe to bee out of possession. But if the tenant had given him any thing in name of attornement, and the right owner had released to him, this release had beene void, because an attornement only can be no disseisin of the rent.

Jeo grant per mon fait, &c. This also proveth, that the right owner is not out of possession, and that this grant over is a demonstration of his election that hee is in possession.

Sect. 590.

I T E M, si jeo sue seisie d'un manor, parcel en demesne, et parcel en service; et jeo done certaine acres del terre, parcel de demesne de mesme le manor, a un

A L S O, if I be seised of a manor, parcell in demesne, and parcell in service, and I give certaine acres of the land, parcell of the demesne of the same manor, to

auter

*auter en le taile, rendant a moy et a mes heires un certaine rent, &c. si en cest case jeo sue disseisie de la manor, et tous les tenants attournont et payont leur rents al disseisor, et auxy le dit tenant en le taile paya le rent per moy reserve, al disseisor, et puis le disseisor morust seisie, * &c. et son heire entra, et est eins per discent, uncore en cest case jeo puisse bien distreigner le tenant en le taile, et ses heires, pur le rent per moy reserve sur le done, scilicet, auxy-bien pur le rent esteant aderer devant le descent al heire le disseisor, et auxy pur le rent que happa d'estre aderer apres mesme le discent, nient obstant tiel morant seisie del disseisor, &c. Et la cause est, pur ceo que quant home dona tenements † en le taile, savant le reversion a luy, et il sur le dit done reserva a luy un rent ou auters services, tout le rent et les services sont incidents a la reversion; et quant un home ad un reversion, il ne pouvoit estre ouste de son reversion per le fait d'un estrange home, sinon que le tenant soit ouste de son estate et possession, &c. Car si longement ‡ que le tenant en le taile et ses heires continuont leur possession per force de mon done, cy longement est le reversion en moy et en mes heires: et entant que le rent et les services reserves sur tiel done sont incidents et dependants al reversion, quecunque que ad le reversion, avera mesme le rent et services, &c.*

another in taile, yeelding to mee and to my heires a certaine rent, &c. if in this case I be disseised of the mannor, and all the tenants attorne and pay their rents to the disseisor, and also the sayd tenant in taile pay the rent by me reserved, to the disseisor, and after the disseisor dieth seised, &c. and his heire enter, and is in by discent, yet in this case I may wel distreyn the tenant in taile, and his heires, for the rent by me reserved upon the gift, *scilicet*, as well for the rent being behinde before the discent to the heire of the disseisor, as also for the rent which happeth to be behind after the same discent, notwithstanding such dying seised of the disseisor, &c. And the reason is, for that when a man giveth lands in taile, saving the reversion to himselfe, and hee upon the sayd gift reserveth to himselfe a rent or other services, all the rent and services are incident to the reversion; and when a man hath a reversion he cannot be ousted of his reversion by the act of a stranger, unlessse that the tenaunt be ousted of his estate and possession, &c. For as long as the tenant in taile and his heires continue their possession by force of my gift, so long is the reversion in me and in my heires: and in as much as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion, shall have the same rent and services, &c.

(Dyer 94. b.)

(Cro. Car. 303.)

(8. Rep. 89.)

Sect.

* &c. not in L. and M. nor Roh.

† a un auter added in L. and M. and Roh.

‡ en ceo cas added L. and M. and Roh.

Sect. 591.

EN mesme le maner est, lou jeo lessa parcel del demesne del manor a un auter pur terme de vie, ou pur terme d'ans, rendant a moy certaine rent, &c. coment que jeo soy disseisie del manor, &c. et le disseisor morust seisie, * &c. et son heire † esteant eins per discent, uncore jeo distreiner pur le rent arere ut supra, nient obstant tiel discent; car quant home ad fait tiel done en taile, ou tiel leas pur terme de vie, ou pur terme d'ans, del parcel de le demesne de un manor, &c. savant le reversion a tiel donour ou lessour, &c. et puis il soit disseisie de le manor, &c. tiel reversion apres tiel disseisin est sever del manor en fait, coment que ne soit sever en droit. ‡ Et isint poyes veier (mon fits) diversitie, lou il y ad un manor parcel en demesne et parcel en services, les queux services sont parcel de mesme le manor nient incidents a ascun reversion, &c. et lou ils sont incidents al reversion, &c.

IN the same manner is it, where I let parcell of the demesnes of the mannor to another for terme of life, or for terme of yeares, rendering to mee a certaine rent, &c. albeit I be disseised of the mannor, &c. and the disseisor die seised, &c. and his heire bee in by discent, yet I may distreine for the rent arere ut supra, notwithstanding such discent; for when a man hath made such a gift in taile, or such a lease for life, or for yeares, of parcell of the demesnes of a mannor, &c. saving the reversion to such donor or lessor, &c. and after he is disseised of the mannor, &c. such reversion after such disseisin is severed from the mannor in deed, though it be not severed in right. And so thou mayst see (my sonne) a diversitie, where there is a mannor parcell in demesne and parcell in services, which services are parcell of the same mannor not incident to any reversion, &c. and where they are incident to the reversion, &c.

(Cro. Car. 303.
1. Roll. Abr. 658.
11. Rep. 47, 48. Plowd. 197. b.)

HERE Littleton putteth a diversitie betweene rents and services parcell of a mannor (whereof he had spoken before) and rents and services incident to a reversion parcell of a mannor.

And the reason of this diversitie is, for that as long as the donee in taile, lessee for life, or lessee for yeares, are in possession, they preserve the reversion in the donor or lessor; and so long as the reversion continue in the donor or lessor, so long do the rents and services which are incident to the reversion belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unlesse the donee or lessee be put out of their possession; and if the donee or lessee be put out of their possession, then consequently is the donor or lessor put out of their reversion. But if the donee or lessee make a regresse, and regaine their estate and possession, thereby doe they *ipso facto* reveist the reversion in the donor or lessor.

[a] 18. Aff. p. 2. 38. H. 6. 33.
Pl. Com. Fulmerstone's case 1. 3.
Lib. 5. fol. 11, 12. 25. 19. E. 2.
Briefe 845. 4. E. 3. Briefe 713.
(Post. 349. 11. Rep. 50. b.)

And here is to be observed, that when a man is seised of a mannor, and maketh a gift in taile, or lease for life, &c. of parcell of the demesne of the mannor, [a] the reversion is part of the mannor, and by the grant of the mannor the reversion shall passe with the attornement of the donee or lessee. But if the lord make a gift in taile, or a lease for life of the whole mannor, excepting *Blacke-Acre*, parcell of the demesnes of the mannor, and after he granteth away his mannor; *Blacke-Acre* shall not passe; because during the estate taile, or lease for life,

* &c. not in L. and M.

† esteant not in L. and M. nor Roh.

‡ &c. added L. and M. and Roh.

life it is severed from the mannor. And so note a diversitie, that a reversion of part may be parcell of a mannor in possession, but a part in possession cannot be parcell of the reversion of a mannor expectant upon any estate of freehold. But if a man make a lease for yeares of a mannor, excepting Blacke Acre, and after granterh away the mannor, Blacke Acre shall passe, because the freehold being entire, it remaineth parcell of the mannor, and one *præcipe* of the whole mannor shall serve. But otherwise it is in case of the gift in taile or lease for life excepting any part, there must be severall writs of *præcipe*, because the freehold is severall.

CHAP. II. Of Discontinuance. Sect. 592.

Discontinuance est un ancien pa-rol en la ley, et ad divers significations, &c. Mes quant a un entent il ad tiel signification, scilicet, lou un home ad alien a un auter certaine terres ou tenements et morust, et un auter ad droit de aver mesmes les terres ou tenements, mes il ne poit entrer en eux per cause de tiel alienation, &c.

Discontinuance is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, viz. where a man hath aliened to another certaine lands or tenements and dieth, and another hath right to have the same lands or tenements, but hee may not enter into them because of such an alienation, &c.

Discontinuance is a Vide Sect. 637.

word compounded of *de* and *continuo*, for *continuo* is to continue without intermission. Now by addition of *de* (*euphonia gratia* dis to it), which is privative, it signifieth an intermission. *Discontinuo* nihil aliud significat quam intermittere, desu- scere, interrompere. And as our author saith, [a] it is a very ancient word in law (1).

A discontinuance of estates in lands or tenements is properly (in legall understanding) an alienation made or suffered by tenant in taile, or by any that is seised in *auter droit*, whereby the issue in taile, or the heire or successor, or those in reversion or remainder, are driven to their action, and cannot enter. (10. Rep. 97.)

All which is implied by the description of our author, and by the (&c.) in the end of this Section.

I have added (properly) by good warrant of our author himselfe, for *Section* 470. he useth discontinuance for a devesing or displacing of a reversion, though the entrie be not taken away.

This discontinuance consisteth in doing or suffering an act to be done, as hereafter shall appeare. And where our author saith, that it hath divers significations, there is also a discontinuance of proesse consisting in not doing, where the proesse is not continued, concerning which there is an excellent statute made in furtherance of justice in [b] 1. E. 6. and is well expounded in my Reports, and therefore need not here to be inserted. (1. Roll. Abr. 130. 485.)

There is another erroneous proceeding, and that consisteth in misdoing; as when one proesse is awarded instead of another, or when a day is given which is not legall, this is called a miscontinuance, and if the tenant or defendant make default, it is error; but if he appeare, then the miscontinuance is salved, otherwise it is of a discontinuance. But let us returne to the discontinuance of estates in lands, whereof *Littleton* doth treat in this Chapter.

[b] Vide the Statutes of 1. E. 6. ca. 7. & 31. Eliz. c. 1. lib. 7. f. 30. 31. &c. le case de discontinuance de proces. (1. Sid. 173. 2. Cro. 284.) 39. E. 3. 7. a. 46. E. 3. 30. 37. H. 6. 25. 26. 9. E. 4. 18. 12. E. 4.

Significations. Here (as in many other places) it appeareth how necessary it is to know the signification of words. Vide Sect. 74. 174. 194. 441. 520.

And in this Chapter it appeareth, that when *Littleton* wrote, the estate in lands and tenements might have bene discontinued five manner of wayes, viz. by feoffment, by fine, by release with warrantie, confirmation with warrantie, and by suffering of a recovery in a *præcipe*

(1) I. As to discontinuances in general: — In note 1. p. 239. a. it was observed, that in the case of a disseisin, while the possession remains in the disseisor, it is a mere naked possession, unsupported by any right; and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by an entry on the land, without any previous action; but that, if the disseisor dies, the heir comes to the possession of the estate by a lawful title. It is the same if the disseisor aliens; the alienee comes in by a lawful title. By reason of this lawful title, the heir, in the first instance, and the alienee, in the second, acquires a *presumptive right of possession* which is so far good even against the person disseised, that he loses by it his right to recover the possession by entry, and can only recover it by an action at law. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be *discontinued*. This is the general import of the word *discontinuance*; but, in its usual acceptation, it signifies the effect of alienations made by husbands seised *jure uxoris*; by ecclesiastics seised *jure ecclesie*; or by tenants in tail; those being the three instances adduced by *Littleton* of a discontinuance. But other cases, where the party having the right could not restore his possession by entry, and was therefore left to his remedy by action were also, in *Littleton's* time, termed discontinuances. Thus, before the statute of the 11. H. 7. c. 20. the alienations of a woman seised of an estate in dower, or of any estate of the gift of her husband, or of any of his ancestors, were said to be a discontinuance; and before the statutes of 32. H. 8. c. 31. and 14. El. c. 8. recoveries suffered by tenants for life, or tenants by the courtsey, or tenants in tail, after possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinuance. See Sir William Pelham's case, 1. Rep. 14. It is to be observed, that there is a material difference between the situation or title of the alienee of any person whose alienation makes a discontinuance, and the situation or title of the heir or alienee of a disseisor; for the heir and alienee of a disseisor immediately claim under a person coming in by a wrongful title, and their estates, though not defeasible by entry, are immediately defeasible by action. But the alienee of every person, whose alienation is said to be a discontinuance, claims by a person having a lawful estate, and the estate of the alienee is unimpeachable during the life of the discontinuor. It should also be observed, that a discontinuance extends to those cases only, where a person is dispossessed of an estate of freehold; and where, though he has lost his right of entry, he can still recover the possession by action. At the common law, if there was a term for years, and the tenant of the freehold suffered a common recovery by covin, it was a good bar to the termor; for, not having the freehold, he could not falsify the recovery, so that all his term and interest in the land was lost, and his only remedy was an action of covenant against the lessor. His possession, therefore, or rather his interest, was absolutely lost, not merely interrupted. Even after the statutes of Gloucester, and the 21. H. 8. c. 15. which preserved the interest of the termor for years, against a common recovery, as the possession of the termor for years is considered in the law as the possession of him who has the next estate of freehold, the recovery is never said to discontinue the estate of the termor for years; the expression discontinuance being applied solely to those cases where the freehold is divested. The peculiar import of the word discontinuance, where applied to the cases mentioned by *Littleton*, is shortly, but forcibly expressed by *Mont. Houard*, who explains the word discontinuance "Interruption du droit, qu'on a sur un fonds, par la

præcipe quod reddat. And this was to the prejudice of five kinds of persons, viz. of wives, of heires, of successors, of those in reversion, and of those in remainder. But for wives, and their heires, and for successors, the law is altered by acts of parliament since Littleton wrote, as in this Chapter in their proper places shall appeare.

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HERE Littleton putteth an example of a discontinuance made by one seised in *auter droit*, as by an abbot who had a fee simple in the right of his monastery, and therefore his alienation without the assent of his convent had beene a discontinuance at the common law, and had driven his successor to a writ *de ingressu sine assensu capituli*.

De ingressu sine assensu capituli, &c.

It is called so because the alienation was *sine assensu capituli*; for if it had beene *cum assensu capituli*, it should have beene a barre to the successor. And because the successor could not enter, the common law gave him this writ, and is so called of these words contained in the writ, which writ you may read in the Register and Fitzherbert's *N. B.*

And here is to be noted, that in law the convent, albeit they be regular and dead persons in law, yet are they said in law to be *capitulum* to the abbot, as well as the deane and chapter, that be secular to the bishop. But it is to be observed and implied in this (&c.) that, a sole body politike that hath the absolute right in them, as an abbot, bishop, and the like, may make a discontinuance; but a corporation aggregate of many, as deane and chapter, warden and chaplaines, master and fellowes, maior and comminaltie, &c. cannot make any discontinuance; for if they joyne, the grant is good; and if the deane, warden, master, or maior make it alone where the body is aggregate of many, it is void, and worketh a disseisin. But now (as hath beene said) by the statute of 27. H. 8. and 31. H. 8. all the abbots, priors, and other religious persons are so dissolved, as there be none remaining this day, and by the statutes of 1. Eliz. and 13. Eliz. cap. 10. and 1. Jac. cap. 3. bishops and all other ecclesiasticall persons are disabled to alien or discontinue any of their ecclesiasticall livings, as by the same acts doth appeare (1).

SICOME un abbe seise de certaine terres ou tenements en fee, et alienast mesmes les terres ou tenements a un auter en fee, ou en fee taile, ou pur terme de vie, et puis l'abbe morust, son successeur ne poit enter en les dits terres ou tenements, coment que il ad droit eux aver come en droit de son meason, mes il est mis a son action de recoverer mesmes les terres ou tenements, quel est appelle, breve de ingressu sine assensu capituli, &c. †

AS if an abbot be seised of certaine lands or tenements in fee, and alieneth the same lands or tenements to another in fee, or in fee taile, or for terme of life, and after the abbot dieth, his successor cannot enter into the said lands or tenements, albeit he hath right to have them as in right of his house, but he is put to his action to recover the same lands or tenements, which is called a writ, *breve de ingressu sine assensu capituli, &c.*

Registr. Orig. fol. 230.
F. N. B. 195. Bracton li. 4. fol.
323. Fleta lib. 5. ca. 34.

21. E. 4. 86.
(Flo. 536.)
(Ant. 85. a.)
(Post. 341. b.)
(11. Rep. Magdalen College's
case.)

See more of this matter hereafter
in this chapter Sect. 648. and
before Sect. 528.

Sect. 594.

EN droit sa feme, &c. (2) That is to say, in fee simple, fee taile,

ITEM, si home seise de terre come en droit

ALSO, if a man be seised of land as in right of his de

* puis not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

vente qu'un autre chargé de conserver ce droit, en a faite. See *Anciennes Loix des Francois*, 2 vol. 435. Our doctrine of discontinuance bears some analogy to the doctrine of interruption in the civil law.—There, interruption, when applied to the real property, signifies the ousting of a person from the possession of his land. From that time, he ceases to be the possessor of it; and if he does not renew his possession, but permits the dispossessor to retain it, he absolutely loses his right to it, and the disseisor is said to acquire it by prescription. It is observable, that by the laws of the Twelve Tables, possession during two years formed a prescription for land; one year, for personal estate. Dio. Sic. 20. In 3. Rep. fol. 8. b. 9. a. Lord Coke observes, that the reason why the law will not permit a person who is in by judgment of law, to have his possession disturbed by the disseisor, is, "to take away the multiplicity and infiniteness of suits, trials, recoveries, and judgments in one and the same case; and therefore in the judgment and policy of the law, it was thought more profitable to the commonwealth, and more for the honour of the law, to leave some without remedy, and to put others to their writ of right, without any respect of coverture, &c. than that there should not be any end of actions and suits."

(1) II. As to discontinuances by ecclesiastical persons:—It is generally supposed that ecclesiastical persons were permitted to acquire real estates, as early as the reign of the emperor Constantine. The tenth century is commonly considered as the period when donations to them were most frequent and considerable. Very soon after they were permitted to acquire, they were restrained from alienating their property. See Dec. Gra. Caf. 12. Q. 2. c. 3. Long leases made by ecclesiastical persons, are declared to be null by the Council of Trent, Sess. 25. de Ref. ch. 11. For the learning relating to the leases made by ecclesiastical persons, the editor begs to refer to the much-admired collections on this subject in Bacon's Abr. vol. 3. tit. Leases, supposed to be extracted from a manuscript of Sir Geoffrey Gilbert. It is to be observed, that bishops and abbots were supposed to have the possession *in fee*, and might therefore alien in fee; but parsons were considered to have no more than a *life estate*. See Gilb. Ten. 108.

(2) III. As to discontinuances by persons seised *jure uxoris*:—It is generally supposed that women, by reason of their incapacity to perform military duty, were not originally admitted to succeed to proper fiefs: so that if the fief, by its original constitution, were descendible to the females, it was, upon that very account, ranked among *improper fiefs*. See Craig. de Jure Feud. 48. 50. 236. Stry. Ex. Jur. Feud. cap. 4. 2. cap. 15. 2. 3. By the Salic law, the females were excluded from succeeding to estates, either lineally or collaterally.—It may not be improper to mention here, that there are two different codes of this law. One of them is supposed to have been collected before christianity was received into France.—The other is of a later date; and appears to be a republication of the former, with considerable alterations, both in substance and phraseology; and with several new regulations supposed to have been made by the princes who filled the throne of that kingdom, after the introduction of christianity.—The former code contains the following clause: "*De terra vero Salica in mulierem nulla portio hereditatis transit; sed hoc virilis sexus acquirit; hoc est, filii in hereditate succedunt.*" In the latter, it is expressed in this manner: "*De terra autem Salica, nulla portio hereditatis mu-*"

lieri

de sa feme, &c. et wife, &c. and thereof ent enfeoffa un auter, infeoffe another, &c. &c.† et morust, la feme and dieth, the wife ne puit enter, mes est may not enter, but is mis a son action, le- put to her action, the quel est appel, cui in which is called, cui vitâ, &c.*

or for life. Here *Littleton* putteth another case where a man is seised in *auter droit*, and may make a discontinuance, as the husband seised in the right of his wife, and therefore the common law gave her a *cui in vitâ*, and her heire a *sur cui in vitâ*, because they could not enter. But this is altered since our author wrote, by the

Bracton lib. 4. f. 202. & 22. & 324. Fleta lib. 5. ca. 34. & 36. F. N. B. 193. Regill. 3a. H. 8. cap. 28.

statute of 32. H. 8. by the purview of which statute, the wife of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

And here is one of the alienations to make a discontinuance, *viz.* a feoffment; and where our author speaketh of a husband seised in the right of his wife, so it is where the husband and wife are jointly seised to them and their heires of an estate made during the coverture, and the husband make a feoffment in fee, and dieth, the wife now may enter within that statute, although it was the inheritance of them both. And so it is if the feoffment be made by the husband and wife, (albeit the words of the statute be by the husband only) for in substance this is the act of the husband only. (1)

(1. Roll. Abr. 634. Ant. 187. b.)

If the husband cause a *præcipe quod reddat* upon a faint title to be brought against him and his wife, and suffereth a recovery without any voucher, and execution to be had against him and his wife, yet this is holpen by the statute; for this by like construction is the act of the husband, and the words of the statute be, *made, suffered, or done.*

Dier. 4. & 5. Ph. & Marie 146. 3. Eliz. Dier. 191. Lib. 8. fol. 71, 72. Greveleye's case. (9. Rep. 140. a.)

Greveleye's case ubi supra. (2. Inst. 343.)

If the husband make a feoffment in fee of the lands which he holdeth in the right of his wife, and after they are divorced *causâ præcontractûs*, yet the woman may enter within the purview of that statute, and is not driven to her writ of *cui ante divortium*, as she was at the common law, albeit the entrie be by the statute given to the wife, and now upon the matter she was never his lawfull wife. But it sufficeth that she was his wife *de facto* at the time of the alienation, and where her husband dieth she cannot be his wife at the time of the entrie.

(F. N. B. 205. f. 7. Rep. 42. 4. Rep. 29.)

If the husband levie a fine with proclamations, and dieth, the wife must enter or avoid the estate of the confinee within five yeares, or else she is barred for ever by the statute of 4. H. 7. for the statute of 32. H. 8. doth helpe the discontinuance but not the barre; and the statute speaketh of a fine, and not of a fine with proclamations.

6. E. 6. Dier. 72. b.

4. H. 7. c. 24.

If lands be given to the husband and wife, and to the heires of their two bodies, and the husband maketh a feoffment in fee and dieth, the wife is holpen by the said statute, as hath beene said, and so is the issue of both their bodies. Feme tenant in taile taketh husband, the husband maketh a feoffment in fee, the wife before entrie dieth without issue, he in the reversion or remainder may enter. For, first, the reversion or remainder cannot be discontinued in this case, because the estate taile is not discontinued. Secondly, the words of the statute be, *shall not be prejudiciall or hurtfull to the wife or her beires, or such as shall have right title or interest by the death of such wife, but that the same wife and her beires, and such other to whom such right shall appertain after her decease, shall or lawfully may enter into all such mannors, lands, &c. according to their rights and titles therein:* by which words the entrie of him in the reversion or remainder in that case is preserved. The husband is tenant in taile, the remainder to the wife in taile, the husband make a feoffment in fee; by this the husband by the common law did not only discontinue his owne estate taile, but his wife's remainder: but at this day after the death of the husband without issue, the wife may enter by the said act of 32. H. 8. If the husband hath issue, and maketh a feoffment in fee of his wife's land, and the wife dieth, the heire of the wife shall not enter during the husband's life, neither by the common law nor by the statute.

Greveleye's case ubi supra. Pasch. 7. Jac. (Hob. 261. 9. Rep. 140. Dyer. 224. a. 3. Inst. 216.)

8. E. 2. tit. cui in vitâ 26. 34. E. 1. ibidem 30. 10. E. 3. 12. Dier. 21. Eliz. 363.

Cui in vitâ, &c. Here is also implied a *sur cui in vitâ* also for the heire. This writ here mentioned in our author is so called of those words contained in the writ, which you may reade in the Register and *Fitzherbert's N. B.*

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* &c. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

(1) But a fine levied both by husband and wife of her lands, is not within the statute; and it operates as a bar to her and her heirs, of all her estate and interest in the land. See 2. Rep. 57. b. 77. b.

"*lieri veniat, sed ad virilem sexum tota hæreditas perveniat.*" But in the course of time, women were admitted, generally, to succeed to all fiefs; and even the Salic law lost all its force, except as to the succession to the crown, in which respect it has been invariably observed from the earliest period of the French monarchy to the present time. This exclusion of females and their descendants from the crown, is now universally agreed to be a fundamental law of that monarchy.—Even in the dispute between Philip Valois and Edward the Third, the validity of the law as to the daughters themselves, was never questioned: the only dispute was, whether it extended to the male descendants of the daughters. Edward the Third contended it did not; but the decision of the assembly, which was held upon this affair, at Paris, and which was composed of the chief nobility, prelates, and burghers of the kingdom, being against him; and the wars which were undertaken in support of his right, proving unfavourable to the English; it is now settled beyond all controversy, that the descendants of the daughters are excluded from the throne of France, as much as the daughters themselves. In consequence of this doctrine, Henry the IVth succeeded to the throne at the distance of twenty-one degrees from his immediate predecessor. See Rapin's Dissertation on the Salic Law, and *Le Brun Traité des Successions*, l. 2. c. 2. §. 2.—This exclusion from the throne of France did not prevent women succeeding there to every other dignity, so as even to become peers of France. Many instances are upon record of their personally presiding in their own courts, even over judicial combats; of their being summoned to, and sitting in, the court of peers; and, what is considered as the highest of honours, of their assisting as peers at the consecration of the king. Thus Mahaut, the countess of Artois, assisted not only at the trial of Robert of Flanders, but at the ceremony of the coronation of Philip the Long, and with the other peers supported his crown. So, in England the celebrated Ann countess of Pembroke Dorset and Montgomery had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby, she sat with the judges on the bench. The reader will find the revolutions in the laws and usages of France, in this respect, stated with the most consummate learning and perspicuity by the Chancellor D'Aguesseau (then Attorney-General) in his pleading in the great cause of the Duke of Luxemburg, tom. 3. p. 643. and in his *Requête sur la Mouvance du Comté de Soissons*, tom. 6. p. 1. & *Observations sur les Pairies*, tom. 7. p. 598. *Procès verbal de ce que s'est passé au Parlement de Paris en 1716, au sujet d'un accusation de duel, intentée par le Procureur-général du Roi contre un Pair de France, qui n'avoit pas encore été reçu en Parlement*. lb. 616. and see also *Droit Public de la France, par Monsr. Bouquet*, p. 332. The cause of the Duke of Luxemburg gave rise to the edict of 1711. By that edict it was declared, that in the letters for the erection of peerages, whether granted before that time, or to be granted afterwards, the words heirs and successors should only comprise male children, descended from him in whose favour the peerage was first erected, and males descended from males, without the intervention of a female: That those clauses, which expressly comprised females, should be considered as having a condition annexed to them, that the female becoming entitled under them, should marry no person without the consent of the king, signified by letters patent addressed to the parliament of Paris: That in these letters patent the peerage should be confirmed to the husband, and his male descendants; and that the peer in whose favour the peerage of his

wife

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ENFEOFFA *un auter, &c.*

Here is implied, or make a gift in taile or an estate for life. Here *Littleton* putteth a third example of a discontinuance made by tenant in taile so as his issue is put to his *formedon* in the descender, which is given to the issue in taile by the statute of 13. E. 1. cap. 1. because he cannot enter.

Tenant en taile.

This extendeth as well to a woman tenant in taile as to a man, and was generally good law when *Littleton* wrote; but now by the statute of

ITEM, si tenant en taile de certaine

terre ent enfeoffa un auter, &c. et ad issue et morust, son issue ne poit pas enter en la terre, coment que il ad title et droit a ceo, mes est mis a son action, que est appellee formedon en le descender, &c.

ALSO, if tenant in taile of certaine

land thereof enfeoffe another, &c. and hath issue and dieth, his issue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a *formedon in le descender, &c.* (1)

Fleta lib. 5. cap. 34.
F. N. B. 211, 212. Regist.
(4. Rep. 3. b.
Poll. 363. b.)

[d] 11. H. 7. ca. 20.
Vide Sect. 697.
(3. Cro. 244.
1. Rep. 102. b.
3. Rep. Lin. Coll. Case.
10. Rep. 39. b. 6. Rep. 9. b.
Bend. 40. Hob. 332. Jo. 31.
Cro. El. 2.)

[e] Lib. 3. fol. 50, 51. Sir George
Browne's case eodem lib. fol. 60,
&c. Linc. Coll. case. Lib. 1.
fol. 176. Mldemay's case.
Dier. 3. & 4. Ph. & Mar. 146.
Idem, 8 Eliz. 248. 17. Eliz.
340. Idem 19. Eliz. 354.
Idem 20. Eliz. 362. 27. H. 8. 23.
Lib. 5. fol. 79. Fitzh. case.
Lib. 8. fol. 71, 72. Greveley's
case.
(F. N. B. 211. 217.
8. Rep. 88.)

[a] 4. E. 3. 38. 43. E. 3. 25.
4. E. 4. 25. F. N. B. 124.
[b] 2. E. 2. Droit. 28.
[c] F. N. B. 123.
[d] 21. E. 3. 11. 5. E. 3. 23.
11. H. 4. 49.
[e] 2. E. 3. Droit. 28. 13. H. 7.
24. 5. E. 4. 2. 20. E. 3. Avow-
rie 131. F. N. B. 10. 46. E. 3.
tit. Cui in vita, 33.

[d] 11. H. 7. if the woman hath any estate in taile joyntly with her husband, or only to her selfe or to her use in any lands or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in taile by any of the ancestors of the husband, or by any other person seised to the use of the husband or his ancestors, and shall hereafter being sole or with any other after taken husband discontinue, &c. the same; every such discontinuance shall be void; and that it shall be lawfull for every person to whom the interest, title, or inheritance, after the decease of the said woman should appertain, to enter, &c. So as if such a feme tenant in taile doe make any discontinuance in fee, in taile, or for life, although it be without warrantie, yet this doth not take away the entry after her death, either of the issue or of him in reversion or remainder. This statute hath bene excellently expounded by divers resolutions and judgements [e] which I have quoted in the margin, and are worthy of due observation.

If lands were entailed to a man and to his wife, and to the heires of their two bodies, and the husband had made a feoffment in fee and died, and then the wife died, this had bene a discontinuance at the common law: for the title of the issue is as heire of both their bodies, and not as heire to any one of them, and his entrie must ensue his title or action.

De formedon, De forma donationis. so called because the writ doth comprehend the forme of the gift. And there be three kinde of writs of formedon, *viz.* The first in the descender to be brought by the issue in taile, which claime by descent *per formam doni*. The second is in the reverter, which lieth for him in the reversion or his heires or assignes after the state taile be spent. The third is the remainder, which the law giveth to him in the remainder, his heires or assignes, after the determination of the estate taile; of all which you may read in the Register and F. N. B.

Here *Littleton* sheweth that the issue in taile shall have a formedon in the descender. What other actions tenant in taile may have, and not have, is good to be seene.

[a] Tenant in taile shall have a *quod permittat*.

[b] Tenant in taile shall have a writ of customs and services *in le debet, et solet*, but shall not have it in the *debet* only.

[c] In like manner he shall have a *sesta ad molendinum in le debet et solet*, but not in the *debet tantum*.

[d] Tenant in taile shall have a writ of *entre in consimili casu* and an *admesurement*, and a *nativo habendo, cessavit, ischeat, waste*, and the like.

[e] But tenant in taile shall not have a writ of right *sur disclaymer*, nor a *quo jure*, nor a *ne injuste vexes*, nor a *nuper obiit*, or *rationabile parte*, nor a *mordancester*, nor a *sur cui in vita*; for these and the like, none but tenant in fee shall have: and the highest writ that a tenant in taile can have is a formedon.

Sect.

wife was thus confirmed, should take his rank only from the day of his reception in parliament, under the letters patent. In the same manner the duchy and peerage of Aubigny was granted in 1684, to the duchess of Portsmouth, the duke of Richmond her son, and his heirs male; but the letters patent by which this grant was made, were not registered; for want of which, though the title of duke of Aubigny had always been admitted by the court of France, and the dukes and duchesses of Richmond had always been allowed at Versailles the honours attached to that dignity, the peerage was not admitted by the parliament. In 1779, his grace the present duke of Richmond obtained letters patent, confirming those of 1684, but with a clause, that neither his grace, nor any of the heirs male of his grandfather, the first duke of Richmond, should be received in parliament, until the possessor should be of the religion, and reside in the kingdom of France; and that the rank of the peerage should take place from the date of the reception. These last letters patent have been duly registered; but his grace's rank and precedence will not begin till his reception. In the mean time, the registry of the peerage in parliament is a recognition of it, and entitles his grace to all the other advantages, honours, and privileges annexed to the dignity. These, when the estate is considerable, are of very great importance. There are in France other peers, whose ancestors have neglected to be received in parliament, and who, being unwilling to take a rank lower than that which the date of their peerage would give them, decline to be received there now. It is said the duc de Bouillon, the duc d'Elbeuf, the duc de Montbazou, and the duc de Valentinois, are in this predicament. Some of them claim to be older than the duc de Uzer, who, by his ancestors having been first received, is now, in fact, the first duke in France. — Both in England and in France, females originally communicated their titles and dignities to their husbands. Many instances of this are to be found in the arguments on the claim of Mr. Bertie to the barony of Willoughby. But this has long since ceased; and we may apply to this circumstance the remark contained in the former part of this work, respecting courtesy in titles of honour, that from the late creations by which women have been made peeresses in order that the issue of their husbands might have titles, yet the husbands themselves continue commoners, it seems that this right in women to communicate peerages to their husbands is considered as extinct. See ant. 296. not. 1. — But though, by our law, a woman does not now communicate her rank or titles of honour to her husband, yet the freehold, or the right of possession, of all her lands of inheritance, vests in him immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351. a. 273. b. And see *Pothier Traité des Fiefs*, vol. 1. p. 123. This estate he may convey to another. An incorrect statement in the book called *Cases in Equity*, during the time of lord Talbot, fol. 167. of what was delivered by his lordship in the case of Robinson v. Cummins, seems to have given rise to a notion that the husband could not make a tenant to the praepice of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can. Mr. Cruise, in his Essay upon Recoveries, p. 38. has given an accurate state of lord Talbot's observations upon this subject, which, in substance and almost in words, is agreeable to a manuscript report of the same case, in the possession of the editor. The same must be concluded from general reasoning. — For the interest which the husband takes in his wife's chattels, real and personal, see ant. 300. a.

(1) IV. *As to discontinuances by tenants in tail with respect to their issue*: — It is to be observed, that though the estate of the tenant in tail, as to his right of possession, or rather as to his beneficial property in the lands, has only a duration for the term of his

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*ITEM, si soit tenant en le taile, le reversion esleant al doner et a ses beires, si le tenant fait feoffment, * &c. et morust sans issue, ce-luy en le reversion ne poit enter, mes est mis a son action de formedon en le reverter †.*

ALSO, if there bee tenant in taile, the reversion being to the doner and his heires, if the tenant make a feoffment, &c. and die without issue, hee in the reversion cannot enter, but is put to his action of *formedon in le reverter* (1).

FAIT feoffment, (F. N. B. 215.)

&c. Here is implied fee simple, fee taile, or estate for life; and in this and the next Section *Littleton* putteth two cases, where if the issues in taile faile, they in the reversion and remainder are driven to their *formedon* in reversion or remainder; and this remaineth as it was when *Littleton* wrote, not altered by any statute. And the reason whereof these alienations in the severall cases in this and the next Section doe make a discontinuance, and put him in the reversion or remainder that right had to his action, and tooke away his entry, was, for that he was privy in estate, and for the benefit of the purchaser, and for the safeguard of his warrantie, so as every man's right might be preserved, *viz.* to the demandant for his ancient right, and to the feoffee for the benefit of his warrantie, which was founded upon great reason and equitie: which benefit of the warrantie should be prevented and avoided if the entrie of him that right had were lawfull, and thereby also the danger that many times happeneth by taking of possessions was warily prevented by law. But then it may be demanded, seeing that there was no reversion or remainder expectant upon any estate taile at the common law, nor the issue in taile had any remedy by the common law, if the tenant in taile had aliened, then by what law is the alienation of tenant in taile a discontinuance at this day to the issue in taile, or to him in reversion or remainder? Whereunto it is thus answered,

Vide Sect. 592. 597. 601. 637, 638.

(F. N. B. 217. b.)
(5. Rep. 3.)

30. E. 1. *Formedon* 65. 19. E. 2. *Formedon* 61. 18. E. 3. 46.
12. E. 4. 3.
(Cro. Car. 405.)
(1. Roll. Abr. 632.)
(Post. 356. a.)
(Sid. 83.)
(Ant. 301.)

Sect. 597.

EN mesme le manner est, lou tenant en le taile ‡ seise de certaine terre dont le remainder est a un autre en le taile, ou a un autre en fee. Si le tenant en le taile alienast en fee, ou en fee taile, || et puis deviait sans issue, ceux en le remainder ne poient enter, mes sont mis a leur briefe de formedon en le remainder, &c. et pur ceo que per force de tielx feoffments et alyenations en les cases avant-dits, et en semblables § cases, ceux queux ont title et droit apres la mort de tiel feoffour ou alienour ne poient pas enter, mes sont mises a leur actions, ut supra; et pur ceo cause tiels feoffments et alienations sont appels discontinuances.

IN the same manner is it, where tenant in taile is seised of certain land whereof the remainder is to another in taile, or to another in fee. If the tenant in taile alien in fee, or in fee taile, and after die without issue, they in the remainder may not enter, but are put to their writ of *formedon* in the remainder, &c. (2) and for that that by force of such feoffments and alienations in the cases aforesaid, and the like cases, they that have title and right after the death of such a feoffor or alienor may not enter, but are put to their actions, *ut supra*; and for this cause such feoffments and alienations are called discontinuances.

* &c. not in L. and M. nor Roh.

† &c. added L. and M. and Roh.

‡ seise not in L. and M. nor Roh.

|| &c. added L. and M. and Roh.

§ auters added L. and M. and Roh.

his life, only; yet, in the eye of the law, he is considered as seised of an estate of inheritance. To understand this, it should be remembered, that, in the case of a fee simple conditional at common law, the condition, from which that estate took its appellation, did not suspend the fee from vesting in the donee, immediately by the gift. Thus, we find, that, if he aliened before he had issue, it not only was no forfeiture, but, if afterwards he had issue, it was a bar to them. See Plo. 239. 2. Inst. 333. But the condition, though it did not prevent the fee from vesting in the donee, suspended his power of alienation. To that power it was considered to be a condition precedent, that the donee should have issue born. The statute extinguished the power; but did not affect the estate of the feodatory, in any other respect: so that a tenant in tail was as much seised of the inheritance, after the statute *de donis*, as a tenant in fee simple conditional was, before it. Hence, if he made a feoffment, it did not, during his life, affect or prejudice the issue. Thus his alienation was, primarily, a lawful transfer of the freehold; the alienee came in by right; and his estate could not be impeached, during the life of the donee. In conformity to the established rule of the common law, that whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry, however slender or unlawful the title of the grantor himself might be, the statute *de donis* did not absolutely nullify the alienations of the donee in tail, but enabled the issue to defeat them by the *formedon* in the descender.—It is generally said that the writ of *mortd'ancestor* was the only remedy, at the common law, for the issue, against the alienations of his ancestor, and that the *formedon* did not lie, till the statute *de donis*. This must be understood with the two following qualifications. 1st, A writ of *mortd'ancestor* could certainly be maintained against an abator; but, as one of the three points in that writ, to be enquired of by a jury, was, *si pater vel mater fuit seifistus*, or *seifista*, in dominico suo ut de fado, die quo obiit, it could not be maintained against a disseisor. See Booth 207. 2d. In one case, a *formedon* was certainly admitted at the common law; that was, when a man had issue a son, and his wife died, and he afterwards took another wife, and land was given to him and his second wife, and to the heirs of their two bodies begotten, and there was issue of that marriage, and both the wife and the father died, and a stranger abated; there, the issue of the second marriage could not maintain a writ of *mortd'ancestor*; for one part of the writ is to enquire, *si petens sit propinquior heres*, to which description no issue of the second venter could answer, while there was a son of the first venter. See Plo. 239. Ant. 196.

(1) V. As to alienations by tenants in tail, with respect to the reversioner:—Upon the death of tenant in fee simple conditional, if the estate was withheld from the reversioner, either by the alienee of the tenant in tail, or by an abator, the reversioner was entitled, at the common law, to a *formedon* in the reverter. It has been observed before, that if tenant in fee-simple conditional at the common law aliened before he had issue, and afterwards had issue, the issue was barred by the alienation; but it does not seem clear whether the alienation in that case barred the reversioner. See Plo. 235. Ant. 19.—In general, when the issue in tail aliened, it was with warranty; in that case, the warranty descended upon the issue in tail, and therefore prevented his claiming against the alienation of his ancestor. But nothing of this nature could be opposed to the reversioner.

(2) VI. As to discontinuances by tenants in tail, with respect to those in remainder:—It has been observed before, that all estates of inheritance were, at common law, either fees simple absolute, or fees simple conditional; and that tenants in fee simple conditional were,

swered, that it is provided by the statute of *W. 2. ca. 1. De donis conditionalibus, quod non habeant illi quibus tenementum sic fuerit datum potestatem alienandi, &c.* Upon these words the fages of the law have construed the said Act according to the rule and reason of the common law, and that in divers and sundry variable manners. For some alienations of tenant in taile, they have adjudged voydable by the issue in taile by action only: some at the election of the issue in taile to avoid it by action, entry, or claime: some are meere void by the death of the tenant in taile: which severall constructions were made upon the selfe-same words aforesaid.

18. E. 3. 12. 19. E. 3. Bre. 468.
24. E. 3. 28. 36. Aff. 8. 12. R. 2.
Discon. 50. 5. E. 4. 3. 4. H. 7. 17.
33. E. 3. Formdon, 47. & 13. H. 7.
Pl. Com. 426. Smith & Staple-
ton's case.

(3. Rep. 85.)

(1. Leo. 66.)

(Plo. 437.)

As for example, If tenant in taile make a feoffment in fee, this drives the issue in taile to his action, which is called in law a Discontinuance; and this construction was made, for that at the common law the feoffment of an abbot or bishop, or of the husband seised in the right of his wife, did worke a discontinuance, and did drive the successor and the wife to their action, and foreclosed them of their entrie: and as the entrie of the issue was taken away, so consequently of them in reversion and remainder. Also if an abbot, bishop, or husband in the right of his wife, seised of a rent, or of any other inheritance that lieth in grant, had aliened, it was in the election of the successor or wife after the death of her husband to claime the rent, &c. or to bring an action, for that alienation did not worke a discontinuance; and so it is by construction in case of tenant in taile. Lastly, if the abbot, bishop, or husband, had granted a rent newly created out of the land, &c. to another in fee, this had utterly ceased by their death; and so it is also by construction in case of tenant in taile. So as these words (*non habent potestatem alienandi*) doe worke these effects, viz. as to lands, that a feoffment barreth not the issue, &c. of his action, but worketh a discontinuance to barre him of his entrie: as to rents or any thing *in esse*, that lie in grant, that the said words doe take away his power to make any discontinuance: as to rents, &c. newly created, that they take away his power to make them to continue longer than during his life.

But there is a diversitie betweene an alienation working a discontinuance of an estate which taketh away an entrie, and an alienation working, divesting or displacing of estates which taketh away no entrie. As if there be tenant for life, the remainder to *A.* in taile, the remainder to *B.* in fee, if tenant for life doth alien in fee, this doth divest and displace the remainders, but worketh no discontinuance. And therein it is to be observed, that to everie discontinuance there is necessary a divesting, or displacing of the estate, and turning the same to a right: for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason that such inheritances as lie in grant, cannot by grant be discontinued, because such a grant divesteth no estate, but passeth onely that which he may lawfully grant, and so the estate itselfe doth descend, revert, or remaine, as shall be said hereafter in this Chapter.

A. maketh a gift in taile to *B.* who maketh a gift in taile to *C.* *C.* maketh a feoffment in fee and dieth without issue, *B.* hath issue and dieth, the issue of *B.* shall enter; for albeit the feoffment of *C.* did discontinue the reversion of the fee simple which *B.* hath gained upon the estate taile made to *C.* yet could it not discontinue the right of intaile which *B.* had, which was discontinued before: and therefore when *C.* died without issue, then did the discontinuance of the estate taile of *B.* which passed by his liverie, cease, and consequently the entrie of the issue of *B.* lawfull; which case may open the reason of many other cases.

Also note, that a discontinuance made by the husband, did take away the entrie only of the wife and her heires by the common law, and not of any other which claimed by title paramount above the discontinuance. As if lands had beene given to the husband and wife, and to a third person, and to their heires, and the husband had made a feoffment in fee, this had beene a discontinuance of the one moitie, and a disseisin of the other moitie: if the husband had died, and then the wife had died, the survivor should have entred into the whole, for hee claimed not under the discontinuance, but by title paramount from the first feoffor; and seeing the right by law doth survive, the law doth give him a remedie to take advantage thereof by entry, for other remedie for that moitie he could not have.

Fee, ou fee taile. And so it is of an estate for life.

Sect. 598.

I T E M, si tenant en taile **ALSO,** if tenant in taile be dis-
soit disseisie, et il releffa per feised, and he release by his
son

were, after the birth of issue, permitted to alien the fee, upon a supposition, that, by the birth of issue, the condition was performed. The statute *de donis* declares this to be manifestly contrary to the form and intent of the gift, and therefore requires, that from thenceforth the will and intent of the donor should be observed, and the fee revert to him, for want of issue. This statute did not create any new estate, but, by disaffirming the supposed performance of the condition, preserved the fee to the issue, while there were issue to take it, and the reversion to the donor, when the issue failed. An estate of inheritance therefore remained in the donee; but only a particular description of heirs being intitled to take under it, it received the appellation of an estate tail, that is, an estate docked, cut off, or abridged, in contradistinction from the estate of fee simple absolute, which remained in the donor. Wright's Tenures, 186. Plo. 251. The expression estate tail does not occur in the statute *de donis*; but it is to be found in a statute of the same year. See Stat. West. cap. 4. The statute *de donis*, by thus securing the reversion to the donor, produced another material alteration in the law. For, by the common law, no remainder could be limited upon, or after, an estate in fee simple absolute or conditional; but when estates in fee simple conditional were reduced to estates tail, remainders after them were permitted: and by analogy to what was done for the issue and the reversioner, a formdon in the remainder was given to the remainder-man;—not, however, expressly, but by inference.—For the remainder-man after an estate tail being by the discontinuance in the same mischief with the issue or the reversioner in tail, an equitable construction of the statute brought him within the like remedy.—Five years after the enacting of the statute *de donis*, the statute *quia emptores terrarum* was passed; by which all persons were enabled to dispose of their lands; but the feoffees were to hold them immediately of the chief lord. Upon this statute, the courts took the following distinction, with respect to estates tail, and other particular estates; that, where a person seised in fee granted for life, or in tail, reserving the reversion to himself, the grantees of the particular estates held of the reversioner, and he of the chief lord: but, where a person granted for life, or in tail, with the remainder over in fee, both the tenants of the particular estates, and the remainder-man, held of the chief lord. 2. Inst. 505.—Care must be taken to distinguish between a remainder limited after an estate tail, and a conditional, or contingent use, limited upon, or after such an estate. See page 203. b. note 1. and page 274. a. continuation of note 1. 271. b.—There are few occasions where greater nicety, or skill, is required, in limiting uses of this kind, than in the two following cases.—The first is, when a person, being seised of two estates, wishes to raise two families; and with this view intends that one of the estates (which shall be called here, the family estate) shall be settled on his eldest son and his issue; and for want of such issue, on his younger sons, successively, and their respective issue; and, that the other estate (which shall be called here the second estate) shall be settled on his second son, and his issue; and for want of such issue, on his other subsequent sons, successively, and their respective issue. In this case, by the death of the eldest son without issue, the family estate would descend on the second son, or his issue. This union of the two estates would effectually defeat the settlor's intention. To guard against it, therefore, it is necessary to provide, that, if by the death of the first son, and failure of issue of his body, the family estate descends upon the second son, or any other younger son, or any issue of their bodies; the second estate shall, in that case, shift from the person upon whom the family estate descends, to the person next in remainder.—The other case is, when a person limits his estate in strict settlement, with an injunction that the several persons taking under the settlement shall use his name and bear his arms. These being cases of difficulty; the rules of law respecting them not having been settled till lately; and the forms for carrying them into execution being in general very imperfect; the following observations, it is imagined, may be properly introduced here.—1st, As to clauses for shifting the second estate, on the accession of the family estate. From what has been said before, it is clear, that the provisos and injunctions, in these cases, are shifting or secondary

son fait a le disseisor et a ses beires tout le droit lequel il ad en mesme les tenements, ceo n'est pas discontinuance, pur ceo que rien de droit passa al disseisor forsque pur terme de vie del tenant en le taile que fist le release, &c.

deed to the disseisor and to his heires all the right which he hath in the same tenements, this is no discontinuance, for that nothing of the right passeth to the disseisor, but for terme of the life of tenant in taile which made the release, &c.

Sect. 599.

MES per feoffment del tenant en le taile, fee simple passa per mesme le feoffement per force de liverie de seisin, &c.

BUT by the feoffment of tenant in taile, fee simple passeth by the same feoffment by force of the liverie of seisin, &c. (2. Rep. 31.)

Sect. 600.

MES per force d'un release rien passera forsque le droit que il poet loyalment et droituralement releffer, sans leyde ou damage as auters persons queux ent averont droit apres son decease, &c. Issint il est graund diversity perenter un feoffement d'un tenant en le taile, et un release fait per tenant en le taile.

BUT by force of a release nothing shall passe but the right which he may lawfully and rightfully release, without hurt or damage to other persons who shall have right therein after his decease, &c. So there is great diversity betweene a feoffment of tenant in taile, and a release made by tenant in taile.

OUR author having put examples of estates passing by transmutation of an estate and possession, doth in this and the two Sections following put a diversity betweene a feoffment and a release or confirmation of a bare right: for it is a rule in law, that the disseisee or any other that hath a right only by his release or confirmation, cannot make any discontinuance, because nothing can passe thereby but that which may lawfully passe: But otherwise it is of a feoffment in respect of the liverie of seisin, for that it is the most solemn and common assurance in the country, and to be maintained for the common quiet of the realme: and by the feoffment the freehold (which is so much esteemed in law) doth passe by open liverie to the feoffee, and by the release a bare right.

Sect. 601.

MES il est dit, que si le tenant en taile en cest cas releffa a son disseisor, et oblige luy et ses beires

BUT it is said, that if the tenant in taile in this case release to his disseisor, and bind him and his heires to warrant

THE reason why the addition of the warrantie in this case maketh a discontinuance, is that which hath been said, viz. If the issue in taile should enter, the warrantie (which is so much favoured in law) should

3. H. 4. 9. 22. R. 2. Discon. 50. 12. E. 4. 11. 21. H. 7. 9. 43. E. 3. 8. 15. E. 4. tit. Discon. 30. Vi. Sect. 596. 602. 637. 658. (3. Rep. 85.) (Post. 632, 633.)

secondary uses; and the point now before us presents us with a curious and striking view of the gradual progress of the doctrines of our courts respecting them.—One of the most remarkable adjudications on this subject is the duke of Norfolk's case; 3d. Ca. in Cha. The case there was, that Henry earl of Arundel conveyed his estates to the use of himself for his life; and, after his decease, to the use of trustees for 200 years; and, after the expiration of that term, to the use of Henry Howard, his second son, in tail male; remainder to Charles Howard, and his other subsequent sons, successively, in tail male; with a declaration that the term of 200 years was limited in trust to attend the inheritance, so long as Thomas Howard, the settlor's eldest son, or any issue male of his body, should live; but with a proviso, that if by his death without issue male living at his decease, or by a subsequent failure of that issue male, the earldom of Arundel should descend on the second son, then the trust should cease as to the second son, and the heirs male of his body; and the trust should then be, for the benefit of the third son, and the heirs male of his body. The eldest son died without issue, in the life-time of the second son; upon this, the difficulty arose. The question was, whether the executory trust for the benefit of the third son was not too remote? It is clear, that the event upon which the trust was to take effect for the benefit of the third son, must, if it took place at all, necessarily take place within the compass of one life; it being, that by event of the death and failure of issue of the first son in the second son's life-time, the second son should become intitled to the earldom of Arundel. The law upon this head is, now, so clearly settled, that if a settlement were to be made now to this effect, all the parties interested would immediately acquiesce in it. But it was then a point so much questioned, that few cases have been heard in the courts, either of law or equity, in which there has been a greater difference of opinion. Lord Nottingham, before whom it was heard, was assisted by the three chief justices. His lordship held the trust to be good. But the three chief justices differed from his lordship; and his lordship's decree was afterwards reversed by lord keeper North: but the House of Lords, on appeal, reversed the reversal; and affirmed lord Nottingham's decree. Thus, by this case, it was solemnly adjudged, that an executory trust of a term of years was good, if so framed as to take effect within the compass of one life in being. This reasoning extended by analogy, to executory devises of legal estates; and to all shifting and secondary uses, whether created by deed, or will.—The next advance in limitations of this nature was to extend them to a period within the compass of one or more life or lives in being, and twenty-one years after. Upon this principle was determined the case of Lloyd v. Carew, Prec. in Cha. 72. Show. Cases in Par. 137. In most cases, till within these thirty years, the clauses in deeds or wills by which these purposes were intended to be effected were framed upon this plan; so that the event upon which the estate limited to the second son was to shift from him and his issue to the subsequent sons and their issue, viz. the accession of the family estate, was confined to the contingency of its happening within the above period of one or more life or lives in being, and twenty-one years. Afterwards, as it was observed that a common recovery suffered by tenant in tail barred all limitations subsequent or collateral to his estate, it was concluded, that there was no necessity to confine the event, upon which the estate was to shift, to any particular period of time; and therefore it is now usual to express it generally, that if any of the younger sons, or of the heirs male of their bodies, shall come into possession of the

should be destroyed: and therefore to the end that if assets in fee simple doe descend, he to whom the release is made, may plead the same, and barre the demandant: by which meanes all rights and advantages are saved. And that I may note it once for all, an (*il est dit*)

agarrantie, et morust, et cest garrantie descendist a son issue, † ceo est discontinuance per cause de le garrantie ‡.*

tie, and dieth, and this warrantie descend to his issue, this is a discontinuance, by reason of the warrantie.

with Littleton, is as good as a *concessum* in a booke case.

Sect. 602.

MES si un home ad issue fits per sa feme, et sa feme morust, et puis il prent auter feme, et tenements sont dones a luy et a sa second feme, et a les heires de leur deux corps engendres, et ils ont issue un auter fits, et le second feme morust, et puis le tenant en le taile est disseisie, et il releffa al disseisor tout son droit, &c. et oblige luy et ses heires a le garrantie, &c. et devia, ceo n'est pas discontinuance al issue en le taile per le second feme, mes il poit bien enter, § pur ceo que le garrantie descendist a son eigne frere que son pier avoit per le primer feme ||, &c.

BUT if a man hath issue a sonne by his wife, and his wife dieth, and after hee taketh another wife, and tenements are given to him and to his second wife, and to the heires of their two bodies engendred, and they have issue another sonne, and the second wife dieth, and after the tenant in taile is disseised, and hee release to the disseisor all his right, &c. and bind him and his heires to warrantie, &c. and die, this is no discontinuance to the issue in taile by the second wife, but he may well enter, for that the warrantie descendeth to his elder brother which his father had by the first wife, &c.

Sect. 603.

EN mesme le manner est, loutenements sont descendable a le fits puisne solonques le custome de Burgh English, queux sont entayles, &c. et le tenant en le taile ad deux fits, et est disseisie, et il releffa a son disseisor tout son droit ove garrantie, &c. et morust, le puisne fits poit enter sur le disseisor, nient obstant le garrantie, pur ceo que le garrantie descendist al eigne fits: car tous foits le garrantie

IN the same manner is it, where lands are descendible to the youngest sonne after the custome of Burrough-English, which are entayled, &c. and the tenaunt in taile hath two sonnes, and is disseised, and he releaseth to his disseisor all his right with warrantie, &c. and dieth, the younger sonne may enter upon the disseisor, notwithstanding the warranty, for that the warrantie descendeth to the elder son: for alwayes the warrantie

(8. Rep. 86.)

* &c. added L. M. and Roh.

§ &c. added L. and M. and Roh.

† donques added L. and M. and Roh.

|| &c. not in L. and M. nor Roh.

‡ &c. added L. and M. and Roh.

the family estate, (without limiting the period, when this happens, to any particular time) the second estate shall shift from the person so becoming intitled to the family estate, and go to the persons next intitled in remainder. An instance of this kind may be seen in an act of parliament, passed in the year 1758, intituled, "an act to enable Charles Bagot, now called Charles Chester, and his sons, to take the surname of Chester." 2dly, *As to clauses injoining persons, to whom estates are limited in strict settlement, to take the name and use the arms of the settlor.* This, in some respects, is nicer than the former clause; because, in the former clause, the intention of the settlor generally is, that the second estate, upon the accession of the family estate, shall pass, not only from the person himself upon whom the family estate descends, but from his issue; but, in the case now under consideration, it generally is not the intention of the settlor, that the issue shall be prejudiced by the non-compliance of his parent with the condition or requisition annexed to his estate. Now suppose an estate is limited to A. for life, remainder to trustees and their heirs, during his life, to preserve the contingent remainders; remainder to A.'s sons successively in tail male, with a proviso, enjoining A. and his sons, and the heirs male of their bodies, when they become seised in possession of the estate, to take the name and bear the arms of the settlor, otherwise the estates limited to them to determine: in this case, if A. the first taker, should not comply with the condition or requisition annexed to his estate, before the birth of a son, his estate would determine, and the contingent remainders limited to his sons would either be void, or be preserved by the limitation to the trustees. The former would be intirely contrary to the intention of the settlor; the latter also would be contrary to his intention, so far, as by the words usually inserted in limitations of this nature, the person refusing to comply with the condition, would be intitled to the rents of the estate during his life; and, if those words were not inserted, the rents, being undisposed of, would belong to the heir at law of the settlor. To prevent this, it is proper to direct, that the trustees for preserving the contingent remainders shall, after the ceffer or determination of the estate for life, and during the suspence and contingency of the then next expectant remainder, stand and be seised of the estate limited to them; in the first place, to preserve the contingent remainders till they come *in esse*; and in the next place, during the suspence of such remainder, upon trust to pay the rents to those, who would be entitled to the estate, if the persons taking under the contingent remainders then in suspence were dead. It may not, perhaps, be unacceptable to the reader to be presented with the following clauses, in which all the above circumstances seem to be attended to. It must be supposed, that the estate is previously limited to A. (a feme sole) for her life, with a power to limit a rent-charge to any person whom she may marry, for his life: with a limitation to C. and D. and their heirs during her life, to preserve the contingent remainders; remainder to her sons successively in tail male; remainder to her daughters, as tenants in common in tail, with cross remainders in tail between them; with several remainders over: then the proviso in question immediately follows: "Provided always, and it is hereby agreed and declared

"between

tie descendera a celuy que est heire rantie shall descend to him who is
per le common ley. heire by the common law.

BY these two examples in this and the Section next following, it appeareth that a warrantie being added to a release or confirmation, and descending upon him that right hath to the lands, maketh a discontinuance; otherwise it is out of the reason of the law, and worketh no discontinuance, if the warrantie descendeth upon another.

Ove garrantie, &c. Here is implied that he doth binde him and his heires to warrant to the releasce and his heires.

Touts foits le garrantie descendist sur le heire al common ley. This is a maxime of the common law, and hereof more shall be said in the Chapter of Warrantie, *Sectiones* 718, 735, 736, 737. so as it is not the warrantie only that maketh a discontinuance, but the warrantie and the discent upon him that right hath together. 13. H. 4. Garrantie 94.
19. R. 2. Garrantie 100.
(10ft. 376. 1.)

Sect. 604.

ITEM, si un abbe soit disseise, et il releffa a le disseisor **ALSO**, if an abbot bee disseised, and hee releaseth to the disseisor with warrantie, this is no discontinuance to his successor, because nothing passeth by this release but the right which hee hath during the time that he is abbot, and the warrantie is expired by his privation, or by his death.

THE reason hereof yeeld ed by *Littleton* is, for that the warrantie is expired by his privation or death. (3. Rep. 73.)

Per son privation, ou per sa mort. Note, that privation is here resembled to death, and so is translation also. Wherein this diversitie is worthy of observation, that when a bishop, &c. make an estate, lease, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues of the bishopricke, &c. which should maintain the successor, there the privation or translation of the bishop, &c. is all one with his death. But

where the bishop is patron and ordinary, and confirmeth a lease made by the parson without the deane and chapter, and after the parson dieth, and the bishop collateth another, and then is translated, yet his confirmation remaineth good; for the revenues that are to maintain the successor are not thereby diminished. And the like diversitie doth hold in case of resignation, notwithstanding [m] the authoritie to the contrary.

Vide 29. E. 3. 16.
(Ant. 300. b.)
(Dyer 356.)

[m] 29. E. 3. 16. tit. garrant. 99.

Sect. 605.

ITEM, si home seise en droit sa feme est disseise, et il releffa, &c. ove garrantie, ceo n'est pas discontinuance a la feme, si el survesquist son baron, mes que el poit enter, &c. **ALSO**, if a man seised in the right of his wife be disseised, and he releaseth, &c. with warrantie, this is no discontinuance to the wife, if shee surviveth her husband, but that she may enter, &c. *Causa patet.*

THIS is evident, unlesse the wife be heire to the husband (as by law she may be), and then it is a discontinuance for the cause aforesaid.

Sect.

"between and by the parties to these presents, that the person or persons whom the said A. shall marry; and every person who by virtue of the limitations hereinbefore contained, or of this proviso, or of the proviso next hereinafter contained, shall become intitled to the possession, or to the receipt of the rents and profits of the manors and other hereditaments hereby released, or expressed and intended so to be, shall and do, within the space of one year next after they respectively shall so marry, or so become intitled to the possession, or to the rents and profits of the said manors and other hereditaments as aforesaid, take upon him and them respectively, and use in all deeds, letters, accounts, and other writings, whereto or wherein they respectively shall be, or parties, or which they respectively shall sign, the surname of Browne only, and take and use no other surname; and quarter the arms of Browne, with their own respective family arms; and also shall and do, within the space of one year next after they respectively shall so marry, or so become intitled, as aforesaid, apply, sue for, and endeavour to obtain an act of parliament, or a proper licence from the crown, or take such other means as may be requisite or proper to enable or authorise him, or them, respectively, to take and bear the said surname and arms: and that, in case any such person or persons shall refuse or neglect to take such surname and arms, and to take and use the steps, or means, which shall be requisite or proper to enable and authorize him or them so to do, within the said space of one year; then, if the person so refusing or neglecting shall be the husband of the said A. the limitation hereinbefore contained, to the use of the said A. shall cease, determine, and be utterly void; and any annual sum, which by virtue of the power for that purpose hereinafter contained, the said A. shall grant, limit, or appoint, to the use of, or on trust for, or for the benefit of such husband so refusing or neglecting, and the powers, or remedies, and terms of years which the shall limit, demise or create for securing the same, shall cease, determine, and become utterly void; and that if the person so refusing, or neglecting, shall be any other than the husband of the said A. or of any of her daughters, the limitation hereinbefore contained of the said manors and other hereditaments, to the use of him or them so refusing, or neglecting, shall cease, determine, and become utterly void: and that the same manors and other hereditaments shall, in such cases, immediately thereupon go to the person next beneficially intitled in remainder, under the limitations hereinbefore contained, in the same manner as if the person or persons, whose estate shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was, or were dead without issue;—without prejudice, nevertheless, to any jointure or jointures, portion or portions, annual sum or annual sums of money, lease or leases, or demise or demises, which, previous to such ceasing or determination, shall have been granted or demised of, or charged upon, the said manors and other hereditaments, hereby released or expressed and intended so to be, or any part thereof, in pursuance of any of the powers hereinafter contained: (except as to any annual sum, and the powers, or remedies, and terms of years for securing the same, which shall have been granted, limited, or appointed, by the said A. in pursuance hereinafter for that purpose contained.) And it is hereby further agreed and declared be-

Lib. 3. Cap. 11. Of Discontinuance. Sect. 606, 607, 608,

Sect. 606.

(1. Saun. 261.)

ITEM, si tenant en taile de certaine terre lessa mesme la terre a un auter pur terme des ans, per force de quel le lessée en eit possession, en quel possession le tenant en taile per son fait releffa tout le droit que il avoit en mesme le terre, a aver et tener a le lessée et a ses heires a tous jours; ceo n'est pas discontinuance, mes apres le decease le tenant en taile, son issue poit bien enter, pur ceo que per tiel release riens passa forsque pur terme de * la vie de le tenant en le taile.

ALSO, if tenant in tayle of certaine land letteth the same land to another for terme of yeares, by force whereof the lessee hath thereof possession, in whose possession the tenant in tayle by his deed releaseth all the right that he hath in the same land, to have and to hold to the lessee and to his heires for ever; this is no discontinuance, but after the decease of the tenant in tayle, his issue may well enter, because by such release nothing passeth but for terme of the life of the tenant in tayle.

CAR per tiel releas riens passa. Here is one of the maxims of the common law rehearsed by our author, whereof he doth put divers examples hereafter.

Sect. 607.

(3. Rep. 85. b.)

EN mesme le manner est, si le tenant en le taile conferma l'estate le lessée pur terme des ans, a aver et tener a luy et a ses heires, ceo n'est pas discontinuance, pur ceo que riens passa per tiel confirmation forsque l'estate que le tenant en le taile avoit pur terme de sa vie, &c.

IN the same manner it is, if the tenant in tayle confirme the estate of the lessee for yeares, to have and to hold to him and to his heires, this is no discontinuance, for that nothing passeth by such confirmation but the estate which the tenant in tayle hath for terme of his life, &c.

(Ant. 328)

RIENS passa per tiel confirmation. Here is another of the maxims of the common law rehearsed by our author, whereof he putteth examples hereafter. More shall be said hereof in the next Section following.

Sect. 608.

ITEM, si tenant en taile apres tiel leas granta le reversion en fee per son fait a auter, et voile

ALSO, if tenant in taile after such lease grant the reversion in fee by his deed to another, and will-
que

* la—son, L. and M. and Roh.

"tween, and by, the parties to these presents, that the cesser or determination of the estate of the said A., or of any other tenant for life, by force of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice, any of the contingent remainders hereinbefore limited to her, his, or their son or sons, daughter or daughters, or any other person or persons; but that the remainder limited to the said C. and D., and their heirs during the life of the said A., or such other tenant for life, shall, after such cesser or determination, take effect, and continue, for preserving such contingent remainders, and giving them effect as they may arise. And that immediately from and after such cesser or determination of such preceding estate for life, and during the suspense and contingency of such then expectant remainder, the said C. and D., their heirs and assigns, shall receive, pay and apply the rents and profits of the said manors and other hereditaments, which would belong to such tenant for life, if such cesser or determination had not taken place, unto the person or persons, for the intents and purposes, and in the manner, to, for, and in which, the same rents and profits would be, or would have been payable and applicable respectively, under and by virtue of the limitations and provisos herein before contained, in case such tenant for life was actually dead; so that immediately from and after such cesser or determination, the issue of the said A., or of such other tenant for life, intitled for the time being, under the limitations aforesaid, to the said manors and other hereditaments, in remainder immediately expectant on the decease of the said A., or of such other tenant for life, may be intitled to the rents and profits of the said manor and other hereditaments, for his and their own proper use and benefit respectively, during the life of the parent, as if such parent were dead: and that in case no such issue be in existence, then, during the vacancy or contingency of such issue, the person next intitled for the time being, under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments, expectant on the decease of the said A., or of such other tenant for life, and failure of such issue of her, or his body, shall and may be entitled to the said rents and profits for his and their proper use and benefit respectively, but without any exclusion of, or prejudice to the estate, interest, or right of any such issue, afterwards coming into existence, but only from the time of the birth of such issue respectively."

que apres le terme fine, que mesme le terre remaindroit a le grantee et a ses heires a tous jours, et le tenant a terme d'ans atturna, ceo n'est pas discontinuance. Car tiels choses queux passent en tiels cases de tenant en le taile tantsolement per voy de graunt, ou per confirmation, ou per tiel release, rien poit passer pur faire estate a celui a que tiel graunt, ou confirmation, ou release, est fait, forsque ceo que le tenant en taile poit droiturement faire, * et ceo n'est forsque pur terme de sa vie, &c.

eth that after the terme ended, that the same land shall remaine to the grantee and his heires for ever, and the tenant for yeares attorne, this is no discontinuance. For such things which passe in such cases of tenant in taile only by way of grant, or by confirmation, or by such release, nothing can passe to make an estate to him to whom such grant, or confirmation, or release, is made, but that which the tenant in taile may rightfully make, and this is but for terme of his life, &c.

Sect. 609.

CAR si jeo lessa terre a un home pur terme de sa vie, &c. et le tenant a terme de vie lessa mesme la terre a un autre pur terme des ans, &c. et puis mon tenant a terme de vie graunta le reversion a un autre en fee, et le tenant a terme des ans atturna, en cest case le grantee † n'aden le franktenement forsque ‡ estate pur terme de vie son grauntor, &c. et jeo que suis en le reversion de fee simple, ne puisse enter per force de cel grant del reversion fait per mon tenant a terme de vie, pur ceo que per tiel grant mon reversion n'est pas discontinue, mes tout temps demurt a moy, sicome il fuit adevant, nient obstant tiel grant del reversion fait al grantee, a luy et a ses heires, &c. pur ceo que riens passa per force de tiel grant, forsque estate que le grantor avoit, &c.

FOR if I lett land to a man for (Ant. 251. b.) terme of his life, &c. and the tenant for life letteth the same land to another for terme of years, &c. and after my tenant for life grant the reversion to another in fee, and the tenant for yeares attorne, in this case the grantee hath in the freehold but an estate for terme of the life of his grantor, &c. and I which am in the reversion of the fee simple may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but alwayes remaines unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heires, &c. because nothing passed by force of such grant, but the estate which the grantor hath, &c. (1)

Sect.

* et ceo n'est—&c. est, L. and M. and Roh.

† n'ad—ad, L. and M. and Roh.

‡ estate not in L. and M. nor Roh.

(1) VII. As to the modes of conveyance which work a discontinuance, it may be laid down as a general rule, that no alienation which is not made by livery of seisin, or what is equivalent to it, can work a discontinuance. It has been observed before, that the usual mode of conveyance at the common law, was a feoffment; that feoffments were formerly made without writing; and that when writing came into use, the transmutation of the property was effected, not by the writing, but by the livery which it authenticated. A fine is often defined to be a feoffment upon record, the donor's acknowledgment upon record of the right of the donee to the land, being considered as tantamount to actual livery. The fines, therefore, which are said to be executed, in contradistinction from those which are said to be executory, give the donee the immediate possession of the land; and those which are called executory, enable him to recover it immediately, by an *habere facias seisinam*.—A common recovery is the judgment of a court of record, that the demandant shall recover against the tenant; upon which he may immediately sue out the *habere facias seisinam*. Considering, therefore, fines and recoveries only as common assurances, the acknowledgment upon record in the former, and the judgment to recover in the latter, are supposed to equipoise the notoriety of livery. Hence, both a fine and a common recovery are of force to work a discontinuance. With respect to releases,—where the person whose estate is discontinued, releases to the alienee, his release must be considered as operating *pur mitter le droit*. Now, it has been observed in a former place, that releases by persons disseised, may be made either to the disseisor, his feoffee, or his heir; and that in all these cases, the possession is in the releasee, the right in the releasor; and that the union of the right to the possession completes the title of the releasee, the notoriety of the disseisin countervailing the livery. But this can only be understood of those cases where the releasor has the fee simple. In both cases the possession of the disseisor is equally notorious; but where the releasor, as in the instance brought by Littleton, has only a partial estate in the lands, he has not in him the right of possession, and cannot, of course, transfer, or cede it to another. Hence, though the release of a disseisee, who before the disseisin was seized in fee-simple, completes the title of the disseisor; the release of a disseisee, who before the disseisin had only

Sect. 610.

(Ant. 318, 319.)

EN mesme le maner est, si le tenant a terme de vie per son fait confirme l'estate son lessée pur terme des ans, a aver et tener a luy et a ses heires, ou releffa a son lessée et a ses heires, uncore le lessée a terme d'ans n'ad estate forsque pur terme de vie de le tenant a terme de vie, &c.

IN the same manner is it, if tenant for terme of life by his deed confirme the estate of his lessee for yeares, to have and to hold to him and his heires, or release to his lessee and his heires, yet the lessee for yeares hath an estate but for terme of the life of the tenant for life, &c.

CAR tiels choses que passent en tiels cases de tenant en le taile, &c.

Here is rehearsed another ancient maxime of the common law touching grants; and hereby it appeareth that a feoffment in fee (albeit it be by *parol*) is of a greater operation and estimation in law, than a grant of a reversion by deed, though it be inrolled, and attornment of the lessee for yeares of a release, or a confirmation by deed, for the reasons aforesaid. And this is manifested by the examples which our author here in these three Sections putteth.

Sect. 611.

(Post 367. a.)

FORSQUE estate pur terme d'ans, &c.

Here it is implied, that albeit the feoffment made by lessee for yeares be a feoffment between the feoffor and feoffee, and that by this feoffment the fee simple passeth by force of the livery, yet is it a disseisin to the lessor. And here it is worthy to be observed, that our author saith, that tenant for terme of yeares may make a feoffment; whereupon it followeth, that the feoffor may thereunto annex a warrantie, whereupon the feoffee may vouch him: but of this you shall reade more in the

MES auterment est quant tenant a terme de vie fait un feoffment en fee, car per tiel feoffment le fee simple passa. Car tenant a terme d'ans poit faire feoffment en fee, et per son feoffment le fee simple passera, et uncore il n'avoit al temps del feoffment fait forsque estate pur terme d'ans, &c.

BUT otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for yeares may make a feoffment in fee, and by his feoffment the fee simple shall passe, and yet he had at the time of the feoffment made but an estate for terme of yeares, &c. (1)

Chapter of Warranties, Sect. 698.

Sect. 612.

ITEM, si tenant en le taile grant ta son terre a un auter pur terme de vie de mesme le tenant en taile, et livrer a luy seisin, &c. et apres per son fait il releffa a le tenant et a ses heires tout le

ALSO, if tenant in taile grant his land to another for terme of the life of the said tenant in taile, and deliver to him seisin, &c. and after by his deed hee releaseth to the tenant and to his heires all the droit

(1) What possession is required in the feoffor to make his feoffment an *actual disseisin* of the freehold; — not merely a disseisin, which is such at the election of the party; has been, of late, a subject of much discussion; and it is therefore supposed, that the following attempt at a full investigation of the very abstruse, but not useless, learning upon the subject, will not be unac-

only an estate tail, does not complete his title, and therefore does not amount to a discontinuance. — With respect to *conveyances which operate by the statute of uses*; it is clear that there cannot be a discontinuance, where the possession remains with the party; for, in those cases, the possession is not disturbed, nor can there be any livery of seisin, or any thing tantamount to it; — but it is equally clear, that if the uses are raised by a transmutation of the possession, that transmutation may produce a discontinuance. This, in fact, is only repeating what has been observed before; for it is not the creation or limitation of the use, but the operation upon the possession, that produces the discontinuance. — Upon these grounds, therefore, a bargain and sale, a covenant to stand seised, and a lease and release, cannot work a discontinuance; but a feoffment executed, a fine levied, or a recovery suffered of uses, have that power. See page 275. contin. of note, 271. b. — But if a warranty is annexed to a bargain and sale, covenant to stand seised, or release, it may produce a discontinuance. This will be better understood after perusing our author's chapter on Warranty. At present it is sufficient to observe, from lord chief-baron Gilbert's Ten. 120. that a release with warranty works a discontinuance; — for at common law the warranty was a voluntary covenant of the force of a feudal contract, repelling the warrantor from claiming the land, and obliging him to defend it; and though the statute takes away the force of such covenants, that they shall not bar the issue, yet the issue must claim in the method the statute prescribes, viz. by action; and, therefore, it works a discontinuance, since the issue, in such case, cannot reconinue but by action only.

droit que il avoyt en mesme la terre; en cest cas l'estate del tenant de la terre n'est pas enlarge per force de tiel releas, pur ceo que quant le tenant avoit l'estate en le terre pur terme de vie de le tenant en le taile, donque il avoit tout le droit que le tenant en le taile pouvoit droiturement grant ou releaser: * issint que per tiel releas nul droit passa, entant que son droit fuit ale adevant.

right which hee hath in the same land; in this case the estate of the tenant of the land is not enlarged by force of such release, for that when the tenant had the estate in the land for terme of the life of the tenant in taile, hee had then all the right which tenant in taile could rightfully grant or release: so as by this release no right passeth, inasmuch as his right was gone before.

Sect. 613.

ITEM, si tenant en le taile per son fait grant a un auter tout son estate que il avoit en les tenements a luy tailes, a aver et tener tout son estate al auter, et a ses heires a tous jours, et delivra a luy seisin accordant; en cest cas le tenant a que l'alienation fuit fait, n'ad auter estate forsque pur terme de vie del tenant en taile. Et issint il poit bien estre prove, que le tenant en taile ne poit pas graunter ne alier, ne faire aucun droiturel estate de franktenement a auter person, forsque pur terme de sa vie demesne, &c.

ALSO, if tenant in taile by his deed grant to another all his estate which hee hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heires for ever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made, hath no other estate but for terme of the life of tenant in taile. And so it may bee well proved, that tenant in taile cannot grant nor alien, nor make any rightfull estate of freehold to another person, but for terme of his owne life only, &c. (1)

(1. Saund. 26. 3. Rep. 84.)

THE meaning of *Littleton* in both these cases, in this and in the Section next preceding is, that having regard to the issue in taile, and to them in reversion or remainder, tenant in taile cannot lawfully make a greater estate than for terme of his life; and therefore this release or grant is no discontinuance. But in regard of himselfe, this release or grant leaveth no reversion in him, but puts the same in abeyance, so as after this release or grant made he shall not have any action of waste, &c.

(Post. 342. b. 345. a. Ant. 263. b.)

13. H. 7. 10. 2. Brooke Release, 95.

Grant tout son estate. Vid. Sect. 650. Action of waste, &c. there is implied that he shall not enter for a forfeiture, if after the release or grant the lessee maketh a feoffment in fee.

Sect. 614.

CAR si jeo done terre a un home en taile, savant

FOR if I give land to a man in taile, saving the reversion to my

HERE *Littleton* proveth, that the feoffee of tenant in taile hath no rightfull estate, having respect

* &c. added L. and M. and Roh.

(1) The livery, in this case, is *secundum formam chartæ*; and therefore, according to Sir Edward Coke's doctrine, ante 48. a. its operation and effect are restrained to the quantity and quality of the effectual estate contained in the deed. Thus, says he, if a man makes a lease for years by deed, and delivers seisin according to the form and effect of the deed, yet he has but an estate for years, and the livery is void. The expression in the text, that tenant in tail cannot grant, or alien; or make any rightfull estate of freehold to another person, but for the term of his own life, is not to be understood literally, that the grantee has but an estate for life, and that his estate is *ipso facto* determined by the death of the tenant in tail: all that is meant by it is, that his estate is certain and indefeasible, no longer than the life of the tenant in tail; for that, upon the death of the tenant in tail, it is defeasible by the issue, either by action, or by entry or claim on the land, at his election. Still it has a continuance till it is so defeated by the issue. In note 1. ante 326. b. it has been explained upon what principle, in the case of a tenant in tail conveying by feoffment, it was held, that the statute *de donis* did not absolutely nullify the alienation, but only took away the entry of the issue, and reduced him to his remedy by formædon. Upon similar principles, in the case of a tenant in tail conveying by bargain and sale, release, covenant to stand seised, or any other mode of conveyance operating by way of grant, it has been held, that the statute does not nullify the conveyance, but reduces the issue in tail to his entry; or, if he prefers it, to his action, to avoid it. Thus, the grantee hath a base fee; his wife is entitled to her dower during the continuance of the fee; and if the grantee commits waste, the tenant in tail, having no reversion, has no right of action against him. 3. Rep. 84. b. 10. Rep. 96. See *Machel v. Clarke*, 2. Salk. 619. *Farrerley* 18. Com. 119. Lord Raym. 778. *Goodright* on the demise of *Tyrrell v. Mead* and *Shilfon*. 3. Burr. 1703. The passage, therefore, in *Littleton* must be understood in this qualified sense, otherwise it is inaccurate. This was observed by lord chief-justice Holt in the case of *Machel v. Clarke*, and by lord chief-justice Hobart in the case of *Sheffield v. Ratcliff*, Hob. Rep. 338, 339.

ceptable to the reader. By the doctrine of the feudal law, no person who had an estate of less duration and extent than for his own life, or for the life of another man, was considered to be a freeholder; and none but a freeholder was considered to have the possession of the land. It is true, that estates were sometimes held for terms of years. In that case, the possession of the termor was considered to be the possession of the freeholder;—but still the termor held the possession, tho' he held it for the freeholder; and the freeholder, by trusting the termor with it, exposed himself to lose it, by the termor's negligence or treachery. If the termor left the possession vacant; if he permitted himself to be disseised of it; if he undertook to alien it either by act in pais, or by matter of record; if he claimed the fee; or if he affirmed

(F. N. B. 211. b.)

[n] Bract. li. 4. fol. 238.
Flet. lib. 5. cap. 11.

Bract. & Flet. ubi supra.

[o] Mir. cap. 2. sect. 25.
(5. Rep. 85. 2. Inlt. 350.)

Westm. 2. cap. 4.

respect to two persons; the one is to the donor, whose reversion is divested and displaced; and the other to the issue in taile, who is driven to his action to recover his right.

A tort luy deforce.

[n] *Deforciare* is a word of art, and cannot be expressed by any other word; for it signifies, to withhold lands or tenements from the right owner; in which case either the entry of the right owner is taken away, or the deforcestor holdeth it so fast, as the right owner is driven to his reall *præcipe*, wherein it is said, *unde A. eum injuste deforceat*, or the deforcestor so disturbeth the right owner, as he cannot enjoy his owne: and therefore it is said, *Per hoc autem quod dicitur in brevi ultimæ præsentationis deforceant, videtur quibusdam quod querens innuat per hoc quod deforceans sit in seisinâ, sicut in brevi de reâ, sed reverâ non est ita, sed satis deforceat qui possessorem uti seisinâ non permisit omnino vel minus commodè impediat præsentando, appellando, impetrand,*

secundum quod dicitur de disseisnore, satisfacit disseisnam, qui uti non permisit possessorem vel minus commodè licet omnino non expellat. In this case that Littleton putteth, the discontinuance being in by wrong, is no disseisor, abator, or intruder, but a deforcestor; and hereof commeth Deforcement, and thus did antiquitie describe it: [o] *Deforcement, come si ascun enter en auter tenement tant come le veray seignior est al market, ou ailors, et retourne, et ne poet aver entre eins est celui deforce et deboutue.* And for that at the first the withholding was with violence and force, it was called a deforcement of the lands or tenements; but now it is generally extended to all kinde of wrongfull withholding of lands or tenements from the right owner. There is a writ called a *quod ei deforceat*, and lieth where tenant in taile, or tenant for life, loseth by default, by the statute he shall have a *quod ei deforceat* against the recoveror, and yet he commeth in by course of law. (1)

le reversion a moy, et puis le tenant en le taile enseoffa un auter en fee, le feoffee n'ad pas droiturel estate en les tenements pur deux causes. Un est, pur ceo que per tiel feoffment ma reversion est discontinue, le quel est a tort fait, et nemy a droit fait. Un auter cause est, si le tenant en taile mourust, et son issue fust briefe de formedon envers le feoffee, le briefe dirra, et auxyle count, &c. que le feoffee a tort luy deforce, &c. Ergo s'il a tort luy deforce, &c. il n'ad pas droiturel estate.

selfe, and after the tenant in taileinfeoffeth another in fee, the feoffee hath no rightfull estate in the tenements for two causes. One is, for that by such feoffment my reversion is discontinued, the which is a wrong and not a rightfull act. Another cause is, if the tenant in taile dieth, and his issue bring a writ of *formedon* against the feoffee, the writ and also the declaration shall say, &c. that the feoffee by wrong himdeforces, &c. *Ergo* if he deforceth him by wrong, he hath no right estate.

Sect. 615.

ITEM, si terre soit lessé a un home pur terme de sa vie, le remainder a un auter en le taile, si celui en le remainder voile graunter son remainder a un auter en fee per son fait, et le tenant a terme de vie attorna, ceo n'est pas discontinuance de le remainder*.

ALSO, if land bee let to a man for terme of his life, the remainder to another in taile, if he in the remainder will grant his remainder to another in fee by his deed, and the tenaunt for life attorne, this is no discontinuance of the remainder.

Sect.

* &c. added L. and M. and Roh.

(1) Sir William Blackstone, in his account of a deforcement, 3. Com. c. 10. observes, that it is *nomen generalissimum*; being a much larger and more comprehensive expression than any of the former, and signifying the holding of any lands or tenements to which another person has a right; so that it includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath a right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of those injuries. A deforcement may also be grounded on the non-performance of a covenant real: as if a man seized of lands covenants to convey them to another, and neglects or refuses so to do, but continues possession against him, this possession being wrongful is a deforcement. And hence, in levying a fine of lands, the person against whom the fictitious action is brought upon a supposed breach of covenant, is called a deforçant. Mons. Howard, *Anc. Loix des François*, tom. 1. p. 654. mentions, that Du Cange refers to the laws of Alfred and other kings of England precedent to the Conquest, for an explanation of the word Deforcement; but that he ought to have observed, that it was not introduced into the Latin translation of those laws till after the introduction of the Norman customs into England; that deforce is an old French word, and that *fortia* is taken for force in the 28th formula of Marculphus.

affirmed it to be in a stranger;—in all these cases, the freeholder exposed himself to the loss of the possession, as much as if they were his own acts. Thus the termor held the possession, but he was said to hold it *nomine alieno*, in contradistinction to the freeholder himself, who was said to hold it *nomine proprio*. Hence Britton expressly defines an estate of freehold to be “the possession of the soil by the freeholder:” and the author of the Doctor and Student says, “that the possession of the land is called in the law of England the franktenement or freehold.” Britt. C. 52. Doct. and Stud. b. 2. d. 22. So nearly synonymous in those days was the possession to the freehold. In this manner, the possession of the termor differed from that of a mere bailiff, who had no possession. The same principles obtained with respect to the transfer of the freehold. Nothing further was necessary than a delivery of the possession, or, as it is called by our law-writers, livery of seisin. The freehold could be transferred by no other means. But here a difference is to be observed with respect to the effect of the livery of a termor for years (such as was mentioned before), and the livery of a mere bailiff. On account of the solemnity, upon which the entry of the termor into the lands was grounded; the connection between him and the reversioner, and his actually holding the possession of the land (though he held it for the freeholder), the livery of the former was a transfer of the possession; but the livery of the latter was absolutely without effect.

Sect. 616.

*ITEM, si home ad rent service ou rent charge en taile, et il granta le dit rent a un autre en fee, et le tenaunt attorne, * ceo n'est pas discontinuance, &c.*

ALSO, if a man hath a rent service or rent charge in taile, and hee grant the sayd rent to another in fee, and the tenaunt attorne, this is no discontinuance, &c.

Sect. 617.

ITEM, si home soit tenant en taile de un advowson en grosse, ou de un common en grosse, s'il per son fait voile graunt l'advowson ou le common a un autre en fee, ceo n'est pas discontinuance; car en tielx cases les grantees n'ont estate forsque pur terme de vie de le tenant en taile que fist le grant, &c.

ALSO, if a man bee tenaunt in taile of an advowson in grosse, or of a common in grosse, if he by his deed will graunt the advowson or common to another in fee, this is no discontinuance; for in such cases the grantees have no estate but for terme of the life of tenant in taile that made the grant, &c.

BY the cases in these three Sections it appeareth, that if a remainder or a rent service, or a rent charge, or an advowson, or a common, or any other inheritance that lieth in grant, be granted by tenant in taile, it is no discontinuance, as formerly hath bene said.

[p] Note, here is an advowson named by *Littleton*, as a thing that lieth in grant, and passeth not by livery of seisin.

Bra. l. 2. f. 3. & f. 366. 378.
Brit. f. 187. Mir. ca. 2. sect. 17.
Flet. lib. 3. ca. 15.
(Post. 335.)

[p] 5. E. 3. 58. 21. E. 3. 37. 38.
43. E. 3. 1. b. 11. H. 6. 4.
5. H. 7. 37. 18. H. 8. 16. M.
Dy. 323. b.

Sect. 618.

ET nota, que de tiels choses que passent per voy de graunt, per fait fait en pays, † et sans livery, la tiel graunt ne fait pas discontinuance, come en les cases avantdits, ‡ et en autres cases semblables, &c. || Et coment que tiels choses sont graunts en fee, per fine levie en le court

AND note, that of such things as passe by way of grant, by deed made in the cuntry, and without livery, there such grant maketh no discontinuance, as in the cases aforesayd, and in other like cases, &c. And albeit such things bee graunted in fee, by fine levied in the king's court, &c.

HERE is the generall reason yeilded of the precedent cases and the like; for that it is a maxime in law, that a grant [d] by deed of such things as doe lie in grant, and not in livery of seisin, doeth worke no discontinuance. (1) But the particular reason is, for that of such things the grant of tenant in taile worketh no wrong, either to the issue in taile, or to him in reversion or remainder; for nothing doth passe but onely during the life of tenant in taile, which is lawfull, and every discontinuance worketh a wrong, as hath bene said.

[d] 6. E. 3. 56. 32. E. 3.
Discont. 2. 33. Aff. 8. 4. H. 7. 17.
21. H. 7. 42. 15. H. 7. 19.
21. H. 6. 52. 53. 5. E. 4. 3.
21. E. 4. 5. 22. R. 2.
Discon. 56. 38. H. 8.
Discon. 35. Brooke. 19. E. 3.
Bre. 468. Pl. Com. 435
18. Aff. p. 2.

[q] If

* &c. added L. and M. and Roh.
|| Et not in L. and M. nor Roh.

† et sans livery, la—&c. tou, L. and M. and Roh.

‡ et en—ou, L. and M. and Roh.

(1) VII. That nothing which lies in grant can be said to be discontinued.—The term discontinuance is used to distinguish those cases where the party, whose freehold is ousted, can restore it by action only, from those in which he may restore it by entry. Now, things which lie in grant, cannot either be divested or restored by entry. The owner, therefore, of any thing which lies in grant, has in no stage, and under no circumstances, any other remedy but by action; consequently the distinction in question can never be applicable to him. It is true, that the books often mention both disseisins and discontinuances of incorporeal hereditaments; but these disseisins and discontinuances are only at the election of the party, for the purpose of availing himself of the remedy by action.—Some observations on disseisins of this description are inserted in the note below, commencing at page 330. b.—But a disseisin or discontinuance of corporeal hereditaments necessarily operates as a disseisin or discontinuance of all the incorporeal rights or incidents which the disseisee or discontinuancee has himself in upon or out of the land affected by the disseisin or discontinuance.

effect. In process of time, involuntary alienation, or alienation arising from attachment for debt, was admitted. This produced the estates of tenants by elegit, by statute-merchant, and statute-staple. Long leases for years also came into use, and more settled and accurate notions were had, of tenancies by sufferance and at will. All these were considered to be in the same situation as the termor for years. Their possession was held to be the possession of the immediate freeholder; but as they had, or rather held, the possession, and were in by the act of the freeholder in some cases, and by his privity or forbearance in all, they were considered to be in, as of the seisin of the fee. It sometimes happened that persons had the possession who had not the right; such were tenants by disseisin, deforcement, abatement, or intrusion. Still, as they had the possession, they might, by livery of it, transfer it to another. Thus, by the old feudal law, on the one hand, the freehold could not be transferred but by livery of seisin; on the other, livery of seisin could not be made by any person who had the possession, without transferring the freehold. This transfer of the fee was called a feoffment. No writing was necessary for this purpose; and when charters came into use, the transfer of the fee was supposed to be produced (as has been already observed), not by the charter, but by the livery which it authenticated. But the material variation with respect to the form of transferring property by livery was, that originally it was usual to make the feoffment on the land before the peers of the court, who subscribed the charter of feoffment with their names, and the entry of the feoffee upon the land was afterwards recorded in the lord's court: but in progress of time, the feoffment was allowed to be good,

Lib. 3. Cap. 11. Of Discontinuance. Sect. 619.

[7] 33. E. 3. Formed. 47.
13. H. 7. 10. 36. Aff. 8.
4. H. 7. 17.

[3. Rep. 84, 85. 9. Rep. 51. a.)

[r] 3. H. 7. 12.
(Mo. 634.)
9. E. 4. 22.
(1. Roll. Abr. 632. Sir Edward Seymour's case. 10. Rep. 95.)

[f] 38. H. 8. Paten. Br. 101.
Pl. Com. 233. Li. 1. f. 26.
Alton Wood's case.
(Ant. 251. b.)
48. E. 3. 23.
(2 Sid. 65.)

[r] 15. E. 4. tit. Discont. 30.
6. H. 56, 57.
(1. Rep. 76. 1. Roll. Rep. 188.
1. Sid. 83.)

[7] If tenant in taile of a rent service, &c. or of a reversion, or remainder in taile, &c. grant the same in fee with warrantie, and leaveth affets in fee simple, and dieth, this is neither barre nor discontinuance to the issue in taile; but he may distraine for the rent or service, or enter into the land after the decease of tenant for life. But if the issue bringeth a formedon in the discender, and admit himselfe out of possession, then he shall be barred by the warrantie and affets.

[r] Tenant in taile of a rent disseiseth the tenant of the land, and maketh a feoffment in fee with warrantie and dieth, this is no discontinuance of the rent, but the issue may distreine for the same; and albeit the warrantie extend to the rent, yet by the rule of *Littleton* it lieth not in discontinuance: and where the thing doth lie in liverie, as lands and tenements, yet if to the conveyance of the freehold or inheritance no liverie of seisin is requisite, it worketh no discontinuance. [f] As if tenant in taile exchange lands, &c. or if the king being tenant in taile, grant by his letters patents the lands in fee, there is no discontinuance wrought.

Per fine. Of a thing that lieth in grant, though it be granted by fine, yet it worketh no discontinuance; and this is regularly true.

[r] If tenant in taile make a lease for yeares of lands, and after levie a fine, this is a discontinuance; for a fine is a feoffment of record, and the freehold passeth. But if tenant in taile maketh a lease for his owne life, and after levie a fine, this is no discontinuance, because the reversion expectant upon a state of freehold which lieth onely in grant passeth thereby. (1)

Sect. 619.

[†] *NOTA, si jeo done terre a un auter en taile, et il lessa mesme la terre a un auter pur terme d'ans, et puis le lessor graunta le reversion a un auter en fee, et le tenant a terme d'ans atturra al grantee, et le terme est expire durant la vie le tenant en taile, per que le grantee enter, et puis le tenant en taile ad issue et devie; en ceo case ceo n'est discontinuance, nient obstant que le grant soit execute en la vie le tenaunt en taile, pur ceo que al temps de lease fait a terme d'ans, nul novel fee simple fuit reserve en le lessor, eins le reversion demurt a luy en taylor, sicome il fuit devant le lease fait. **

NOTE, if I give land to another in taile, and hee letteth the same land to another for terme of yeares, and after the lessor graunteth the reversion to another in fee, and the tenant for yeares attorne to the grantee, and the terme expireth during the life of the tenant in taylor, by which the grauntee enter, and after the tenant in taile hath issue and die; in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in taile, for that at the time of the lease made for yeares, no new fee simple was reserved in the lessor, but the reversion remained to him in taile, as it was before the lease made.

* THIS is added to *Littleton*, and not in the originall, and therefore I purposely omit it: yet is the case good in law, because neither the lease for yeares, nor the grant of the reversion, divesteth any estate.

Sect.

† Nota—item, L. and M. and Roh. No part of these Sections within crotchets, is in L. and M. and Roh.

(1) It is frequently said in our law-books, that a fine has no operation upon any estate or interest, which is not previously divested or turned to a right; but this expression, considering it strictly, is inaccurate. By turning to a right, it is generally meant, that the person whose possession is usurped, cannot restore it by entry, and can only recover it by action. See note 1. ant. 239. a. But in the present case, the expression, turned to a right, must be understood in a more general sense. The import of it is, that the parties to the fine, or some of them, have in them at the time of their levying the fine, or acquire by it, a possession, adverse to, and inconsistent with, the estate or right intended to be barred; the real owner, therefore, at the time of levying the fine, or by its operation, is disseised of his possession, but the right still remains in him. In this general sense, his possession may be said to be turned to a right; but this right may be such as enables him to restore his possession by mere entry, without his resorting to an action. See 2. Atk. 631. In another sense it is inaccurate, as it seems to imply, that the turning to a right is produced by the operation of the fine; but, generally speaking, this is not the case. Every disseisin, intrusion, or abatement, turns the estate to a right, in the sense in which that expression is explained above. If the disseisor, intruder, or abator, afterwards levies a fine, it operates by the statute, after a non-claim of five years, as a bar to the right of the person whose estate is disseised, intruded upon, or abated. But its operation in these cases is merely as a bar, the ouster of the possession or divesting of the right being previously effected by the disseisin, intrusion, or abatement. In some cases, however, it does not operate only as a bar. As if tenant for life levies a fine, it is a forfeiture of his estate; and if the reversioner does not enter within five years after the forfeiture, or at the furthest within five years after the death of the tenant for life, he is barred of his remedy to recover. *Wherley and Tancred*, 1. Ventris 241.

good, though it were attested by strangers only; and the recording of the feoffee's entry was dispensed with. This, undoubtedly, lessened, very considerably, the solemnity and notoriety of feoffments: and we have an opinion of the highest authority, delivered with much consideration and infinite ability, in a case of the highest moment, that it had a very great effect on their operation and efficacy, with respect to the circumstance before us.—The case alluded to is that of *Taylor on the demise of Atkins v. Horde* and others, 1 Burr. 60. 3 Bro. Par. Ca. 247. Cow. 689.—As a minute and accurate statement and examination of the doctrines laid down in that case will serve greatly to illustrate the point now under consideration, they shall be presented here to the reader. The case, so far as it relates to the points in question, was, that sir Robert Atkins was tenant for life; remainder to dame Ann Atkins; his wife, for life; remainder to sir Robert Atkins (his eldest son by a former marriage) in tail male; remainder to Mr. John Tracy and his younger brothers successively, in tail male; remainder to Mr. Richard Atkins and his heirs. Upon the death of sir Robert

Sect. 620.

† *MES si le tenant en taile fait leas a terme de vie le lessee, &c. en cest case le tenant en le taile ad * fait un novel reversion de † fee simple en luy; pur ceo que quant il fist leas pur terme de vie, &c. il discontinua le taile ‡, &c. per force de mesme le leas, et auxy il discontinua ma reversion, &c. Et il covient que la reversion de fee simple soit en aucun person en tiel cas: et il ne poit estre en moy que sue donor, entant que mon reversion est discontinue; ergo il covient que la reversion de fee soit en le tenant en le taile, que discontinua ma reversion per tiel leas, &c. Et si en cest case le tenant en le taile graunta per son fait cest reversion en fee a un auter, et le tenant a terme de vie attorna, &c. et puis le tenant a terme de vie morust, vivant le tenant en le taile, et le grantee de le reversion entra, &c. en la vie le tenant en le taile, donques ceo est un discontinuance en fee; et si apres le tenant en le taile morust, son issue ne poit enter, mes est mis a son brieve de forme-*

BUT if the tenant in taile make a lease for terme of the life of the lessee, &c. in this case the tenant in taile hath made a new reversion of the fee simple in him; because when hee made the lease for life, &c. he discontinued the taile, &c. by force of the same lease, and also hee discontinued my reversion, &c. And it behoveth that the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, inasmuch as my reversion is discontinued; ergo the reversion of the fee ought to be in the tenant in taile, who discontinued my reversion by lease, &c. And if in this case the tenant in taile grant by his deed this reversion in fee to another, and the tenant for life attorne, &c. and after the tenant for life dieth, living the tenant in taile, and the grantee of the reversion enter, &c. in the life of the tenant in taile, then this is a discontinuance in fee; and if after the tenant in taile dieth, his issue may not enter, but is put to his writ of *formedon*.

PUR terme de vie del lessee, &c.

Here is implied, or for (1. Roll. 633.) terme of another man's life. (1)

Novel reversion 15. E. 4. tit. Discont. 36.

de fee simple.

Which must bee understood of a fee simple determinable upon the life of the lessee, which our author here calleth a fee simple; for if the lessee dieth, the donee is tenant in taile againe, as hee was before: and that is the reason that if in that case hee granteth over the reversion (Cro. Car. 156.) and dieth; and after the death of tenant in taile, the lessee dieth; the entry of the issue is lawfull, because by the death of the lessee the discontinuance is determined; and consequently the grant made of the reversion gained upon that discontinuance, is void also.

If tenant in taile maketh a lease for three lives according to the statute of 32 H. 8. that is no discontinuance of the estate taile or of the reversion, because it is authorized by act of parliament, whereunto every man in judgement of law is partie.

And yet in some cases the freehold may be discontinued and not the reversion. [u] As if the husband and wife make a lease for life by deed (2) of the wife's land, reserving a rent, the husband dieth; this was a discontinuance at the common law for life; and yet the reversion was not discontinued, but remained in the wife. Otherwise it is if

† In L. and M. and MSS. this Section begins thus: *Si jco done terre a un auter en le taile, et il lessa mesme la terre a un auter pur terme de vie, &c.* * en added L. and M. † de—en, L. and M. ‡ le taile, &c. per force de mesme le leas, et auxy i discontinua, not in L. and M. nor Roh.

(1) VIII. It has been observed before, that no conveyance by tenant in tail can operate as a discontinuance, unless it is created by livery, or by that which, in the eye of the law, is tantamount to it.—Littleton now proceeds to lay down, that to make a discontinuance, the conveyance must be of such an estate as in its original creation may, by possibility, endure beyond the life of the tenant in tail. When the estate so created is at an end, the discontinuance also is at an end.

(2) Nota, a proviso on 32 Hen. VIII. that the lease shall be made in both their names, where the inheritance is in the woman. And see Cro. Car. 22. Smith v. Trender, where there is a quere, whether it ought to be so where the inheritance is in both.—Lord Nott. MSS.

Robert the father, dame Ann his widow entered upon the lands. In Trinity term 1710 an ejectment was brought, in the court of common-pleas, against her ladyship, by John Phillips, upon the several demises of sir Robert Atkyns the son, and of Joseph Walker, to whom several terms of years attendant upon the inheritance had been assigned, in trust for sir Robert the son. A verdict was found for the plaintiff, and he recovered *terminum suum predictum*, and had *an habere facias possessionem*. It is to be observed, that no account of the case states the grounds upon which this verdict was found for the plaintiff. Most probably, it was merely in consequence of the terms of years which had been assigned to him. On the 1st of January 1710, John Phillips, the plaintiff, surrendered the terms to sir Robert the son; and on the 17th of the same month sir Robert made a feoffment of the estates in question, with livery of seisin, to James Earle and his heirs. In the deed of feoffment it was declared, that the feoffment was made, that James Earle might become perfect tenant of the freehold, in order for the suffering of a common recovery; which recovery, it was thereby declared, should enure, to the use of sir Robert Atkyns the son and his heirs. The recovery was suffered in Hilary term 1710. Sir Robert died on the 9th of November 1711, without issue, and intestate. His nephew, Mr. Robert Atkyns, was his heir at law. In Hilary term 1711 an ejectment was brought against him by lady Atkyns; and in Easter term 1712 a general verdict was given for her. She died in the month of October following. Upon her death, Mr. Robert Atkyns entered, and continued in possession of the estates till the 16th of March 1753, when he died, leaving issue only two daughters; Ann, the wife of Mr. Horde; and Elizabeth, the wife of Mr. Chamberlayne. The death of sir Robert Atkyns the son without issue, necessarily brought into question the validity of the recovery suffered by him; for if it were good, it destroyed his estate tail, and all the remainders expectant upon it; and Mr. Robert Atkyns, his nephew, and after his decease Mrs. Horde and Mrs. Chamberlayne, his only children, became entitled to the estates, as his heirs at law. But if it were not a good recovery, then, upon

(8. Rep. 71.)

21. H. 6. 52. 15. E. 4. tit.
Discont. 30.32. E. 3. Discont. 2. 43. E. 3.
Entr. Cong. 31. 3. H. 4. 9.
22. R. 2. Discont. 50. 34. Aff. 6.
Pl. 4. 38. Aff. 6. p. 6.
43. Aff. 6. 48. 18. E. 3. 43.
21. H. 6. 52. 15. E. 4. tit. Dis-
continuance 30. Brooke tit.
Discont. 3. & 14. 4. H. 7. 17.
21. H. 7. 11.

[w] 21. H. 6. 52, 53.

[y] 34. E. 1. quare impedit 179.
22. E. 3. 6. 17. E. 3. 3.
33. E. 3. quare imp. 196.
23. Aff. 8. 50. E. 3. 26.
(Ant. 298. Post. 349. b. F.N.B. 32.
1. Roll. Abr. 632. 1 Rep. 76.)36. Aff. 8. 42. E. 3. 20.
22. R. 2. Discont. 50.
(Sect. 601. 638.)
21. H. 6. 52, 53. Brooke tit.
Discont. 3. 21. H. 7. 11. Lib. 1.
fol. 85. Lib 10. fol. 96, 97.
(W. Jones 210. Cro. Car. 156.)(*) 15. E. 4. Discont. 30.
Vide Sect. 642.if the husband had made
the lease alone.*Et puis le te-
nant a terme de vie
morust, &c.* The like
law it is if the tenant
for life surrender to the
grantee, or if the grantee
recover in an action of
waste, or enter for the
forfeiture.*Avoit seisin et
execution.* And here
it is to be observed, that
when the reversion in
this case is executed in
the life of tenant in taile,
it is equivalent in judgement of law to a feoffment in fee, for the
state for life passed by livery.[w] If tenant in taile make a lease for life, the remainder in fee, this is an absolute dis-
continuance, albeit the remainder be not executed in the life of tenant in taile, because all is
one estate, and passeth by one livery. And so note a diversitie betweene a grant of a reversion,
and a limitation of a remainder. B. tenant in taile maketh a gift in taile to A. and after B.
releaseth to A. and his heires, and after A. dieth without issue; the issue of the first donee may
enter upon the collateral heire, because A. had not seisin and execution of the reversion of
the land in his demesne as of fee, as Littleton here speaketh. But if tenant in taile make a
lease for the life of the lessee, and after releaseth to him and his heires, this is an absolute
discontinuance; because the fee simple is executed in the life of tenant in taile.[y] If tenant in taile of a manor whereunto an advowson is appendant, maketh a feoff-
ment in fee by deed (as it ought to be) of one acre with the advowson, and the church becom-
meth void, and the feoffee present, tenant in taile dieth, the church becommeth void; the
issue shall not present untill he hath re-continued the acre. But if the feoffee had not executed
the same by presentment, then the issue in taile should have presented. And so was it at the
common law, of the husband seised in the right of his wife, *mutatis mutandis*.If a fine be levied to a tenant in taile, and he granteth and rendreth the land to him and
his heires, and die before execution, this is no discontinuance. Otherwise it is, if it had
beene executed in the life of tenant in taile.If tenant in taile make a lease for life of the lessee, and after grant the reversion with war-
rantie, and dieth before execution, this is no discontinuance; because the discontinuance
was (as hath beene said) but for life, and the warrantie cannot enlarge the same. (1)*Et ceo est per force del grant de mesme le tenant en taile.* Hereupon
Littleton himselfe is of the same opinion, (*) as it appeareth he was in our bookes; that if
tenant in taile make a lease for life, and grant the reversion in fee, and the lessee attorne,
and that grantee granteth it over, and the lessee attorne, and then the lessee for life dieth, so
as the reversion is executed in the life of tenant in taile, yet this is no discontinuance, but
that after the death of tenant in taile the issue may enter; because (as Littleton here saith)
he is not in of the grant of the tenant in taile, but of his grantee.If at this day tenant in taile make a lease for life, and after by deed indented and inrolled
according to the statute he bargaineth and selleth the reversion to another in fee, and the
lessee dieth, so as the reversion is executed in the life of tenant in taile; albeit the bargainee
is not in the *per* by the tenant in taile, yet inasmuch as he claimeth the reversion immedi-
ately from him, which is executed in his lifetime, this is a discontinuance. And so it is,
and for the same cause, if tenant in taile had granted the reversion to the use of another and
his heires. If tenant in taile maketh a lease for life, and after disseiseth the lessee for life,
and maketh a feoffment in fee, the lessee dieth, and then tenant in taile dieth; albeit the
fee be executed, yet for that the fee was not executed by lawful meanes, (as in all the cases
of Littleton it appeareth it ought to be) it is no discontinuance.

Sect.

* No part of this or of the following Section within crotchets is in L. and M. and Roh.

(1) All this is a consequence of the doctrine laid down in the last page. If the remainder or reversion is created at the same time
as the particular estate, it necessarily must be created by the same livery. If it is created at a subsequent time, then to continue the discon-
tinuance after the determination of the particular estate, the reversion or remainder must be executed in possession during the life of the ten-
nant in tail. The entry of the reversioner or remainder-man in this case is tantamount to a second livery.

upon the decease of dame Ann Atkyns, Mr. John Tracy became seised in tail of the lands devised by the testator's will, with the
several remainders over.—In the year 1752, an ejectment was brought against Mr. Robert Atkyns, and Mr. and Mrs. Horde, and
Mr. and Mrs. Chamberlayne, by Cyprian Taylor, on the demise of Mr. John Tracy, who, in consequence of a direction
contained in sir Robert Atkyns the father's will, had taken the name of Atkyns. The jury found a special verdict.
The case was argued four times before the judges of the court of king's-bench. A point arose, whether, supposing the recovery
to be bad, the plaintiff's ejectment, not having been brought within twenty-one years after his title accrued, was not barred by the
statute of limitations. The court was of opinion it was barred by that statute. The case afterwards went to the house of lords:
all the judges were ordered to attend: their opinion was asked upon the point arising from the statute of limitations; it agreed
with that of the judges of the court of king's bench: the judgment of the court was therefore affirmed. Afterwards, Mr.
John Tracy Atkyns and all his brothers died without issue; and then, supposing the recovery to be void, Mr. Edward Kinsey
Atkyns, the then heir at law of Mr. Richard Atkyns, became entitled to the estate. He claimed under a new title, and was not
therefore bound by the statute of limitations. An ejectment was delivered by him in Hilary term 1777. This brought the question
of the validity of the recovery once more before the court. It is to be observed, that though, when the case came before the court
upon the ejectment brought by Mr. John Tracy Atkyns, the matter went off on the point arising from the statute of limitations,
yet the questions arising upon the validity of the recovery were most elaborately argued by the bar: and lord chief-justice Mans-
field, when he gave the judgment of the court, entered into a very minute discussion of them, and gave his opinion very fully
and decisively upon them all: so that what was said upon this subject, when the case came before the court in 1777, was, in
general, only a repetition of what was said upon it on the former occasion. As lord Mansfield's speech, in the report given of it
by sir James Burrow, contains the most methodical and comprehensive state of the arguments and opinions intended to be discussed
in this place, it is here particularly referred to.—His lordship stated the question to be, Whether Earle was a good tenant of the
freehold. He observed, that to prove he was a good tenant of the freehold, it was necessary to shew, either that sir Robert Atkyns,
by the entry under the judgment in ejectment in 1710, acquired the freehold by disseisin; or that, supposing he did not acquire the free-
hold, he acquired the possession, and by his feoffment vested an estate of freehold in Earle. His lordship denied both of these positions.
As to the first, he laid it down, that the disseisin to be effectual in this case, must be an actual disseisin, not a disseisin, which was
merely such, at the election of the party. No case, therefore, or other authority from the books respecting disseisins, was applicable
to the present case, if it did not relate to an actual disseisin. He then proceeded to explain the nature of an actual disseisin. He
defined

Sect. 621.

EN *mesme le manner ferra,* **I***N* the same manner shall it be, if (Post. 335. b. *mesme le case*.)
si en le case avantdit le te- in the case aforesaid the tenant
nant a terme de vie apres l'at- for terme of life after the attorne-
tournement al grantee uft alien ment to the grantee had aliened
en fee, et le grantee uft enter pur in fee, and the grantee had entred
forfeiture de son estate, et puis le by forfeiture of his estate, and af-
tenant en taile uft devie, c'est un ter the tenant in taile had died,
discontinuance, causã quã su- this is a discontinuance, *causã quã*
pra.] *supra.*

THIS is added in this place, but in the originall it commeth in after in this Chapter *. 21. H. 6. 52. 53. 15. E. 4.
 Discont. 30.

Sect. 622.

MES en cest cas, si tenant en **B***UT* in this case, if tenant in taile (Sir W. Jones 209. Cro. Car. 156.)
taile que granta le rever- that grants the reversion, &c.
sion, &c. morust, vivant le tenant dieth, living the tenant for life, and
a terme de vie, et puis le tenant a after the tenant for life dieth, and
terme de vie morust, et puis ce- after hee to whom the reversion
luy a que le reversion fuit graunt was granted enter, &c. then this is
enter, &c. doncque ceo n'est pas no discontinuance, but that the is-
discontinuance, mes que l'issue del sue of the tenant in taile may well
tenant en taile poit bien enter enter upon the grantee of the re-
sur le grauntee del reversion; version; because the reversion
pur ceo que le reversion que le which the grantee had, &c. was
grauntee avoit, &c. ne fuit exe- not executed, &c. in the life of the
cute, &c. en le vie le tenant en tenant in taile, &c. And so there is
taile, &c. Et issint il est graund a great diversitie when tenant in
diversity quant tenant en taile taile maketh a lease for yeares,
fuit un leas pur terme d'ans, et and where hee maketh a lease for
lou il fait leas pur terme de vie; life; for in the one case hee hath a
car en l'un cas il ad reversion en reversion in taile, and in the other
taile, et en l'auter cas il ad un re- case hee hath a reversion in fee. (1)
version en fee.

OF this sufficient hath beene said before, and is of itselfe manifest, and needeth no explication.

Like law was at the common law of a husband seised of land in right of his wife, *mutatis mutandis*. 18. Aff. 6. 21. H. 6. 53.

Sect.

* But it does not appear in this Chapter in L. and M. nor Roh. nor in MSS.

(1) See the note on the following Section.

defined feisin to be a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure: disseisin, therefore, must mean the turning the tenant out of his tenure, and usurping his place and feudal relation. He observed, that originally no tenant could alien without licence of the lord; and that, when the lord consented to the alienation, the only form of conveyance was by feoffment, before the peers of the court, with the lord's concurrence, and with the ceremonies of homage and fealty. That a disseisin differed from a disposssession. It was something more. The effect of it was to make the disseisor tenant to every demandant, and freeholder *de facto*, in spite of the true owner. That, on the one hand, the lord must know upon whom to call as his tenant; on the other hand, the stranger must know against whom to bring his præcipe. A disposssession, therefore, did not amount to a disseisin, if it were not forcible, that is, against the will of the real owner; and if it were not such as, both with respect to the lord and to strangers, introduced the dispossessor into the tenure. These, he said, were the consequences of an actual disseisin. A disseisin by election was attended by none of these circumstances. In that case, the disseisor was neither tenant to the lord nor the stranger;—he was merely a disseisor at the will of the disseisee, who might, if he thought the process of assise a more eligible remedy than any of those to which he might have recourse, without disclaiming his feisin, resort to it, and, for that purpose, choose to be considered as disseised. From this description of the nature and consequences of the two different kinds of feisin, his lordship inferred, that sir Robert's entry was not an actual disseisin. Supposing it a real proceeding, a termor might recover against the disseisor, or against the feoffee of the lessor; the possession he recovered enured to himself, or for his own benefit during his term:—subject to that, it enured to, or for the benefit of the persons who had the right to the freehold; that is, to the lessor, if he continued the owner of the fee; to his alienee, if he had inclosed; to the heir or feoffee of his disseisor, if he had been disseised, and his entry taken away.—Then, suppose the proceeding to be merely fictitious, the judgment only entitled the party to recover the possession, without prejudice to the right. Now, by the special verdict it appears he had no right to the possession: he had therefore a possession without prejudice to the right. He was not in as particular tenant; there was no privy of feisin; he had only a naked possession.—But, says his lordship, the case is still stronger: the true owner cannot even elect to make a person in possession under a judgment in ejectment, a disseisor: the entry is not *injuste & sine judicio*, but under authority of a court of justice. The true owner might enter upon a disseisor. But after a judgment in ejectment, an actual entry would not be permitted. Upon this reasoning his lordship establishes his first position. That sir Robert Atkyns did not acquire, by his entry, an actual estate of freehold, by disseisin. This brought his lordship to the second question, Whether the feoffment to Earle vested an estate of freehold in him by disseisin. Here his lordship concluded, from

Sect. 623.

CAR si terre soit done a un home et a ses heires males de son corps engendres, le quel ad issue deux fits, et l'eigne fits ad issue file et devy, * et le tenant en taile fait un leas pur terme des ans et devy, ore le reversion descendist a le fits puisne, pur ceo que le reversion fuit forsque en le taile, et le fits puisne est heire male, &c. Mes si le tenant ust fait un leas pur terme de vie, &c. et puis morust, ore le reversion descendist a le file del eigne fits, pur ceo que le reversion est en fee simple, et la file est heire general, &c.

FOR if land bee given to a man and to his heires males of his body engendred, who hath issue two sonnes, and the eldest sonne hath issue a daughter and dieth, and the tenant in tayle maketh a lease for yeares and die, now the reversion descendeth to the younger sonne, for that the reversion was but in the taile, and the youngest sonne is heire male, &c. But if the tenant had made a lease for life, &c. and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heire generall, &c. (1)

This is evident also, and needeth no explanation.

Sect. 624.

ITEM, si home soit seisse en taile de terres devisables per testament, &c. et il ceo devisa a un auter en fee, et morust, et l'auter enter, &c. ceo n'est pas discontinuance, pur ceo que nul discontinuance fuit fait en la vie del tenant en le taile, &c.

ALSO, if a man be seised in taile of lands devisable by testament, &c. and hée deviseth this to another in fee, and dieth, and the other enter, &c. this is no discontinuance, for that no discontinuance was made in the life of the tenant in taile, &c.

9. E. 4. 22. 20. H. 6. 14.
Vid. 18. E. 3. 8.
(Cro. Cra. 405.
1. Roll. Abr. 633.)

THIS is manifest, and needeth no explanation: only this is to be observed, that no discontinuance can be made by tenant in taile, but such as is made and taketh effect in his life-time, which is here implied in the (&c.)

Sect. 625.

[4] 9. E. 4. 24. b.

AND of this opinion is *Littleton* [a] in our bookes, and saith that so it was adjudged.

Enfeoffe le donor, &c. This must be understood where the reversion of the donor is immediately ex-

ITEM, si terre soit done en taile, savant le reversion al donor, et puis le tenant en taile per son fait enfeoffa le donor, **ALSO**, if land be given in taile, saving the reversion to the donor, and after the tenant in taile by his deed enfeoffe the do-

Lib. 1. fol. 140. in Chudlye's case.

* et le tenant en taile fait un leas pur terme des ans, et devy, not in L. and M. nor Rok.

(1) The estate of the lessee for years not being created by livery, does not displace the possession, and consequently does not disturb the descent of the inheritance upon the issues inheritable to the estate. It is otherwise where the lease is for life. That is created by livery, and therefore displaces the possession, and gives the tenant in tail a tortious estate in fee simple, in reversion immediately expectant upon the life estate of his donee;—that reversion must therefore descend on the daughter as heir general.

the principles laid down by him in his discussion of the first question, that the feoffment did not amount to an actual disseisin, but was such merely at the will of dame Atkyns. In this part of the question he says, that except the special case of fines with proclamation, which, he observed, stands upon distinct grounds, and the construction of the stat. of 4 Hen. VII. c. 24. for the sake of the bar, he could not think of a case where the true owner, whose entry is not taken away, might not elect, by choosing a possessory remedy, to be deemed as not having been disseised. The judges of the king's bench, in the opinion delivered by them in 1774, express themselves still more strongly on this head. They say, that "where the books speak of feoffments in fee by tenants for years, and that the fee simple passes thereby, it is to be understood of those feoffments of old, attended with livery, and actual transmutation of the possession from one man to another; that feoffments, from having been the only conveyance of land, for a long term of years have languished into mere form, and are nothing now more than a common conveyance; that their grandeur and efficacy is lost; and that without actually transferring of the estate from one man to another, they mix with the community of all other assurances: that the name of these feoffments, and the remembrance of them, remains, and survives them, however imperfectly, after the practice of making them, and consequently their solemnity, is quite at an end." Lord Mansfield afterwards considered the case in a third point of view, which was, That a tenant in tail in remainder could not, by the established law of the land, suffer a common recovery, without the consent and concurrence of the immediate tenant of the freehold. Now, says his lordship, the law will never permit that to be effected by wrong, unfair, or indirect means, which cannot be effected by right, fair, and direct means: but sir Robert could not by right, fair, or direct means, suffer a common recovery, in the life of dame Ann, without her concurrence; he never had her concurrence; it follows, that his recovery must have been covinous, and therefore void. Upon these grounds, the court were of opinion, 1st, that sir Robert Atkyns the son by his entry under the verdict in 1710, was not an actual disseisor, and therefore had not in him any actual estate of freehold: 2dly, that his feoffment to Earle gave Earle an estate of freehold only at the election of dame Atkyns, but did not give him an actual estate of freehold; and, 3dly, that the whole transaction was fraudulent, and therefore void. The doctrine upon which the first of

a aver et tener a luy et a ses heires a tous jours, et liver a luy seisin accordant, &c. ceo n'est pas discontinuance, pur ceo que nul poit discontinuer l'estate en le taile, si non que il discontinue le reversion celuy que ad le reversion, &c. ou le remainder, si ascun ad le remainder, &c. Et entant que per tiel feoffment fait a le donnor (le reversion adonques esteant en luy) son reversion ne fuit discontinue ne alterate, &c. cest feoffment n'est pas discontinuance, &c.

nor, to have and to hold to him and to his heires for ever, and deliver to him seisin accordingly, &c. this is no discontinuance, because none can discontinue the estate taile, unless he discontinueth the reversion of him who hath the reversion, &c. or remainder, if any hath the remainder, &c. And inasmuch as by such feoffment made to the donnor (the reversion then being in him) his reversion was not discontinued nor altered, &c. this feoffment is no discontinuance, &c.

pectant upon the estate of the donee; [b] for if a man make a gift in taile the remainder in taile, reserving the reversion to himselfe: in this case if the donee enfeoffe the donor, this is a discontinuance, because there is a meane estate; and so doth *Littleton* here put his case of a reversion immediately expectant upon the gift in taile. Also it is to be intended of a feoffment made to the donor solely or only; for if the donee enfeoffe the donor and a stranger, this is a discontinuance of the whole land.

But if tenant for life make a lease for his owne life to the lessor, the remainder to the lessor and an estranger in fee: in this case forasmuch as the limitation of the fee should worke the wrong, it enureth to the lessor as a surrender for the one moitie, and a forfeiture as to the remainder of the stranger; for he cannot give to the lessor that which he had before, as our author here saith; and as to the remainder to the stranger, it is a forfeiture

(1. Roll. Abr. 634.)
[b] 41. Aff. 2. 41. E. 3. 2.
(1. Rep. 146. b.)

(Ant. 42. a.)

28. H. 8. Dier 12.

(1. Rep. 76. b. Sid. 361.)

(Dyer 12. b.)

(Ant. 169. a. 186. a. 193. b.
200. b. 2. Roll. Abr. 86. 403.
1. Rep. 100. b. 4. Leo. 23.)

40. Aff. 36. 21. Aff. 36.
18. E. 3. 45. F. N. B. 142. a.
Pl. Com. 555.

[c] 33. H. 8. tit. Taile. Br. 41.
Pl. Com. ubi supra.

[d] 27. Aff. p. 60. 29. Aff.
43. 11. Aff. 11. 16. Aff. 11.
18. E. 3. 45.
(Ant. 333. b. Post. 336.)

for his moitie, and when the lessor entreteth, he shall take the benefit of it. But if two joynt-nants be, and one of them enfeoffe his companion and a stranger, and make livery to the stranger; this shall vest only in the stranger, because the livery cannot enure to his companion.

Nul poit discontinuer l'estate en taile, si non que il discontinue le reversion, &c. ou le remainder, &c. And therefore for this cause, if the reversion or remainder be in the king, the tenant in taile cannot discontinue the estate taile. [c] But tenant in taile, the reversion in the king, might have barred the estate taile by a common recovery, untill the statute of 34 H. 8. ca. 20. which restraineth such a tenant in taile; but that common recovery neither barred nor discontinued the king's reversion. (1)

Note, the reversion may be revested, and yet the discontinuance remaine. [d] As if a feme covert be tenant for life, and the husband make a feoffment in fee, and the lessor enter for the forfeiture; here is the reversion revested, and yet the discontinuance remained at the common law.

Sect. 626.

EN mesme le maner est, lou terres sont dones a un home en taile, le remainder a un auter en fee, et le tenant en taile enfeoffa celuy que est en le remainder, a aver et tener a luy et a ses heires; ceo n'est pas discontinuance, causâ quâ supra.

IN the same manner is it, where lands are given to a man in taile, the remainder to another in fee, and the tenant in taile enfeoffe him that is in the remainder, to have and to hold to him and to his heires; this is no discontinuance, *causâ quâ supra*. (2)

(1. Roll. Abr. 633.)

LE remainder a un auter. Here it appeareth that (as hath beene said in case of a reversion) the remainder must be immediately expectant upon the estate taile.

Sect.

(1) See *Stone v. Newman*, 2. Cro. 427.

(2) IX. As to discontinuances made to, or with the concurrence of, the remainder-man or reversioner:—The feoffment of tenant in taile to the immediate remainder-man or reversioner in fee, has the operation of a surrender. In this light it cannot be considered to pass a greater estate than the grantor may lawfully convey: it does not, therefore, work a discontinuance. But if it is made to a stranger, the mere concurrence of the remainder-man or reversioner does not prevent the discontinuance, either with respect to the issues in tail, or his own remainder or reversion, even though the tenant in tail die without having issue. Thus, in *Baker v. Hacking*, 3. Cro. 387. 405. J. C. being tenant in tail, with the immediate reversion in fee to R. C. both of them joined in a feoffment to A. for life. R. C. made his will and died; and then J. C. died without issue. It was admitted, that if it were a discontinuance of the reversion, the deviser, not being seised, had no power to devise. Sir Geo. Croke was of opinion, that as there was no issue of the tenant in tail, his feoffment was no discontinuance of the reversion: he considered it as the lease of the tenant in tail during his life, and afterwards, the lease of the reversioner; and that the reversioner's joining shewed it was not the intention of the parties to displace his estate. But the three other judges held it to be a discontinuance on the ground, that the effect of a discontinuance is immediate, and does not depend on the tenant in tail having or not having issue.—They were also of opinion, that if the reversion in fee, instead of being in a stranger, had been in the tenant in tail himself, the feoffment would have been a discontinuance, as well of his own reversion as of the estate of the issue in tail.—But where the tenant for life and reversioner join in the conveyance, each of them is considered to pass his own estate: the tenant for life, the freehold; the reversioner, the inheritance. Hence if tenant for life, remainder in tail, remainder in fee, join in a fine, it is no discontinuance to the remainder-man in fee. This was resolved in *Peck v. Channell*, 1. Cro. 827, 828. on the ground, that none shall make a discontinuance, but he who is seised of an estate tail in possession.

of these points turns, is not immediately the subject of the present enquiry. But some of the principles laid down by the court in giving their opinions on the 2d and 3d points, will be investigated here, under two general questions: 1. *What estate in the lands a feoffor must have to give the feoffment efficacy.*—It seems to be admitted by the court, in the case referred to, that, originally, no greater estate was required to be in the feoffor than mere possession. This they attribute to the solemnities originally attending both the admission of tenants into the tenure, and the transfer of the fee. But it seems to be their opinion, that, since most, if not all, of these solemnities have been dispensed with, the peculiar efficacy of a feoffment has been lost. This has certainly been the case in one very remarkable instance. Lord chief-baron Gilbert, in his *Treatise of Tenures*, p. 43. observes, "that the feoffee of the disseisor that came in by title, after a year and a day was expired, was anciently held, to have right of possession,"

Sect. 627.

*ITEM, si un abbe ad un reversion, ou rent service, ou rent charge, et voile graunter * cel reversion, ou rent service, ou rent charge, a un auter en fee, et le tenant atturna, &c. ceo n'est pas discontinuance.*

ALSO, if an abbot hath a reversion, or a rent service, or a rent charge, and he will grant this reversion, or rent service, or rent charge, to another in fee, and the tenant attorne, &c. this is no discontinuance.

Of inheritances that lie in grant, sufficient hath beene said before.

Sect. 628.

EN mesme le manner lou abbe est seifie d'un advowson, ou de tielx choses que passent per voy d'un grant sans liverye de seisin, &c.

IN the same manner where an abbot is seised of an advowson, or of such things which passe by way of grant without liverye of seisin, &c.

HERE it appeareth, (as hath beene said) that an advowson doth not lie in liverye, but in grant.

Sect. 629.

(Ant. 234. a.)

ITEM, si tenant en taile lessa sa terre a un auter pur terme de vie, et puis il graunta en fee le reversion a un auter, et le tenant atturna, et puis le tenant a terme de vie aliena en fee, et le grantee de reversion entra, &c. en le vie le tenant en le taile, et puis le tenant en le taile morust, son issue ne poit enter, mes est mis a son brieve de formedon, pur ceo que le reversion en fee simple que le grauntor avoit per le grant del tenant en le taile, fuit execute en le vie de mesme le ternaunt en le taile, et pur ceo est un discontinuance en fee, &c.

ALSO, if tenant in tayle letteth his land to another for life, and after he granteth in fee the reversion to another, and the tenant attorne, and after the tenant for life alien in fee, and the grantee of the reversion enter, &c. in the life of the tenant in taile, and after the tenant in taile dieth, his issue shall not enter, but is put to his writ of formedon, because the reversion in fee simple which the grauntor had by the graunt of the tenant in tayle, was executed in the life of the same tenant in tayle, and therefore it is a discontinuance in fee, &c.

Of this sufficient hath beene said before.

SECT.

* cel reversion, ou rent service, ou rent charge,—un d'eux, L. and M. and Roh. but as above in MSS.

" and to put the disseisee to his writ of entry, because the feoffee came in by title. Hence, writs of entry against the feoffee in the " *per and cui* :—but this was not held so in respect of disseisors, because they themselves being the wrong-doers, had no law in " their favour, lest it should encourage such injuries. But afterwards, as feoffments became more secret, and nothing paid to the " lord, then they thought it too hard such feoffments should alter the right of possession; and therefore they construed the feoffee, " that came in by his own act, to be a wrong-doer, and not to alter the right of possession." But it will be difficult to find another instance in which feoffments have lost their efficacy. The arguments brought to prove that they have lost their efficacy in creating an estate of freehold, when it is not in the feoffor at the time of the feoffment, are, 1st. that livery is not made now with the solemnity with which it was made formerly;—2dly. that the passages in the books which speak of feoffments by tenants for years, and others having estates less than freehold, creating estates of freehold in the feoffee, by disseisin, are to be understood as referring only to a disseisin by election.—As to the first objection, It seems to be every where admitted, that the feoffments we are speaking of, once had the operation and efficacy in question; and that this operation and efficacy is ascribed to them in numberless passages in our law books: so that the great, if not the only, difficulty is to shew, that, at the time when it is universally agreed feoffments had this operation and efficacy, they were made with no other forms and solemnities than those with which they are made now. It is certain, that the custom of making livery before the peers of the court, and recording the entry of the feoffee in the records of the lord's court (if it were ever absolutely necessary), was dispensed with very soon after the Conquest, and was fallen completely into disuse at so early a period as that of Henry II.; so that in this reign, and from thence to the present time, no other ceremony in making feoffments was used, than that which is now practised, of the feoffor and feoffee coming upon the land, either in person or by attorney, and there the feoffor in the presence of witnesses (all other persons being out of the land) delivering the possession of it to the feoffee. The form of making feoffments in the reign of Henry II. is minutely described in Bracton, lib. 2. cap. 18. *Item, non valet donatio, nisi subsequatur traditio, tunc demum, cum donator plenam fecerit seisinam donatorio per se si presens fuerit, vel per procuratorem, & literas si absens fuerit, ita quod charta donationis & literae procuratorie coram vicinis, ad hoc specialiter convocatis, legantur in publicis, & etiam cum donator corpore & animo recesserit a possessione.* This is the account given by Bracton of the mode of making feoffments in his time. He makes no mention of the presence of the *pares curie* being necessary; or of its being necessary to record the entry of the feoffee in the lord's court; or of any other ceremony besides those now practised. Hence we find that the account given by Sir William Blackstone, book 2. chap. 2. § 3. of the present mode of making feoffments, is no more than a transcript of the passage cited above from Bracton. The next thing to be shewn is, that as the ceremony of making feoffments has been the same during all this period, the courts of judicature, and the writers upon our laws, have, during all this period, agreed in ascribing to them the effect and operation in question. Their language

Sect. 630.

ET nota, que ascuns font discontinuances pur terme de vie. Sicome tenaunt en le taile fait un lease pur terme de vie, savant le reversion a luy auxy longement que le reversion est al tenant en taile, ou a ses beires; ceo n'est discontinuance, forsque durant la vie le tenant a terme de vie, &c. Et si tiel tenant en taile dona les tenements a un auter en taile, savant le reversion, donques ceo est discontinuance durant le second taile, &c.

AND note, that some make discontinuances for terme of life. As if tenant in tayle make a lease for life, saving the reversion to him as long as the reversion is to the tenaunt in tayle, or to his heyres; this is no discontinuance but during the life of tenant for life, &c. And if such tenant in taile giveth the lands to another in tayle, saving the reversion, then this is a discontinuance during the second tayle, &c. (1. Roll. Abr. 631.)

THIS is manifest, and hath beene handled before, and needeth no explanation; onely this is to be observed, where *Littleton* putteth hereafter cases of discontinuances by feoffment, &c. he hath a double entendment. First, by feoffment, or by any other conveyance which may make a discontinuance. Secondly, (&c.) implieth a discontinuance by a gift in taile, or a lease for life, &c.

Sect. 631.

MES lou le tenant en taile fait un lease pur terme d'ans, ou pur terme de vie, le remainder a un auter en fee, et delivra liverie de seisin accordant, ceo est discontinuance en fee, pur ceo que le fee simple passa per force de liverie de seisin, &c.

BUT where the tenant in tayle maketh a lease for yeares or for life, the remainder to another in fee, and delivereth liverie of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the liverie of seisin, &c.

This is evident also, and hereof sufficient hath beene spoken before.

Sect. 632.

ET est ascavoir, que ascuns tiels discontinuances font fait sur condition, &c. et pur ceo que les conditions sont enfreints, &c. ou pur

AND it is to be understood, that some such discontinuances are made upon condition, &c. and for that the conditions be broken, &c. or for

DISCONTINUANCES fait sur condition, &c. Here is to be understood a diversitie betweene a condition in deed, whereof *Littleton* here speaketh, and a condition in law, whereof somewhat hath beene said before in this chapter, viz.

guage in this respect is perfectly uniform, that no freehold is required in the feoffor, and that however tortious or slender his possession may be, his feoffment, necessarily and unavoidably, gives an estate of freehold to the feoffee. Nothing can be more decisive on this subject, than the following passages transcribed from *Bracton*:—*Poterit autem res esse omnino aliena, & ex toto, quantum ad jus & proprietatem, & feodum, & liberum tenementum, usum fructum, & nudum usum; & aliquis posuerit se in feysnam, per disseysnam, vel per intrusionem, cum sorte invenerit rem vacantem. Et si talis, dum ita fuerit in feysina, donationem fecerit, valebit quantum ad ipsum, & feoffatum suum, & alios, qui jus non habent, ut prius dictum est, donec per illum, qui jus habet, revocetur. Item poterit esse aliena, quantum ad omnia predicta, et alicujus in possessione existentis, quoad nudum usum, vel quoad hoc, quod servitutem habeat in re, quoad usum fructum percipiendum, sive ad certum terminum vel ad voluntatem. Item quoad hoc, quod habeat custodiam, vel curam, vel hujusmodi; in quibus casibus, si dum sic fuerit in feysina, quali quali, donationem fecerit, statim fit res data accipientis, quoad dantem & accipientem, & quoad alios, qui jus non habent. Sed quoad verum dominum, nunquam erit liberum tenementum, nisi ex longa & pacifica feysina, & unde si incontinenti post tale feoffamentum possit verus dominus ponere se in feysnam, omnes quoscunque tenere possit exclusus a possessione.—Sed quid dicatur de eo qui nullam omnino feysnam habuit, nec aliquid juris scintillam, si donationem fecerit de re quam alius tenet, per se ipsum vel per alium nomine suo, non faciet rem accipientis, cum ipse nihil teneat, quia non potest plus juris ad alium transferre quam ipse habet, nec plus valebit ista donatio quam valeret si aliquis transiens per aliquod manerium ab aliquo possessum, diceret socio suo viatori, Do tibi tale manerium, quod talis possidet, quia nihil aliud esset dicere quam dare ei plenam pugnatam ex nihilo, cum possessio non sit vacua.—Bract. lib. 2. c. 14.—Si fiat donatio de re aliena.—So, in another place: Item licet liberum tenementum non habuerit, potest facere quis, dum tamen in feysina fuerit aliqua iusta de causa, sicut ad terminum annorum, vel ratione custodie. Idem erit, si nullam iustam causam habuerit, ut si per intrusionem vel disseysnam; et cum sit in feysina alius donare poterit, licet non cum effectu et aliis per donationem facere liberum tenementum, quod quidem ipse non habuerit.—Ibid. lib. 2. c. 5. § 4.—It seems to be clear from these passages, that in *Bracton's* time, every person who had the possession, however slender his possession might be, as termor for years, tenant at will, or guardian; or however tortious his possession might be, as a disseisor or intruder; was nevertheless considered to be in the seisin of the fee, and might by livery transfer it to another. *Bracton* frequently repeats this doctrine, and illustrates it by many examples in the course of the second book.—Such is the account given by *Bracton* of the operation of feoffments; and as the account given by him of the form of feoffments has been contrasted with the account given of it by *William Blackstone*, the reader is desired to contrast the above account given by him of the operation of feoffments with the account given of it by *Edward Coke*, ant. 48. b. and 49. a. He expresses himself to the same effect in his 2d Inst. fol. 413. Commenting on the statute of Westminster 2. cap. 2. he observes, that though the act speaks of an alienation by feoffment by a tenant for years, yet*

(Ant. 335. a.)

viz. where the feme is tenant for life, and the husband maketh a feoffment in fee, and the lessor entreth for the condition in law.

Conditions sont enfreints, &c. Here is implied, or any cause given either by disability of the feoffees, or by any condition performed on the part of the feoffor, or otherwise, whereby the state is in any sort avoided.

(1. Rep. 59.)

Come si le baron soit seisi de certain terre en droit sa feme, &c.

Here it appeareth, that for the condition broken, the heire of the husband may enter; for albeit no right descend from the husband to his heire, yet the title of entry by force of the condition which the husband created upon the feoffment, and reserved to him and his heirs, doth descend to his heire; and *Littleton* saith truly, that so it hath been adjudged.

4. H. 6. 2. 9. H. 7. 24. b. Lib. 8. fol. 43, 44. Whittingham's case.

(Ant. 12. b. 46. b. 202. a.)

Sur le heire. Note, when the heire in this case hath entred for the condition broken, and hath avoided the feoffment, the estate of the

*autres causes, selonque le course de la ley, tiels estates sont defeatés, donques sont les discontinuances defeatés, et ne tollent aucun home per force de eux de son entrie, &c. * Come si le baron soit seisi de certaine terre en droit sa feme, et fait feoffement en fee sur condition, et devie, si le heire apres enter sur le feoffee pur le condition enfreint, l'entrie la feme est congeable sur le heire, pur ceo que per l'entrie del heire le discontinuance est defeat, come est adjudge.*

other causes, according to the course of law, such estates are defeated, then are the discontinuances defeated, and shall not by force of them take any man from his entrie, &c. As if the husband be seised of certaine land in right of his wife, and maketh a feoffment in fee upon condition, and dyeth, if the heire after enter upon the feoffee for the condition broken, the entrie of the wife was congeable upon the heire, for that by the entry of the heire the discontinuance is defeated, as is adjudged.

the feme or her heirs, without any entry or claime by her or them; for the heire entreth in respect of the condition, upon the reall contract, and not of any right, as hath been said; and if the husband himselfe had re-entred, the state had vested in his wife: and therefore where *Littleton* and our bookes say, that the wife shall enter upon the heire, the meaning is, that after the re-entry of the heire she may enter.

Whittingham's case, ubi supra.

Sect. 633.

Whittingham's case, ubi supra.

THE reason here rendered by *Littleton* is, for that the husband cannot enter in his owne right, but in the right of his wife; and the heire of the husband cannot enter, for no right or title descends unto him, and the wife in this case shall take benefit of the nonage of her husband, and enter into the land.

If an infant be tenant for another man's life, and make a feoffment in fee, and *cestuy que vie* dieth, the infant himselfe shall not enter, because he hath no right at all.

ITEM, si feme inheritrix que ad un baron, quel baron est deins age, et il esteant deins age fait un feoffment de les tenements son feme en fee, et morust, il ad este question, si la feme poit enter, ou non, &c. Et il semble a ascuns, que l'entry la

ALSO, if a woman inheritrix hath a husband who is within age, and hee beeing within age maketh a feoffment of the tenements of his wife in fee, and dieth, it hath beene a question, if the wife may enter or not, &c. And it seemeth to some, that the

* The remaining part of the above Section is not in L. and M. nor Roh. nor in Pynson, nor MSS. But in all, the case of the grandfather, father, and son, Sect. 637. is here inserted, with some small variation.

yet it extends to tenants by statute-merchant, statute-staple, tenant at will, and tenant by sufferance; because all these have a possession. But he observes, that it is otherwise of a bailiff, for he has no possession at all.—Several other authorities will be offered to prove this point in a subsequent part of this note; one more authority only shall be mentioned here. Mr. Knowler in his argument for the defendant in the case above referred to, seems, with reason, to lay great stress upon it. It is 10. Ed. IV. 8, 9. In trespass, the defendants said, that one *M.* was seised in his demesne as of fee, and leased to him for his life. The plaintiff said, that long before *M.* had any thing in the land, *D.* was seised in fee, and leased to *E.* for life; that *E.* died, and thereupon the reversion descended upon *Jane* his daughter, who married *M.*; that *M.* granted the reversion to the defendant for life; that the tenant attorned; that *M.* died, and then *Jane* granted the reversion to the plaintiff, and the tenant attorned; whereupon he (the plaintiff) entered, and was seised till the defendant made the trespass without this, that *M.* whom the defendant supposes to have leased to him, was seised in his demesne as of fee. It is to be observed, that the leases mentioned here, being for lives, were necessarily created by livery. The question before the court therefore was, Whether want of seisin in a feoffor was a good plea? All the judges held it was not; and that the plaintiff should have pleaded generally *ne lessu pas*. And *Littleton* expressly says there, that if a man pleads a feoffment, it is no plea to say, that the feoffor had nothing at the time; he can only plead *n'enfeoffa pas*.—Here then we have the most decisive evidence, that from the reign of Henry II. to the present time, the courts of judicature and the writings of the professors of the law are perfectly agreed, in considering feoffments as made with the same ceremonies, and attended with the same efficacy and operation. It follows from this, that it can be no argument against their having the efficacy and operation contended for in the particular instance now in question—that at a period anterior to that mentioned here, they were made (if that really was the case) with more notoriety and ceremony than they are now.—As to the second objection, that the passages in the books which speak of tenants for years and others having estates less than of freehold, creating estates of freehold in the feoffee by disseisin, are to be understood as referring only to a disseisin by election;—lord Mansfield, on his entering into this part of the argument, observes, that the precise definition of what constituted that disseisin which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but that it is not now to be found. Most unquestionably there are many cases in which it would now be difficult, perhaps impossible, to say with certainty, whether they amounted to an actual disseisin, according to the doctrine of the old law; yet surely many cases may be stated, which by the most conclusive and satisfactory reasoning may be shewn to be actual disseisins, according to that law. Perhaps the following observations may serve to establish a general rule for distinguishing those acts which amount to actual disseisins, from those which

*feme apres la mort sa baron, est congeable en cest cas. Car quant sa baron feasoit tiel feoffment, &c. il pouvoit bien enter, nient contri-
stant tiel feoffment, &c. durant la couverture; et il ne pouvoit enter en son droit demesne, mes en le droit la feme: ergo, tiel droit que il avoit d'entrer en droit sa feme, &c. cest droit d'entrer demurt al feme apres son decease.*

entrie of the wife after the death of her husband, is congeable in this case. For when her husband made such feoffment, &c. he might well enter, notwithstanding such feoffment, &c. during the couverture; and he could not enter in his owne right, but in the right of his wife: ergo, such right as hee had to enter in the right of his wife, &c. this right of entrie remayneth to the wife after his decease.

If the husband within age take to wife some tenant in taile generall, and the husband make a gift in taile and dieth within age, in this case the wife may enter, as *Liverton* here holdeth, or the heire of the husband in respect of the new reversion descended unto him may enter. But if the heire enter, presently thereupon his estate vanisheth. If tenant in taile being within the age of one and twenty yeeres make a feoffment in fee, and after is attainted of felony and dieth, the entry of the issue is not lawfull; for his entry is not lawfull in respect of his estate only, but of

his blood also which is corrupted; and therefore in that case he is driven to his *formdon*.

If husband and wife be both within age, and they by deed indented joyne in a feoffment reserving a rent, the husband dieth, the wife may enter, or have a *dum fuit infra etatem*. But if she were of full age, she shall not have a *dum fuit infra etatem*, for the nonage of her husband, albeit they be but one person in law.

(8. Rep. 43.)

14. E. 3. Bre. 281. 14. E. 3.

Dum fuit infra etatem 6.

F. N. B. 192.

(1. Roll. Abr. 634.)

Sect. 634.

ET il y ad este dit, que si deux joyntenants esleants deins age font un feoffment en fee, et l'un des enfants devy, et l'auter survesquist; entant que les ambideux enfants puissent enter joyntment en leur vies, cel droit accruist tout a luy que survesquist, et pur ceo celuy que survesquist poit enter en l'entiertie, &c. Et auxy l'heire le baron que fist le feoffment deins age ne poit enter, &c. pur ceo que nul droit descendist a tiel heire en le cas avantdit, pur ceo que le baron n'avoit unques riens forsque en droit de sa feme, &c.

AND it hath beene said, that if two joyntenants being within age make a feoffment in fee, and one of the infants die, and the other surviveth; in as much as both the infants might enter joyntly in their lives, this right accrueth all to him which surviveth, and therefore hee that surviveth may enter into the whole, &c. And also the heire of the husband which made the feoffment within age cannot enter, &c. because no right descendeth to such heire in the case aforesaid, for that the husband had never any thing but in right of his wife, &c.

POIT enter en l'entiertie, &c.

And the reason hereof is implied in this (&c.) for that they may joyne in a writ of right, and therefore the right shall survive. But they cannot joyne in a *dum fuit infra etatem*, because the nonage of the one is not the nonage

21. E. 3. 50. 18. E. 2. Bre. 831.

6. E. 3. 4. 9. H. 6. 6. 1. H. 6. 6.

39. H. 6. 42. 34. H. 6. 31.

F. N. B. 192.

which are such only at the election of the party. By a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised, may, if he please, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election, is no disseisin till the party in question, by his election, makes it such. It follows therefore, that every act which is said by the writers to produce an immediate disseisin, necessarily implies an actual disseisin. Now we find, that the disseisins produced by feoffments instantly gave the feoffee, against every person but the disseisor, an immediate estate of freehold, with all the rights and incidents annexed to it. To this effect Bracton writes, lib. 2. ch. 5. § 3. *Item valida poterit esse donatio statim ab initio inter quasdam personas, et invalida et suspensa quantum ad alias personas, ut si quis rem alienam dederit alicui, ut supra dictum est.* Hence we find every where, that the wife of the feoffee became immediately intitled to her dower; the husband of the feoffee became immediately intitled to his curtesy; and the descent upon the heir of the feoffee immediately took away the entry of the disseisor. This is the constant language of the books, when they speak generally of disseisins. Now the books make no difference, whether the feoffment is made by a person seized of an estate of freehold, or by a person having only the bare possession, as tenant for years, at will, or by sufferance. The description given by Bracton in the passages cited from him, answers every notion given by lord Mansfield of an actual disseisin. Bracton says, that immediately upon the feoffment the estate becomes the property of the feoffee, as between him and the feoffor, and every other person, except the rightful owner; that a long and uninterrupted possession of a certain duration, will make the title of the feoffee good even against the rightful owner; that, to prevent this, the donor must restore his own seisin.—Here then is what his lordship so justly considers as necessarily requisite to form an actual disseisin—a person who has expelled the tenant from his fee, and usurped his feudal place and relation; a tenant to the *præcipe* of every demandant, though the true owner's right of entry upon him is not taken away. If the feoffee in this case were only a disseisor at the election of the disseisor, it would follow, that he was not a disseisor till the right owner made him such by his election, and therefore, that the fee would not be in him, if the rightful owner did not elect to make him a disseisor. According to this doctrine, if the feoffee of tenant for years, or any other person making a feoffment without an estate of freehold in him, died in the life of the rightful owner of the estate, the estate would not be subject to dower or curtesy, nor would the entry of the rightful owner be taken away. But we find, that in all cases in which our law-writers treat of disseisins made by feoffments, they consider it as a matter of course, that the estate of the feoffee, immediately, became an estate of freehold, with all the qualities and rights of a freehold estate annexed to it. A similar argument lies from the relation in which such a feoffee stood with respect to strangers. Bracton observes, that he immediately acquired the seisin of the fee as against strangers; which could not be, if he were only a disseisor at the election of the party. It has been observed before, that the books make no difference between feoffments made by persons having estates of freehold, and feoffments

Lib. 3. Cap. 11. Of Discontinuance. Sect. 635, 636.

See of this in the Chapter of Joyntenants.
(8. Rep. Whittingham's case.)

nonage of the other. In this case, if one joyntenant had made a feoffment in fee and died, the right should not have survived, for the joynture was severed for a time. If two joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the infant shall enter, or have a *dum fuit infra etatem* but for the moitie.

Sect. 635.

(F. N. B. 192. a. 5. Rep. 27. 29.
6. Rep. 3. 9. Rep. 84. b.
8. Rep. 42.)

ET auxy quant un enfant fait un feoffment esteant deins age, ceo ne luy greevera ne ledra, mes que il poit enter bien, &c. car ceo serroit encounter reason, que tiel feoffment fait per celuy que ne fuit able de faire tiel feoffment, greevera ou ledra auter, de toller eux de lour entre, &c. Et pur ceux causes il semble a ascuns, que apres la mort de tiel baron issint esteant deins age al temps de le feoffment, &c. que sa feme bien poit enter, &c.

AND also when an infant make a feoffment being within age, this shall neither grieve nor hurt him, but that hee may well enter, &c. for it should be against reason, that such feoffment made by him that was not able to make such a feoffment, shall grieve or hurt another, to take them from their entry, &c. And for these reasons it seemeth to some, that after the death of such husband so being within age at the time of the feoffment, &c. that his wife may well enter, &c.

Bracl. fol. 14. Britton fol. 88. a.
Fleta lib. 3. cap. 3.
(Poll. 350. b. 380. b.)

MES que il poit enter bien, &c. Here is implied, that he might enter either within age, or at any time after full age, and likewise after his death his heire may enter. *Meliorum enim conditionem facere potest minor deterorem nequaquam.*

Nota. A speciall heire shall take advantage of the infancie of the ancestor. As if tenant in taile of an acre of the custome of borow English make a feoffment in fee within age, and dieth, the youngest sonne shall avoid it; for he is privie in blood, and claimeth by descent from the infant.

(8. Rep. 54. Ant. 12. a.)

And so if tenant in taile to him and the heires females of his bodie make a feoffment in fee and dieth within age, having issue a sonne and a daughter, the daughter shall avoid the feoffment. And so note, that a cause to enter by reason of infancie is not like to conditions, warranties, and estoppels, which ever descend to the heire at the common law.

The residue of this Section upon that which hath beene said is evident.

Sect. 636.

(Ante 218. b. Perk. 581.
2. Roll. Abr. 494.)

SURRENDER, sursum redditio, properly is a yeelding up of an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them. (1)

ITEM, si feme enkeritrix prent baron, et ont issue fite, et le baron morust, et el prent auter baron, et le second baron lessa la terre que il ad en droit sa feme a un au-

ALSO, if a woman inheritrix taketh husband, and they have issue a sonne, and the husband dieth, and she takes another husband, and the second husband letteth the land which he

ter

(1) A surrender differs from a release in this respect, that the release operates by the greater estate's descending upon the less:—a surrender is the falling of a less estate into a greater. As there is necessarily a privity of estate between the surrenderor and the surrenderer, no livery of seisin is necessary to a perfect surrender. See 2. Bla. Com. ch. 20.—In *Thompson v. Leach*, 2. Salk. 618. the court held, that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and that, tho' it be true, that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied; that a gift imports a benefit; that an assumpsit to take a benefit may well be presumed; and that there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property; or sealing of a bond to another in his absence, should be the obligee's bond, immediately without notice.

made by persons having estates less than freehold. Bracton expressly mentions guardians, tenants for years, by sufferance, at will, by disseisin, or intrusion, as persons whose feoffments are attended with the effect described above. So does sir Edward Coke, in the passage cited from the 2d Institute. So Perkins, sect. 222. "If lessee for years enfeoff a stranger, the lessor being upon the land, yet the land shall pass by the feoffment; but perhaps, if he continues upon the land, claiming the same after the feoffment, this countervails an entry for a forfeiture: and the reason why it passed by such a feoffment, is, because the lessor had nothing to do, to meddle with the possession of the land during the term." So Dyer, 362. b. A termor for 1000 years made a feoffment, by the words *dedi, concessi, et feoffavi*. It was made a doubt, whether the lands passed by the feoffment, so that the lessor might enter for the forfeiture; or whether the term passed by the first words. The very doubt shews that it was taken for granted, that without those words the freehold would vest in the feoffee. In the margin of that case it is said, that in the case of *Read and Morpeth v. Errington* (reported in Cro. Eliz. 322.) it was held, that the lessee for years might make a feoffment, notwithstanding the presence of the lessor; and that it was a forfeiture of the lease; for though the lessee had the possession and might dispose of it, yet the lessor might enter for the forfeiture. Thus, in the case of *Blundell v. Baugh*, sir William Jones 315. the judges held, that when tenant at will makes a lease rendering rent, and he enters and pays rent, that is no disseisin, but at the election of the first lessor; for, say they, it never shall be a disseisin, unless there be the claim of a stranger by entry to have the freehold, or unless the owner of the land waives the occupation of the land, or brings an action, or otherwise declares his intention, that he takes it by disseisin. Here the two kinds of disseisin are contrasted in the most direct and positive manner. The judges also, in the case of *Blundell v. Baugh*, cited Matthew Taylor's case, 34. Eliz. C. B. Tenant at will, or for years, makes a feoffment in fee, and dies, his wife brings dower against the feoffee, who pleaded *ne unque seise que dower*: but the whole court was against him; for in the instant the fee was gained. In 12. Edw. IV. 12. ant. 31. b. Cro. Jac. 615. that doctrine is controverted, on the ground that the seisin of the feoffor was but momentary: but this proves the position attempted to be established here; for if the feoffment

*ter pur terme de sa vie, et puis la feme morust, et puis le tenant a terme de vie surrendist son estate a le second baron, &c. quære, si le fite le feme poit enter en cest cas sur le second baron durant la vie le tenant a terme de vie, * &c. Mes il est cleere ley, que apres la mort le tenant a terme de vie, le fite la feme poit enter; pur ceo que le discontinuance, que fuit tantsolement pur terme de vie, est determine, &c. per la mort de mesme le tenant a terme de vie †.*

Michaelmasse next, this future interest cannot be surrendered, because there is no reversion wherein it may drown; but by a surrender in law it may be drowned. As if the lessee before *Michaelmasse* take a new lease for years either to begin presently, or at *Michaelmasse*, this is a surrender in law of the former lease. *Fortior & æquior est dispositio legis quàm hominis* (2)

Also there is a surrender without deed, whereof *Littleton* putteth here an example of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yielding, or a restoring of the state againe to him in the immediate reversion or remainder, which are alwayes favoured in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot commence without deed, and by consequent the estate cannot be surrendered without deed. But in the example that *Littleton* here putteth, the estate might commence without deed, and therefore might be surrendered without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendered without deed, in respect of the nature and qualitie of the thing demised, because the particular estate might have beene made without deed; and so on the other side. If a man be tenant by the courtiesse, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and qualitie of the thing that lies in grant, it cannot be surrendered without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. See in my Reports plentifull matter of surrenders.

Quære, si le fite la feme poit enter, &c. Here *Littleton* maketh a *quære*. So as grave and learned men may doubt, without any imputation to them; for the most learned doubteth most, and the more ignorant for the most part are the more bold and peremptory. It is holden of some, that after the surrender the issue in taile during the life of tenant for life may enter; for that having regard to the issue, the state for life is drowned, and consequently the inheritance gained by the lease is by the acceptance of the surrender vanished and gone: as if tenant in taile make a lease for life, whereby he gaineth a new reversion (as hath beene

Note, there be three kinde (Ant. 218. b.) of surrenders, viz. a surrender properly taken at the common law, which is here before described, and whereof *Littleton* speaketh. (1) Secondly, a surrender by custome of lands holden by copy, or of customary estates, whereof you have read before, *Sec. 74.* and a surrender improperly taken (as appeare before, *Sec. 550.*) of a deed. And so of a surrender of a patent, and of a rent newly created, and of a fee simple to the king.

A surrender properly taken is of two sorts, viz. a surrender in deed, or by expresse words, (whereof *Littleton* here putteth an example) and a surrender in law wrought by consequent by operation of law. *Littleton* here putteth his case of a surrender of an estate in possession, for a right cannot be surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for yeares to begin at

(9. Rep. 75.)
2. Eliz. Dier. 176. 14. H. 7. 3.
27. Aff. 37. 49. E. 3. 2.
11. H. 4. 2. 12. H. 4. 21.
13. H. 4. 13.

14. H. 8. 15. 37. H. 6. 17.
21. H. 7. 6. 40. E. 3. 24.
31. Aff. 26. 50. E. 3. 6.
44. Aff. 3. 35. H. 8. Dier 37.
8. Aff. 20. 4. Ma. Dier. 141.
11. Eliz. Dier. 280.

6. H. 7. 9. 37. H. 6. 17.
21. H. 7. 6. 14. H. 7. 4.
Lib. 6. f. 69. Sir Moyle Finche's case.
(5. Rep. 11. 1. Leo. 323.
4. Rep. 53.)

(10. Rep. 67. 6. Rep. 69.
Cro. Jac. 84. 2. Roll. Abr. 494.
Ant. 47. b. Dyer 58.)
19. H. 6. 33. 27. Aff. 46.
14. H. 7. 4. 1. H. 6. 1.
Pl. Com. 541.

(Ant. 225. b. Cro. Car. 399;
2. Roll. Abr. 498.)

(10. Rep. 66, 67.)

* &c. not in L. and M. nor Roh.

† &c. added L. and M. and Roh.

(1) By the stat. 29. Cha. II. c. 3. sect. 3. no lease, &c. either of freehold or term of years, or any uncertain interest, not being copyhold or customary interest, shall be surrendered, unless it be by deed or note in writing, signed by the party surrendering the same, or his agents thereunto lawfully authorized by writing, or by act and operation of law. Upon this statute it was held, by lord chief-baron Gilbert, in *Magennis v. Macculloch*, Gilb. Ca. in Eq. 236. that a lease for years cannot be surrendered by cancelling of the indenture without writing; because the intent of that statute was to take away the manner they formerly had of transferring interests to lands, by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment was a sign of passing the freehold, before the statute, but is now taken away by the statute; so the cancelling of a lease was a sign of a surrender, before the statute, but is now taken away, unless there be a writing under the hand of the party. In *Farmer v. Rogers*, 2. Will. p. 27. it was held, that the statute does not make a deed absolutely necessary to a surrender; for it directs it to be made either by deed or note in writing; and when it is made by a note in writing, there is no occasion for any stamp-duty, it not being a deed. But see 23. Geo. III. c. 58. sect. 1.

(2) For the first lease and the second cannot subsist together, and the parties, by making a contract of as high a nature for the same thing, tacitly consented to dissolve the former; for without the dissolution of that, the lessor could not grant to the lessee that interest which was already passed from the lessor to the lessee by the first lease. Note to the 11th edition.

feoffment in this case only gave a freehold at the election of the reversioner, the feoffor had no seisin. The same doctrine seems to be laid down very expressly by lord Hardwicke. Having occasion to mention a fine levied by tenant at will, he says, "If they meant a wrong thereby, they must have taken another method; as this could not work a disseisin on the trustees, and turn their estate to a right, while they were tenants at will to the trustees. This way indeed they might do it, according to the distinction taken in several cases, particularly in *Dormer* and *Parkhurst*, if they executed a feoffment on the land; because it is a feoffment on livery which is a notoriety to the trustees, and puts it on them to make entry to avoid." In the same manner, 3. Atk. 339. his lordship says, "If a man enters as my tenant, he does not gain such a possession to levy a fine thereon, unless he continues in possession; for a wrong-doer to gain a possession by disseisin, must not step on the land, and withdraw, and leave the rightful owner in possession, which would be sufficient to give a seisin on a feoffment, but not to levy a fine."—In every stage of our law, the most modern as well as the most antient, the peculiar operation of a feoffment, as to the divesting of estates, destruction of contingent remainders, and extinction of powers, has been recognised. Citations and arguments to prove the point before us, might be easily multiplied; but they shall be concluded here, by some observations upon the allowed effect of a fine levied by a tenant for years, or even by a tenant at sufferance, who has previously made a feoffment. No point of our law is more clearly settled, than that, unless some

21. H. 6. 53.
(Ant. 185. 8. Rep. 145.)

45. E. 3. 13. 5. H. 5. 9.
9. E. 4. 18.

40. E. 3. 13. 9. E. 4. 18.
1. H. 6. 1. 24. E. 3. 77.
5. H. 5. 8. 26. Aff. 38.
7. H. 6. b.
(6. Rep. 79. 7. Rep. 38.
Ant. 184. b.)

(Ant. 234)
48. E. 3. 16.
(Mo. 94.)

(Flo. Com. 198.)

(4. Leo. 37. Hob. 3.)
Adjudge Mich. 16. & 17. Eliz.
int. Turner pl. & Gray def. in
ejectione firmæ in communi
banco Rot. 945. Sir Francis
Fleming's case.
[a] 6. H. 4. 7. Pl. Com. 418.

[b] 32. H. 8. Br. surrender 52.
(2. Cro. 275. Mo. 54.)

Vide Sect. 638.
(1. Roll. Abr. 634.)

beene said) if tenant for life surrender to the tenant in taile, the estate for life being drowned, the reversion gained by wrong is vanished and gone, and he is tenant in taile againe against the opinion *Obiter* of *Portington*, 21. H. 6. 53.

But herein are two diversities worthy of observation. The first is, that having regard to the parties to the surrender, the estate is absolutely drowned, as in this case betwene the lessee and the second baron. But having regard to strangers, who were not parties or privies thereunto, left by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance. (1) As if a reversion be granted with warrantie, and tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger during the life of tenant for life; for this surrender shall worke no prejudice to the grantor who is a stranger.

So if tenant for life surrender to him in reversion being within age, he shall not have his age; for that should be a prejudice to a stranger, who is to become demandant in a reall action.

If tenant for life grant a rent charge, and after surrender, yet the rent remaineth, for to that purpose he commeth in under the charge. *Causâ quâ supra.*

If a bishop be seised of a rent charge in fee, the tenant of the land enfeoffe the bishop and his successors, the lord enter for the mortmaine, he shall hold it discharged of the rent; for the entrie for the mortmaine affirmeth the alienation in mortmaine, and the lord claimeth under his estate; but if tenant for life grant a rent in fee, and after enfeoffe the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claime above the feoffment. But if I grant the reversion of my tenant for life to another for terme of his life, and tenant for life attorne, now is the waste of tenant for life dispunishable. (2) Afterwards I release to the grantee for life and his heires, or grant the reversion to him and his heires; now albeit the tenant for life be a stranger to it, yet because he attorned to the grantee for life, the estate for life which the grantee had shall have no continuance in the eye of the law as to him, but he shall be punished for waste done afterward.

The second diversity is, that for the benefit of an estranger the estate for life is absolutely determined. As if he in the reversion make a lease for yeares, or grant a rent charge, &c. and then the lessee for life surrender, the lease or rent shall commence *maintenant*. So in the case of *Littleton*, first, betwene the lessee and the second husband, the state for life is determined; and secondly, for the benefit of the issue it shall be so adjudged in law. Here note a diversity, when it is to the prejudice of a stranger, and when it is for his benefit.

If a man maketh a lease to A. for life, reserving a rent of 40 shillings to him and his heires, the remainder to B. for life, the lessor grant the reversion in fee to B. A. attorne, B. shall not have the rent; for that although the fee simple doe drowne the remainder for life betwene them, yet as to a stranger it is *in esse*; and therefore B. shall not have the rent, but his heire shall have it.

A master of an hospitall being a sole corporation, by the consent of his brethren makes a lease for yeares of part of the possessions of the hospitall; afterwards the lessee for yeares is made master, the terme is drowned; for a man cannot have a terme for yeares in his owne right and a freehold *in auter droit* to consist together (as if a man lessee for yeares take a feme lessor to wife). (3) [a] But a man may have a freehold in his owne right and a terme *in auter droit*; and therefore if a man lessor take the feme lessee to wife, the terme is not drowned, but he is possessed of the terme in her right during the coverture. [b] So if the lessee make the lessor his executor, the terme is not drowned. *Causâ quâ supra.* (4)

But if it had beene a corporation aggregate of many, the making of the lessee master had not extinguished the terme, no more than if the lessee had beene made one of the brethren of the hospitall.

* Sect. 637.

UN foits. Here it is to bee observed, that it is not necessary that the tenant in taile bee ever seised of an estate taile at the time when the discontinuance of the whole estate is begun: as if tenant in taile make a lease [*NOTA, que un estate taile ne peut estre discontinue, mes la ou cestuy que fait le discontinuance fuit un foits seise per force de le taile, sinon*] NOTE, that an estate taile cannot bee discontinued, but there where hee that makes the discontinuance was once seised by force of the taile, unless it be *que*

* The part of this Section within crotchets is not either in L. and M. nor Roh. nor MSS. and the remainder of this Section in those copies immediately follows (with a small variation) that part of the work which is distinguished by Sect. 632.

(1) On the surrender of terms of years by one termor for years to another termor for years, see *Hughes v. Robotham*, 1st Cro. 302.

(2) See note 2. ante 218. b.

(3) *Cont. Lichden v. Winimore*, 1. Roll. Abr. 954.

(4) Mergers were never favoured in courts of law, and still less in courts of equity. Hence, even in a very early period of the equitable jurisdiction of the court of chancery, it was admitted, that a fine or feoffment to lessee for years to the use of a stranger, did not extinguish the term; because the *cestui que use* had no method to compel the execution of it, but thro' the medium of the court of chancery; and the court would not compel him to execut it, to his own prejudice, during the continuance of the term. The statute of uses expressly saves the rights of the feoffee to the use; this preserves him the benefit of any terms which may be vested in him. Even where a termor for years was made a tenant to the *præcipe*, it was determined, that the momentary freehold vested in him, for the purpose of making him tenant, did not extinguish the term. Cro. Jac. 643. It is however dangerous to make feoffees or releasees to uses, trustees for terms of years, if they are also trustees for preserving contingent remainders; for if they should have occasion to enter for the forfeiture of the tenant for life, it may be made a question, whether, at least in law, that would not be a merger of their term.

some one of the parties to a fine has an estate of freehold in the lands, of which it is levied, it is totally void, as to all strangers, and may be avoided at any time by the plea, *quod partes finis nihil habuerunt*. Now, supposing a tenant for years to make a feoffment, and the feoffee afterwards to levy a fine, it is clear, that the fine would be without effect, unless the feoffment gave him an estate of freehold. In the case of *Whaley v. Tancred*, 1. Vent. 241. Sir Thomas Raymond, 219. 1. Leo. p. 2. 52. it was settled, that where a fine is levied in this manner, the fine will bar the lessor at the end of five years after the expiration of the term. This would never be the case unless the feoffment had previously created an estate of freehold.—In the case of *Doc v. Proffer*, Cowp. 217. Lord Mansfield expressed himself as follows:—"It is very true that I told the jury, they were warranted by the length of time in this case, to presume an *adverse* possession and *ouster* by one of the tenants in common, of his companion; and I continue still of the same opinion. Some ambiguity seems to have arisen from the term "*actual ouster*," as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over under circumstances will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of "one

que soit per reason de garrantie, &c. Come] si soit aiel, pier, et fits, * et l'ayel soit tenant en taile, et est disseise per le pier que est son fits, et le pier fait un feoffment de ceo sans garrantie et devie, et puis l'ayel devie, le fits bien poit enter sur le feoffee, pur ceo que ceo ne fuit pas discontinuance, entant que le pier ne fuit seise per force de le taile al temps del feoffment, &c. mes fuit seise en fee per le disseisin fait al ayel.

by reason of a warranty, &c. As if there be grandfather, father, and son, and the grandfather is tenant in taile, and is disseised by the father who is his son, and the father maketh a feoffment of this without warranty and die, and afterwards the grandfather dies, the son may wel enter upon the feoffee, because this was no discontinuance, inasmuch as the father was not seised by force of the entaile at the time of the feoffment, &c. but was seised in fee by the disseisin of the grandfather.

for life, whereby he gaineth, as hath been said, a fee simple by wrong; in this case if he grant the reversion in fee, and the lessee dieth, the whole estate is discontinued; and yet at the time of the grant (by which the discontinuance continueth) hee was not seised by force of the taile; and therefore *Littleton* materially added these words (*un feits*) that is, that hee was once seised by force of the estate taile: and seeing that (as hath been said) a discontinuance is a privation, the rule of law agreeth well with the rule of philosophie, that *omnis privatio presupponit habitum*. and therefore he cannot discontinue that estate which he never had.

Sinon que il soit per reason del garrantie, &c. For in many cases a warrantie added to a conveyance is said to make a discontinuance *ab*

Vide Sect. 592. 596, 597 601. 640. 658.

effectu, although he that made the conveyance was never seised by force of the estate taile, because it taketh away the entrie of him that right hath, as a discontinuance doth. As if tenant in taile be disseised and dieth, and the issue in taile release to the disseisor with warrantie; in this case the issue was never seised by force of the taile; and yet this hath the effect of a discontinuance by reason of the warrantie, and the reason hereof appeareth before in this Chapter.

9. E. 4. 19. 12. E. 4. 11. 21. E. 4. 97.

Le fits poit enter. But if the father that made the feoffment had survived the grandfather, he should never have entred against his own feoffment; but albeit the father had survived, yet after his decease the sonne should have entred, for the reason here yeilded by *Littleton*. But if the feoffment had beene with warrantie, then it had wrought the effect of a discontinuance; and therefore *Littleton* saith *sans garrantie*, without warrantie.

15. E. 4. Discont. 30. & entr. Cong. 21. 21. E. 4. 97. 9. E. 4. 19. 39. H. 6. 45. 21. H. 6. 52. 12. E. 4. 11. 1. Mar. Dier. 98. (Ant. 265.)

Sect. 638.

ITEM, si tenant en taile fait un lease a un auter pur terme de vie, et le tenant en taile ad issue et devie, et le reversion descendist a son issue, et puis l'issue granta le reversion a luy descendue, a un auter en fee, et le tenant a terme de vie attourna † et devie, et le grantee del reversion enter, &c. et est seise en fee en la vie del issue, et puis issue en le taile ad issue fits et devie, il sem-

ALSO, if tenant in taile make a lease to another for terme of life, and the tenant in taile hath issue and dieth, and the reversion descendeth to his issue, and after the issue granteth the reversion to him descended, to another in fee, and the tenant for life attorne and die, and the grantee of the reversion enter, &c. and is seised in fee in the life of the issue, and after the issue in taile hath

ble

* et l'ayel soit tenant en taile, et est disseise per le pier que est son fits, not in L. and M. † et devie, et le grantor del reversion enter, &c.—&c. et puis le tenant a terme de vie morust, et celui en le reversion entra, &c. L. and M. and Roh.

"one thousand years, or under a lease for lives, as long as the lives are in being, gives no title. But if tenant *pur autre vie* hold over for twenty years after the death of *cestuy que vie*, such holding over will in *effect* be a complete bar to the remainder-man or reversioner; because it was adverse to his title. So in the case of tenants in common; the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co tenant: nor indeed is a refusal to pay of itself sufficient, without denying his title. But if upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough." By the adverse possession mentioned in this case, his lordship never could mean, a disseisin at the election of the party. What is there to distinguish it from an actual disseisin?—Upon the whole, therefore, it is submitted to the learned reader's consideration, 1st, that, as feoffments have not been made from the reign of Henry the 11th. to the present time, with any other solemnities than those with which they are made at present, every operation and efficacy which has

ble que ceo n'est pas discontinuance issue a son and dieth, it seemes that
a le fits, mes que le fitz poit enter, this is no discontinuance to the
Ec. pur ceo que son pier, a que son, but that the son may enter,
le reversion de fee simple descendist, &c. for that his father, to whom the
Ec. n'avoit unques riens en la reversion of the fee simple de-
terre per force de le taile, Ec. scended, had never any thing in
the land by force of the entaile, &c.

15. E. 4. Discont. 30. 43. Ed. 3.
 6. 21. H. 6. 52. 4. H. 7. 17.
 (1. Roll. Abr. 634.)
 (4. Leo. 39. 160. 156.)

21. H. 6. 52, 53.
 (Ant. 333.)

OF this opinion is Littleton in our bookes.

Le grantee del reversion enter, Ec. Here it is to be understood and observed, that in this case of the grant of the reversion Littleton doth not say *sans garrantie*; because if a warrantie had been added, it had wrought no discontinuance, for that (as hath beene said) the discontinuance in judgement of law was but for life: but when the addition of a warrantie doth worke a discontinuance, then Littleton saith, *sans garrantie*, as you may observe often in this Chapter.

Sect. 639.

CAR si home seifie en droit sa
feme, lessa mesme la terre a
un auter pur terme de vie, ore
est le reversion de fee simple a le
baron, Ec. Et si le baron mo-
rust, vivant sa feme et le tenant
*a terme de vie, * et le reversion*
descendist al heire le baron, si le
heire le baron grant le reversion a
un auter en fee, et le tenant at-
turna, Ec. et puis le tenaunt a
terme de vie morust, et le grauntee
del reversion en cel case enter:
† en cest case ceo n'est pas dis-
continuance a la feme, mes la feme
bien poit enter sur le grantee, Ec.
pur ceo que le grantor n'avoit
riens al temps del graunt, en le
droit la feme, quant il fist le
graunt del reversion.

FOR if a man seised in the right of his wife, letteth the same land to another for terme of life, now is the reversion of the fee simple to the husband, &c. And if the husband dieth, living his wife and the tenant for life, and the reversion descend to the heire of the husband, if the heire of the husband grant the reversion to another in fee, and the tenant attorne, &c. and afterwards the tenant for life dieth, and the grantee of the reversion in this case enter: in this case this is no discontinuance to the wife, but she may well enter upon the grantee, &c. because the grantor had nothing at the time of the graunt, in the right of his wife, when hee made the graunt of the reversion.

14. E. 3. Discont. 5. 18. Aff.
 p. 2. 18. E. 3. 54. 38. E. 3. 32,
 22. H. 6. 24. 21. H. 6. 52, 53.
 15. E. 4. Discont. 30.

CAR si home seifie en droit sa feme, lessa, Ec. Here Littleton putteth his case where the baron onely makes a lease for life; for if he and his wife joyne in a lease by deed, there the reversion is not discontinued. See before, Sect. 620. More need not to be said hereof, in respect the like case of tenant in taile hath been explained before.

Sect.

* et not in L. and M. nor Roh.

† en cest cas not in L. and M. nor Roh.

been constantly and uniformly allowed or ascribed to them by the courts of judicature, or writers of authority contemporary with or subsequent to that monarch's reign, down to the present time, ought, notwithstanding the objection that they are not now made with some of the solemnities with which they are said to have been made in their very earliest institution, to be allowed and ascribed to them now: 2dly, that by the passage cited from Bracton, and the other authorities cited or referred to in the course of this note, it appears, that the disseisin produced by feoffments must be understood to be an actual disseisin, and not a disseisin merely at the election of the party: 3dly, that in many of these authorities it is most expressly mentioned, and that in all of them it must be implied, that however slender, bare, or tortious, the possession of the feoffee is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee by entry or action restores his possession: 4thly, (to apply this abstruse and antiquated learning to the present subject-matter of business) that copyholders, tenants for years, by *elegit*, statute-merchant, statute-staple, at will, or by sufferance, are all considered to have the possession of the estate, and that they may by feoffment vest an actual estate of freehold in the feoffee: 5thly, that a fine may be levied of, or a common recovery suffered upon, this estate of freehold: 6thly, that the feoffment so executed, the fine so levied, and the recovery so suffered, are immediately good against every person except the rightful owner: and, 7thly, that in process of time they become good against the owner himself.—To ascertain the exact period of time when fines levied by persons of this description will be a bar to the rightful owner, would be too great an extension of this note, the length of which already requires an apology.—As to the second objection, that the feoffment of sir Robert Atkyns was founded in fraud, and was therefore void; it is to be observed, that however that reasoning applied to the particular case before the court, it does not apply to the general question discussed in this note, which presupposes previous

Sect. 640.

ET issint il semble, coment que homes queux sont inheritables per force de le taile, et ils ne fueront unques seises per force de mesme le taile, que tiel feoffements ou grants per eux fait sans clause de warrantie, n'est pas discontinuance a lour issues apres lour decease, mes que lour issues poyent bien enter, &c. coment que ceux queux fierent tielz grants en lour vies fueront forbarres d'entrer per lour fait demesne, &c.

AND so it seemeth, that men ^(1. Roll. 6, 4.) which are inheritable by force of an entaile, and never were seised by force of the same entaile; that such feoffements or grants by them made without clause of warrantie, is no discontinuance to their issues after their decease, but that their issues may well enter, &c. albeit they which made such graunts in their lives were forebarred to enter by their owne act, &c.

Sect. 641.

*ET si le tenant en taile ad issue deux firs, et l'eigne disseisist son pier, et ent fait feoffment en fee sans clause de garrantie, et devia sans issue, et puis le pier devie, le puisne firs poit bien enter sur le feoffee; pur ceo que le feoffment son eigne frere ne poit estre discontinuance, pur ceo que il ne fuit unques seisie per force de mesme le taile. Car il semble encounter reason, que per matter en fait, &c. sans clause de garrantie, home poit discontinuer un * fait, &c. que ne fuit unques seisie per force de mesme le taile †.*

AND if tenant in taile hath issue two sonnes, and the eldest disseiseth his father, and thereof maketh a feoffment in fee without clause of warrantie, and die without issue, and after the father die, the youngest son may well enter upon the feoffee; for that the feoffment of his elder brother ^(10. Rep. 95.) cannot be a discontinuance, because he was never seised by force of the same taile. For it seemeth to be against reason, that by matter in fact, &c. without clause of warrantie, a man should discontinue a deed, &c. that was never seised by force of the same taile.

NOTE, there also in these two Sections appeareth, that (as hath beene said before) a warrantie, though he were never seised by force of the taile, may worke the effect of a discontinuance. ^{Vide Sect. 592. 596, 597. 601. 658.}

Home poit discontinuer un fait, &c. This is mistaken, and should be, *home poit d'continuer un taile*; and so is the originall.

Sect.

* fait—tail, L. and M.

† &c. added in L. and M. and Roh.

previous possession in the feoffor, free from every circumstance of fraud; either fair and innocent; or acquired by the open and notorious circumstances of disseisin, abatement, intrusion, or forcement. Sir Robert Atkyns acquired his possession by the entry made by him under the verdict obtained by him in 1710. He lost it by the verdict given for dame Ann Atkyns in 1712. It may, therefore, be said (and the fact really was), that he obtained the verdict given for him in 1710, and consequently the possession under it, by a pretended title. He had not a fair or innocent possession. He did not acquire his possession by disseisin, intrusion, abatement, or forcement; it did not descend upon him; it did not come to him by act of law; he was not in the seisin of the fee by virtue of any gift or demise from the freeholder: he obtained his possession by the judgment of a court of law, under the colour of a pretended title. Thus, in the language of the law, his original possession was founded in fraud, practice, and stratagem. And to use an expression of the judges, 3. Rep. 78. a. "the common law does so abhor fraud and covin, that all acts, as well judicial as others, which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law "wrongful and unlawful."—In Burr. 117. great stress was laid on the resolution of the judges in Fermor's case. The case there was, that Thomas Smith being seised in fee of several lands, and holding others by copy of court-roll, and others for a term of years, and others at will (all of them lying in the same vill), made a feoffment with livery of all those held by copy, for years, and at will, to one Chappell for life, and afterwards levied a fine. The question was, Whether the fine was a bar to the owners of the fee, at the expiration of the first five years. It appeared that Smith continued in possession of the land, and paid the rents. See 3. Rep. 77. 1. And. 170. Cary, 20. Cro. Eliz. 86. The judges were of opinion, that the feoffment was fraudulent. Upon an examination of the different reports of the case, it will be found, that his continuing in the possession of the land, and paying rent after

Sect. 642.

**NOTA, si soit seignior et tenant, et le tenant dona les tenements a un auter en † taile, le remainder a un auter en fee, et puis le tenant en taile fait un leas a un home pur terme de vie, &c. savorant le reversion, &c. et puis granta le reversion a un auter en fee, et le tenant a terme de vie attorna, &c. et puis le grantee del reversion morust sans heire, ore mesme le reversion devient al seignior per voy d'escheate. Si en cest cas le tenant a terme de vie deviaist, et le seignior per force de son escheate enter en la vie le tenant en le taile, et puis le tenant en le taile morust, il semble en ceo cas que ceo n'est pas discontinuance al issue en le taile, ne a celuy en le remainder, mes que il poit bien enter, pur ceo que le seignior est eins per voy d'escheat, et nemy per le tenant en le taile, &c. Mes secus effet, si le reversion ust este execute en le grantee en le vie de tenant en le taile, car adonque ust le grantee este eins en les tenements per le tenant en le taile, ‡ &c.*

NOTE, if there be lord and tenant, and the tenant giveth lands to another in taile, the remainder to another in fee, and after the tenant in taile makes a lease to a man for a terme of life, &c. saving the reversion, &c. and after granteth the reversion to another in fee, and the tenant for life attorne, &c. and after the grantee of the reversion die without heire, now the same reversion commeth to the lord by way of escheat. If in this case the tenant for life dieth, and the lord by force of his escheat enter in the life of tenant in taile, and after the tenant in taile dieth, it seemeth in this case that this is no discontinuance to the issue in taile, nor to him in the remainder, but that he may well enter, because the lord is in by way of escheat, and not by the tenant in taile. But otherwise it should bee, if the reversion had beene executed in the grantee, in the life of tenant in taile, for then had the grantee been in the tenements by the tenant in taile, &c.

Vide Sect. 620.

Lib. 1. fol. 136.
Lib. 3. fol. 62, 63.

THE reason of this case is here rendred (as before it was in this Chapter), that albeit the reversion be executed in the lord by escheat in the life of tenant in taile, yet because he is not in by the tenant in taile but by escheat, it worketh no discontinuance. But if it had beene executed in the life of tenant in taile in the grantee which was in by tenant in taile, then the lord by escheat should have taken advantage of it. But of this sufficient hath beene said before in this Chapter.

Sect. 643, 644, & 645.

PARCEL de son **ITEM**, si un parson **ALSO**, if a parson
glebe, &c. In son d'un esglise of a church or vi-
whom the fee simple of the ou un vicar d'un car of a church alien
esglise

Not. — Item, L. and M. and Roh.

† taile, le remainder a un auter en, not in L. and M. nor Roh.
‡ &c. not in L. and M. nor Roh.

after he made the feoffment, were the chief circumstances which induced the court to consider the feoffment to be fraudulent. The same may be observed of the case of *White v. Bacon*, Saville 126. The continuing in the possession of the land after the conveyance, has always been considered in our law as a badge of fraud. Fermor's case therefore only proves, that if a tenant for years, after making a feoffment, continues in the possession of the land, and pays rent for it, the possession acquired by him under the feoffment is fraudulent; and therefore a fine, and every other act which derives its effect from that possession, is void. But Fermor's case does not apply to the general question, of the operation of a fine levied by tenant for years, who has previously executed a feoffment, when the case is not affected by circumstances of fraud. The case mentioned before in this note of *Whaley v. Tancred* is directly in point, that a fine so levied by lessee for years is a bar to the lessor after five years from the expiration of the lease. And with respect to the feoffor's remaining in the possession, if by the deed declaring the uses of the fine it is expressed that the fine should enure to his use, the possession will be invested in him by the statute of uses.—The editor begs to conclude with an observation of lord Hardwicke (3. Atk. 631.) which seems to him to sanction, in some measure, the general reasoning contained in this note:—"If it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice so as to make him a trustee for the person who had the right, because this would be carrying it much too far; for the defect upon the face of the deeds is often the occasion of the fine's being levied."

esglise, alien certaine terres ou tenements parcel de son glebe, &c. a un auter en fee, et morust, ou resigne, &c. son successeur poit bien enter, nient contristeant tiel alienation, come est dit en un Nota 2. H. 4. Terme Mich. quod sic incipit.

certaine lands or tenements parcell of his glebe, &c. to another in fee, and die or resigne, &c. his successor may well enter, notwithstanding such alienation, as is said in a *Nota 2. H. 4. Termine Mich.* which beginneth thus.

glebe is, is a question in our bookes. [a] Some hold that it is in the patron; but that cannot be for two reasons. First, for that in the beginning the land was given to the parson and his successors, and the patron is no successor. Secondly, the words of the writ of *juris utrum be, si sit libera elemosina ecclesie de D.* and not of the patron. Some others doe hold that the fee simple is in the patron and ordinary; but this cannot be, for the causes abovesaid: and therefore, of necessitie, the fee simple is in abeyance, as *Littleton* saith. And this was provided by the providence and wisdom of the law; for that the parson and vicar have *curam animarum*, and were bound to celebrate divine service, and administer the sacraments; and therefore no act of the predecessor should make a discontinuance to take away the entry of the successor, and to drive him to a recalculation, whereby he should be destitute of maintenance in the meane time. Upon consideration of all our bookes I observe this diversitie: that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to doe any thing to the prejudice of his successor in many cases, the law adjudgeth him to have in effect but an estate for life.

Causae ecclesiarum publicis causis equiparantur: and Summa ratio est quae pro religione facit. And Ecclesia fungitur vice minoris, meliorem facere potest conditionem suam, deteriorem nequaquam.

As a parson, vicar, archdeacon, prebend, chantery priest, and the like, may have an action of waste, and in the writ it shall be said, *ad exheredationem ecclesiae, &c. ipsius B. or praebendae ipsius A.*

And the parson, &c. that maketh a lease for life, shall have a *confimili casu* during the

[a] 8. H. 6. 24. 12. H. 8. 8.

Vide Registr. 307. a. 45. E. 3. tit. Exchange. 12. H. 8. 9. (F. N. B. 48, 49. a.)

F. N. B. 19. L. (Dyer 71. a. 2. Roll. Abr. 339.)

Bracton lib. 4. fol. 226.

Brit. fol. 143.

F. N. B. 55. D. & 57. E. F. 10. H. 7. 5.

Sect. 644.

NOTA quod dictum fuit pro lege, en un brieve de accomplt port per un master d'un college * vers un chapleine, que si un parson, ou un vicar, graunt certaine terre quel est de droit son esglise a un auter et devie, ou permute, le successor poit enter, &c. Et jeo croy que la cause est, pur ceo que le parson, ou vicar, que est seisie, &c. come en droit de son esglise, n'ad pas droit de fee simple en les tenements, † et le droit de fee simple de ceo demurt en ascun auter person; et pur cel cause son successor poit bien enter, nient contristeant tiel alienation, &c.

NOTA quod dictum fuit pro lege, in a writ of account brought by a master of a college against a chaplaine, that if a parson, or vicar, grant certaine land which is of the right of his church to another and die, or changeth, the successor may enter, &c. And I take the cause to bee, for that the parson, or vicar, that is seised, &c. as in right of his church, hath no right of the fee simple in the tenements, but the right of the fee simple abideth in another person; and for this cause his successor may well enter, notwithstanding such alienation, &c.

* vers un chapleine—d'un chapel, L. and M. and Rob.

† et—ne, L. and M. and Rob.

F. N. B. 49. l. m. n. 20. E. 3.
tit. Juris utrum. Temps E. 3.
Juris utrum 14. 1. 14. E. 3.
ibid. 4. F. N. B. 50. 30. E. 3. 26.
21. E. 3. 11. tit. Entrée 10.
F. N. B. 206. F. Registr. 237.
4. E. 4. 2. 8. E. 3. tit. Entrée 2.
7. H. 3. 54. 55.
(Ant. 67. a.)

[c] F. N. B. 49. L. 50. a.

(1 Roll. Abr. 476. 479. 488.
Cro. Car. 38. 5. Rep. 81.
2. Roll. Abr. 63. 334.)

20. E. 3. tit. Aid. 30. 25. E. 3. 54.
8. E. 3. 45. 8. H. 6. 24.
11. H. 6. 9. 6. E. 3. 45.
43. Aff. Pl. 13. F. N. B. 129.
(Flo. 538.)

(2. Cro. 200. Ant. 225. b.
Flo. 356. Doc. Pla. 27. 271.)

44. E. 3. 11. 11. H. 4. 63.
9. F. 4. 16. 18. E. 3. 7.
6. E. 3. 11. 5. E. 2. Aid 167.
12. H. 4. 11. 32. E. 3. Aid 39.
38. E. 3. 19. 24. E. 3. Juris
utrum 4.

the life of the lessee, and a writ of entree *ad communem legem* after his death, or a writ *ad terminum qui præterit*, or a *quoddam permittat* in the *debet*, and none can maintain any of these writs, but a tenant in fee simple or fee taylor.

And a parson, &c. may receive homage, which tenant for life cannot do. *Temps E. 1. Incumbent 19.*

[c] Likewise a parson, &c. shall have a writ of mesne, and a *contra formam feoffamenti*.

But a parson cannot make a discontinuance, as *Littleton* here teacheth; for that should be to the prejudice of his successor to take away his entree, and to drive him to a real action.

Also if a parson, &c. make a lease for yeares, reserving a rent, and dieth, the lease is determined by his death; as if tenant for life had made a lease, no acceptance of the rent by the successor can make it good. Also in a real action a parson, vicar, archdeacon, prebend, &c. shall have aid of the patron and ordinary, as tenant for life shall have. So as it is evident, that to many purposes a parson hath but in effect an estate for life, and to many a qualified fee simple, but the entire fee and right is not in him; and that is the reason that hee cannot discontinue the fee simple that he hath not, nor ever had; for, as it hath beene said, *Omnis privatio præsupponit habitum*. And for the same cause he cannot have a writ of right right, nor a writ of right in his nature; as a writ of right *sur disclaimer* of customs and services, *ne injuste vexes*, *rationabilibus divisis*, *quo jure*, and the like.

But here it appeareth by *Littleton*, that such bodies politike or corporate as have a sole seisin, and may have a writ of right, for that the fee and right is in them (albeit they cannot absolutely convey away their lands, &c. without assent of others), may make a discontinuance; as a bishop, an abbot, a deane, a master of an hospitall, and the like. But this is to be understood where a deane or a master of an hospitall, &c. are solely seised of distinct possessions; for if the bodie that is seised be aggregate of many, as the deane and chapter, master and confreres, &c. then the scottment of the deane or master is so farre from a discontinuance as it is a disseisin.

And these that have the fee and right in them shall not have aid in respect of their high and large estate, albeit any of them be presentable: but a deane that is collative shall have aid of the king.

And it is to be observed, that the remedie is ever agreeable to the right; and therefore the bishop, deane, master of an hospitall, that hath college and common seale, or the like, shall have a writ of right right, which is the highest remedie, for that they have the highest estate.

Here

Sect. 645.

*CAR un evesque
poit aver breve
de droit de * tenements
de droit de son es-
glise, pur ceo que le
droit est en son cha-
piter, et le fee simple
demurrant en luy et
en son chapiter. Et un
deane poit aver breve
de droit, pur ceo que
le droit demurt en luy.
† Et un abbe poit a-
ver briefe de droit, pur
ceo que le droit de-
murt en luy et en son
covent. Et un mas-
ter d'un hospitall poit
aver briefe de droit,
pur ceo que le droit
demurt en luy et
en ses confreres, &c.
Et sic de aliis § ca-
sibus consimilibus. ||
Mes un parson ou
un vicar ne poit a-
ver briefe de droit,
&c.*

FOR a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapter, and the fee simple abideth in him and in his chapter. And a deane may have a writ of right, because the right remaines in him. And an abbot may have a writ of right, for that the right remaines in him and in his convent. And a master of an hospitall may have a writ of right, because the right remaineth in him and in his confreres, &c. And so of other like cases. But a parson or vicar cannot have a writ of right, &c.

* *tenements de droit de son esglise, pur ceo que le droit est en son chapiter, et le*—not in L. and M. nor Roh.

† *Et un abbe poit aver briefe de droit, pur ceo que le droit demurt en luy*, not in L. and M. nor Roh.

‡ *Et un abbe poit*
§ *in added L. and M. and Roh.*

Here *Littleton* citeth the booke case, *Mich. 2. H. 4.* as an authoritie whereupon he groundeth his opinion. And it is to be observed, that the yeares of *H. 4.* were published before *Littleton* did write.

But at this day, the bishop, deane, master of an hospitall, or the like, that have the fee and right in them, as hath beene said, cannot discontinue; neither can they or any parson, vicar, archdeacon, prebend, or any other having any ecclesiasticall living, with assent of deane and chapter, patron and ordinary, or the consent of any others, make any lease, gift, grant or conveyance, estate, charge or incumbrance to binde his successor other than for terme of one and twentie yeares, or three lives in possession, whereupon the accustomed rent or more shall be reserved. These be excellent lawes, and have beene well expounded for the maintenance of religion and the good of God's church; for otherwise it is to bee feared that holy church would lose more than it would gaine in these dayes.

But where *Littleton*, in this and other Sections, makes mention of masters of hospitals, the reader must know, that since *Littleton* wrote, there hath beene a great alteration made by divers acts of parliament concerning hospitals.

Master del hospitall. These points concerning hospitals were resolved [c] by the justices.

First, that no hospitall was given to the crowne by the statute of 27. *H. 8.* nor any hospitall is within the statute of 31. *H. 8.* of monasteries, but only religious and ecclesiasticall hospitals, and that no lay hospitall was within those statutes.

Secondly, if upon the foundation of any lay hospitall or after it was ordained, that one or divers priests should be maintained within the hospitall to celebrate divine service to the poore, and to pray for the soule of the founder, and all christian soules, or the like; and that the poore of such hospitall should make the like orisons, yet such an hospitall is not within the said statutes; for the hospitall is lay, and not religious; and all or the most part of antient lay hospitals were founded or ordained after the like sort; and the makers of those statutes never intended to overthrow workes of charitie, but to take away the abuse.

Thirdly, that no hospitall was given to the king by the statute of 37. *H. 8.* but in two cases, where the donors, founders or patrons, &c. had entred and expelled the priests, wardens, &c. betweene the fourth day of Februarie, *Anno 27. H. 8.* and the five and twentieth of December, *Anno 37. H. 8.* or where king *Henry* the eighth, by commission according to that act, should enter and seise the same; but that determined by the death of that king.

Fourthly, that the statute of 1. *E. 6.* extended not to any hospitall whatsoever, either lay or religious, as by the same appeareth.

And I was of counsell with the lord *Cheney* in this case, which, seeing it may doe good for maintenance of charitable uses, I thought good summarily to report it. To this I will adde, *Panis pauperum vita pauperum; qui defraudat eos vir sanguinis est.*

Nota. Of hospitals, some are corporations aggregate of many; as of master or warden, &c. and his confreers: some, where the master or warden hath only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seale: some, where the master or warden hath the state in him, but hath no college and common seale; and such a master or warden shall have a *juris utrum*: and of these hospitals some bee eligible, some donative, and some presentable.

Vide Sect. 577. 593. &c. 1. *Eliz.* c. 18. 13. *Eliz.* c. 10. 1. *Jacobi* cap. 3.

Lib. 2. fol. 46. Lib. 4. fol. 76. & 20. Lib. 5. fol. 9. & 14. Lib. 6. fol. 37. Lib. 7. fol. 8. Lib. 11. fol. 67. 37. *H. 8.* 31. *H. 8.* 32. *H. 8.* 37. *H. 8.* 1. *E. 6.* &c.

[c] *Patch.* 24. *Eliz.* the Lord *Cheneye's* case. Lib. 2. fol. 48, 49. *Evesque de Canterburie's* case.

(2. *Sid.* 48.)

Lib. 1. f. 24. *Porter's* case.

Porter's case ubi supra, Lib. 4. 111. 113, 114. 116. in *Lambert's* case.

Ecclesiasticus c. 34. ver. 22. (8. *Rep.* 131. a.)

14. *E. 3.* *juris utrum* 4.

Sect. 646.

*MES le plus haut briefe que ils poient aver est le briefe de juris utrum, le quel est graund prooffe que le droit de fee n'est en eux, ne en nul auters, &c. Mes le droit de fee simple est en abeiance, &c. ceo est a dire, que il est tant-solement en le remembrance, entendement et consideration de la ley, * &c. Car moy semble que tiel*

BUT the highest writ that they can have is the writ of *juris utrum*, which is a great prooffe that the right of fee is not in them, nor in any others, &c. But the right of the fee simple is in abeiance, that is to say, that it is only in the remembrance, intendment and consideration of the law, &c. for it seemeth to me, chose

(F. N. B. 48.)

* &c. not in L. and M. nor Roh.

*chose * et tiel droit que est dit en divers livres estre en abeyance, est † a tant a dire en Latyne (scilicet), Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstitie, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, ‡ et quod alii dixerunt, talem rem aut tale rectum fore in nubibus. Mes jeo suppose que ils intenderont per ceux parols, in nubibus, &c. come jeo aye dit adevant. §*

that such a thing and such a right which is sayd in divers bookes to be in abeyance, is as much to say in Latine (scilicet), *Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstitie, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus.* But I suppose, that they meane by these words (*in nubibus, &c.*), as I have said before.

24. E. 3. 63. Vi. Sect. 648, 649, 650. 651.
Vide Sect. 1.
(Hob. 338. Ant. 263. b.
2. Roll. 339. Post. 345. 2.
1. Rep. 66.)

EN *abeyance.* (1) That is, in expectation, of the French word *bayer*, to expect. For when a parson dieth, wee say that the freehold is in abeyance, because a successor is in expectation to take it; and here note the necessity of the true interpretation of words.

If tenant *pur terme d'auter vie* dieth, the freehold is said to be in abeyance untill the occupant entreth. If a man make a lease for life, the remainder to the right heires of *I. S.* the fee simple is in abeyance untill *I. S.* dieth. And so in the case of the parson, the fee and right is in abeyance, that is, in expectation, in remembrance, entendment, or consideration of law, 1. *In consideratione fore intelligentiâ legis*, because it is not in any man then living; and the right that is in abeyance is said to be *in nubibus*, in the clouds, and therein hath a qualitie of fame whereof the poet speaketh:

Virg. 4. *Æneid.*

Ingrediturque solo, et caput inter nubila condit.

Sect. 647.

ITEM, *si un parson d'un esglise devie, ore le franktenement del glebe del parsonage est en nul luy durant le temps que le parsonage est voide, mes in abeyance; c'est a scavoir, in consideration et en le intelligence de le ley, tant que un auter soit fait parson de mesme l'esglise; et immediat quant un auter est fait parson, le franktenement en fait est en luy come successor. ¶*

ALSO, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is voide, but in abeyance, viz. in consideration and in the understanding of the law, untill another be made parson of the same church; and immediatly when another is made parson, the freehold in deed is in him as successor.

SI *un parson d'un esglise devie, &c.* So it is of a bishop, abbot, deane, archdeacon, prebend, vicar, and of every other sole corporation or body politike, presentative, elective, or donative, which inheritances put in abeyance are by some called *hereditates jacentes*; and some say, *que le fee est en balance.*

Bract. li. 1. c. 2. Brit. f. 249.

Sect.

* *et—en*, L. and M. and Roh.

in nubibus, &c. not in L. and M. nor Roh.

¶ *&c.* added L. and M. and Roh.

† *&c.* added L. and M. and Roh.

§ *&c.* added L. and M. and Roh.

‡ *Mes jeo suppose que ils intenderont per ceux parols,*

¶ *fait* not in L. and M. nor Roh.

(1) In the course of these notes, frequent mention has been made of the necessity which there was at the old law, that there should always be an immediate tenant of the freehold, and of the reasons upon which this necessity was grounded; but these reasons did not apply, in the same degree, against the suspension of the inheritance. Hence, tho' for the reasons I have mentioned, it was an established maxim, that the freehold never could be in suspension, or, as it is generally called, in abeyance, it was admitted that the inheritance might. But this suspension or abeyance of the inheritance could not but be considered with a very jealous eye; for tho' fiefs, in their original constitution, were not hereditary; still, when they had once become hereditary, the consequences of their becoming such were so numerous, and affected materially so many other parts of the feudal system, that, tho' it was always admitted that the inheritance might be suspended, it was agreed, that the suspension of it should be discountenanced and discouraged as much as possible, and allowed upon none but the most pressing and urgent occasions. The chief reasons of the aversion of the old law from the suspension of the inheritance are set forth in two late matterly and profound publications, sir William Blackstone's Argument on the Case of Perryn and Blake, and Mr. Hargrave's Observations on the Rule in Shelley's case.—To these reasons the modern law has added her marked and unremitted odium of every restraint upon alienation; it being clear, that no restraint upon the alienation of property would be more effectual than the admission of a suspension of the inheritance.—The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders. Mr. Fearne's excellent Essay upon these subjects makes any farther investigation of them here quite unnecessary: but perhaps the reader will not be displeased with the following short discussion of a subject intimately connected with them;—*the suspension and extinction of powers*, deriving their effect from the statute of uses, or the statute of wills; those powers which are given to mere strangers, that is, to persons who have neither a present nor a future estate or interest in the land, are said to be collateral to the land; those which are reserved to a person who has either a present or future estate or interest in the land, are said to be relating to the land: and these again are subdivided into two classes, powers annexed to the estate in the land, and powers in gross. The former are, where a person has an estate in the land, and the estate to be created by the power is to take effect in possession during the continuance of the estate to which the power is annexed: such is the power usually given in settlements to tenants for life, when respectively in possession, to make leases.—Powers in gross are, where the person to whom they are given has an estate in the land; but the estate to be created under, or by virtue of the power, is not to take its effect till after the determination of the estate to which it relates: such are the powers usually inserted in settlements to jointure an after-taken wife.—I. As to the powers collateral to the land,—it is said, that a release, fine, feoffment, or common recovery, will not extinguish or destroy them. See ante

Sect. 648.

ITEM, ascuns per-
adventure voient
arguer et dire, que en-
tant que un parson
ove l'assent del patron
et ordinarie, poit gran-
ter un rent charge
hors del glebe del par-
sonage en fee, et is-
sint charger le glebe
del parsonage perpe-
tualment, ergo ils ont
fee simple, ou deux ou
un de eux avoit fee
simple* al meins†. A
ceo poit estre respon-
due, que il est princi-
ple en le ley, que de
chescuns terres il y
ad fee simple, &c. en
ascun home, ou ‡ au-
terment le fee simple
est en abeyance ||. Et
un auter principe est,
que chescun terre de
fee simple poit estre
charge de un rent-
charge en fee per un
voy ou per auter.
Et quant tiel rent est
graunt per le fait le
parson, et le patron,
et l'ordinaire, &c. en
fee, nul avera preju-
dice ou parde per force
de tiel grant, forsque
les § grantors en lour
vies, et les heires le
patron, et les succes-
sors del ordinary a-
pres leur decease. Et
apres tiel charge, si le

ALSO, some perad-
venture wil argue
and say, that inasmuch
as a parson with the
assent of the patron
and ordinary, may
grant a rent charge
out of the glebe of
the parsonage in fee,
and so charge the glebe
of the parsonage per-
petually, ergo they
have a fee simple, or
two or one of them
have a fee simple at the
least. To this may bee
answered, that it is a
principle in law, that
of everie land there is
a fee simple, &c. in
some bodie, or other-
wise the fee simple is in
abeyance. And there is
another principle, that
every land of fee sim-
ple may bee charged
with a rent charge in
fee by one way or
other. And when such
rent is granted by the
deed of the parson, and
the patron, and ordi-
nary, &c. in fee, none
shall have prejudice
or losse by force of
such grant, but the
grantors in their lives,
and the heires of the
patron, and the suc-
cessors of the ordina-
ry after their decease.
And after such charge

IL est un principe (Ant. 10. b.)
en la ley, &c. Prin-
cipium, quod est quasi primum
caput, from which many cases
have their originall or begin-
ning, which is so strong, as it
suffereth no contradiction;
and therefore it is said in our
books, that ancient principles
of the law [a] ought not to be
disputed, *Contra negantem prin-*
cipia non est disputandum. That
which our author here calleth
a principle, Sect. 3. & 90. he
calleth a maxime. [a] 11. H. 4. 9. Sect. 3. & 90.

Here Littleton in answer to
an objection alleageth two
principles. First,

*Que de chescun terre
il y ad fee simple, &c.*
This is perspicue verum, and
needeth no explanation. Se-
condly,

*Chescun terre de
fee simple poit estre
charge en fee per un
voy ou auter.* Hereby it
(Lampet's case 10. Rep. 46. b.)
appeareth, that albeit the
right of the fee simple be in
abeyance, yet it may be charg-
ed by one way or another.
And so it may be aliened in
fee, albeit the right of the fee
be in abeyance, or in confide-
ration of law. And herein
is a diversitie worthy the ob-
servation to be made; that
when the right of fee simple
is perpetually by judgement
of law in abeyance; without
any expectation to come in esse,
there he that hath the quali-
fied fee, *concurrentibus hiis que
in jure requiruntur*, may charge
or alien it, as in the case
of parson, vicar, prebend,
&c. But where the fee simple
is in abeyance, and by pos-
sibilitie may every houre
come in esse, there the fee sim-
ple cannot be charged untill
it commeth in esse. (1) As if a
(2. Roll. 418, 419.)
lease for life be made, the re-
mainder to the right heires of
I. S. the fee simple cannot be
charged

* al—an, L. and M. and Roh. † &c. added L. and M. and Roh. ‡ outerment not in L. and M. nor Roh. || &c. added
L. and M. and Roh. § grantors—grantees, L. and M. and Roh.

(1) On the question, whether the fee simple, during the suspense of a contingent remainder, remains in the grantor, or is in abey-
ance, see Mr. Fearn's Essay on Contingent Remainders, 3d ed. 275.

ante 265. b. Albanie's case, 1. Rep. 110. b. Digges's case, 1. Rep. 173. a. Moore 605. The reason why a release does not extin-
guish them, is said to be (ante 265. b.), that collateral powers are not in the nature of rights or titles, and cannot therefore, from their
nature, be released. 2dly, That where powers are given or reserved to any person having any estate or interest, either present or future,
in the land, the exercise of these powers is considered as advantageous to him; and there is no reason why he should not be allowed to de-
part with, or exclude himself from the benefit of them: but that, when they are given to strangers, they are intended for the benefit of some
third person; and therefore the extinction of them is supposed to be injurious to some person intended to be benefited by them. With
respect to their not being destroyed by feoffment, fine, or recovery; every man, it is said, is estopped from claiming any estate contrary
to his own feoffment; but if a stranger, with a power of revocation, makes a feoffment, levies a fine, or suffers a recovery, and afterwards
revokes, the person claiming the estate under the revocation is immediately by, and makes his title immediately from the original settlor
or devisor, and not by or from the feoffor, consor, or recoverer; he is not therefore bound or estopped by any act of the feoffor,
consor, or recoverer. Thus, by the old law, if *cessui que use* devised that his feoffees should sell his land, and died, and his
feoffees made a feoffment over; yet it was held, that the feoffees might sell against their own feoffment, because the power to
sell was merely collateral to the right to the land, and the vendee took nothing by the feoffment. II. As to powers relating to
the land.—Such of those powers as are in the nature of powers appendant to the estate, may, it is agreed, be extinguished by
release, feoffment, fine, or common recovery. These powers also are liable to be extinguished or suspended by any of the conveyances
which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seised:
for whoever has any estate in the land, may convey that estate to another; and it would be unjust that he should afterwards be admitted
to avoid, or to do any thing in derogation from his own grant.—Any assurance of this nature, therefore, which carries with it the whole
of the grantor's estate, is a total destruction of the powers appendant to that estate; and by parity of reason, any such assurance as carries
with it only a part of the estate (as a term for years or an estate for life), suspends, during the continuance of that estate, the exercise of
the power, or, at least, the estate to be raised by it; and any such assurance, which induces only a charge upon the estate (as a grant of a
rent), necessarily subjects the estate created by the power to that charge. With respect to such of the powers relating to land as are said to
be powers in gross:—As the estates raised by them do not fall within the compass of the estate to which they are said to relate, there does
not

charged till *I. S.* be dead. And so is *Littleton* to be understood, viz. that either it may be charged in *presenti*, or in *futuro*.

Chefcun terre de fee simple. And so it is of lands entailed, for they may be charged in fee also; for the estate taile may be cut off by fine or recovery. Also the estate taile may continue, and yet tenant in taile may lawfully charge the land and binde the issue in taile. As if a disseisor make a gift in taile, and the donee in consideration of a release by the disseisor of all his right to the donee, granteth a rent charge to the disseisor and his heires, proportionable to the value of his right, this shall binde the issue in taile. *Vide Sect. 1. Bridgewater's case*; which lands, by the rule of *Littleton*, may be charged: and therefore if the owner of those thirteene acres grant a rent-charge out of those thirteene acres generally, lying in the meadow of eightie, without mentioning where they lie particularly; there, as the state in the land removes, the charge shall remove also. But since our author wrote, all ecclesiasticall persons are disabled to charge in fee any of their ecclesiasticall possessions, as before hath beene spoken of at large.

Et quant tiel rent est grant, &c. This is an excellent interpretation and limitation of the said principle, viz. that none shall have prejudice or losse by any such grant, but such as are partie or privie thereunto; as the patron and his heires, the ordinary and his successors; and the parson and his successors; which successors of the parson are to be presented by the patron or his heires, and admitted and instituted by the ordinary or his successors. The like is to be said of an archdeacon, prebend, vicar, chauntrye priest, and the like.

Per le fait le parson, et patron, et l'ordinarie, &c. Yet if the parson die, and in time of vacation the patron, of the assent of the ordinary, or the patron and ordinary grant an annuitie or rent-charge out of the glebe, this shall (as hath beene said) binde the succeeding parsons for ever.

If there be parson, patron, and ordinary, and the parson by the ordinance and assent of

** parson devie, son successeur ne peut venir a le dit esglise de estre parson de mesme le esglise per la ley, forsque per presentment del patron, et admission et institution del ordinarie. † Et pur cel cause il convient que le successeur soy teigne content, et agree de ceo que son patron et l'ordinarie loyalment fesoient adevant, &c. Mes ceo n'est prooffe que le fee simple, &c. est en le patron et l'ordinarie, ou en aucun de eux, &c. Mes la cause que tiel grant de rent-charge ‡ est bone, est, pur ceo que ceux queux averont interest, &c. en la dit esglise, scilicet, le patron solonque la ley temporal, et l'ordinarie solonque la ley spiritual, fueront assentus, ou parties a tiel charge, &c. Et ceo semble estre la verie cause que tiel glebe peut estre charge en perpetuitie, || &c.*

if the parson die, his successor cannot come to the sayd church to be parson of the same by the law, but by the presentment of the patron, and admission and institution of the ordinarie. And for this cause the successor ought to hold himselfe content, and agree to that which his patron and the ordinarie have lawfully done before, &c. But this is no prooffe that the fee simple, &c. is in the patron and the ordinarie, or in either of them, &c. But the cause that such graunt of rent-charge is good, is, for that they who have the interest, &c. in the sayd church, viz. the patron according to the law temporall, and the ordinarie according to the law spiritual, were assenting, or parties to such charge, &c. And this seemeth to be the true cause why such glebe may be charged in perpetuitie, &c.

44. E. 3. 21, 22.

(Flo. Com. 435.)

Vide Sect. 1. Bridgewater's case, &c. 39.

Vide Sect. 593. (Doct. and Stud. 50. a.) 31. E. 1. tit. Grant. 90. 8. R. 2. Annuity. 53. (2. Cro. 197.)

(5. Rep. 81.)
16. E. 3. Annuity. 24. 40. E. 3. 30.
3. E. 3. 17. Reg. 38.
(Doct. & Stud. 56. b.)

* parson not in L. and M. nor Roh.
and M. nor Roh.

† &c. added L. and M. no Roh.

‡ &c. added L. and M. and Roh.

|| &c. not in L.

not seem to be any reason why any alteration in that estate should affect them. Hence, if tenant for life, with a power to jointure an after-taken wife, conveys a life estate by bargain and sale, lease and release, or covenant to stand seised, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a right to convey, the power in gross is not affected by it; but if he conveys by fine, feoffment, or recovery, as these assurances not only pass the estate of the grantor, but convey a tortious fee, they necessarily disturb the whole inheritance; and consequently divest the seisin, out of which the uses to be created by the power are to be fed. They therefore operate in extinction of the power. A power in gross may also be released to any of those in remainder.—And if the whole fee is in the terre-tenant, subject to the power; as where an estate is limited to A. for life, remainder to such uses as he shall by deed or will appoint, remainder to A. in fee; there if A. conveys the whole fee by lease and release, his power of appointment; notwithstanding it is in the nature of a power in gross, is totally extinguished. See *Ca. Temp. Talbot* 41.—It should be observed, that in mentioning above the effect of a feoffment, fine, or common recovery, the expression is, that powers may be extinguished by those conveyances. But it is not intended to imply, either with respect to powers collateral or powers relating to the lands, that those conveyances necessarily and unavoidably extinguish the powers in all cases. In some cases they do not. Thus, in the earl of Leicester's case, 1 Vent. 278, A. being tenant for life, with power to revoke by deed or will, executed a deed, whereby he covenanted to levy a fine to several uses, and afterwards levied a fine accordingly; it was held, that the deed and fine (taken together) were a good execution of the power, and not an extinction of it. Afterward, in *Herring v. Brown*, Carth. 22. 1 Vent. 368. 371. Skin. 35. 184. where A. being tenant for life, with power of revocation, levied a fine, and afterwards declared the uses, it was contended, that the fine was an extinction of the power; and to distinguish that case from the earl of Leicester's case, it was said, that in the former case the deed preceded, in the latter it was subsequent to the fine. In the former case it was said, the power was executed, and an estate created by the deed, so that no estate remained forfeitable by the fine; but that, in the latter case, the fine being first levied, was *ipso facto* a forfeiture of the estate, and the subsequent deed could not, by any intendment of law, revive the power. Three judges against one, in the king's-bench, were of this opinion. But error was afterwards brought in the exchequer-chamber to reverse their judgment; and it was accordingly reversed, by five judges against two, on the ground, that the fine and the subsequent deed, declaring the uses thereof, were but one and the same conveyance.—These cases shew, that where a person is tenant for life, with a general power of revocation, a fine and a deed, declaring the uses of it, will be construed as a good exercise of the power. The principles of these cases may be extended much farther in argument; but it is by no means advisable to do it in practice. In *Carthew* 23. it is expressly said, that if an estate is granted to one for life, who afterwards levies a fine *sur convauance de droit*, and declares the uses to himself for life, remainder in fee to the grantor or lessor, this is a forfeiture, notwithstanding the declaration of the use.

of the ordinarie grant an annuities to another, having *quid pro quo* in consideration thereof, this shall binde the successor of the parson, without the consent of the patron.

A church parochiall may be donative and exempt from all ordinarie jurisdiction, and the incumbent may resigne to the patron, and not to the ordinarie; neither can the ordinarie visit, but the patron by commissioners to be appointed by him. And by *Littleton's* rule, the patron and incumbent may charge the glebe; and albeit it be donative by a layman, yet *merit laicus* is not capable of it, but an able clerke *infra sacros ordines* is; for albeit he come in by lay donation, and not by admission or institution, yet his function is spirituall; and if such a clerke donative be disturbed, the patron shall have a *quare impedit* of this church donative, and the writ shall say, *quod permittat ipsum presentare ad ecclesiam, &c.* and declare the speciall matter in his declaration. And so it is of a prebend, chantery, chappell, donative, and the like; and no laps shall incurr to the ordinarie, except it be so specially provided in the foundation. But if the patron of such a church, chantery, chappell, &c. donative, doth once present to the ordinarie, and his clerke is admitted and instituted, it is now become presentable, and never shall be donative after, and then laps shall incurr to the ordinarie, as it shall of other benefices presentable. But a presentation to such a donative by a stranger, and admission and institution thereupon, is meere void. And all this was resolved by the whole court of king's bench, for the rectorie parochiall donative of Saint *Buxian* in the countie of Cornwall.

It appeareth by our bookes, and by divers acts of parliament, that at the first all the bishopricks in England were of the king's foundation, and donative *per traditionem baculi, (id est)* the crozier, which was the pastorall staffe, & annuli, the ring whereby hee was married to the church. And king *Henry* the first being requested by the bishop of Rome to make them elective, refused it: but king *John* by his charter bearing date *quinto Junii, anno decimo septimo*, granted that the bishopricks should be eligible. If the king doth found a church, hospitall, or free chappell donative, he may exempt the same from ordinarie jurisdiction, and then his chancellor shall visit the same. Nay, if the king doe found the same without any speciall exemption, the ordinarie is not, but the king's chancellor, to visit the same. Now as the king may create donatives exempt from the visitation of the ordinarie, so he may by his charter licence any subject to found such a church or chappell, and to ordaine that it shall be donative, and not presentable, and to be visited by the founder, and not by the ordinarie. And thus beganne donatives in England, whereof common persons were patrons.

Ordinarie. *Ordinarius* is hee that hath ordinarie jurisdiction in causes ecclesiasticall, immediate to the king and his courts of common law, for the better execution of justice, as the bishop or any other that hath exempt and immediate jurisdiction in causes ecclesiasticall.

Ley temporel. Which consisteth of three parts, viz. First, on the common law, expressed in our bookes of law, and judiciall records. Secondly, on statutes contained in acts and records of parliament. And thirdly, on customes grounded upon reason, and used time out of minde; and the construction and determination of these doe belong to the judges of the realme.

Ley spiritual, &c. That is, the ecclesiasticall lawes allowed by the lawes of this realme, viz. which are not against the common law (whereof the king's prerogative is a principall part) nor against the statutes and customes of the realme; and regularly according to such ecclesiasticall lawes, the ordinarie and other ecclesiasticall judges doe proceed in causes within their consueance. And this jurisdiction was so bounded by the antient common lawes of the realme, and so declared by act of parliament.

Admission & institution. In propriety of speech, admission is, when the bishop upon examination admitteth him to be able, and saith, *Admitto te habilem.* [d] Institution is, when the bishop saith, *Instituo te rectorem talis ecclesie cum cura animarum, & accipe curam tuam & meam.* [e] But sometimes in a more large sense, *admissus* doth include *institutus* also: *cujus presentatus sit admissus, (i. e.) institutus.* And it is to be observed, that institution is a good plenarie against a common person (but not against the king, unless he be inducted); and that is the cause that regularly plenarie shall be tried by the bishop, because the church is full by institution, which is a spirituall act; but void or not void shall be tried by the common law.

At the common law, if an estranger had presented his clerke, and he had benee admitted and instituted to a church, whereof any subject had benee lawfull patron, the patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the incumbent

Lib. 3. Cap. 11. Of Discontinuance. Sect. 648.

6. E. 3. 28. 39. 52. 39. E. 3. 24.
43. E. 3. 25. 45. E. 3.
Quar. imp. 139. 10. E. 2.
Com. 22. 31. E. 1.
Quar. imp. 186.

(5. Rep. 57. 97. Lib. 6. 49. 50. b.
6. Rep. Green's Case.
2. Cro. 385. F. N. B. 33. h.)

F. N. B. 36. k. 143. 2.
35. E. 3. ca. 3. 13. R. 2. ca. 1.
4. H. 4. ca. 21. 1. H. fol. 19.

[*] Li. 6. fol. 51. Li. 7. fol. 19.
3. H. 6. Dam. 17. 34. H. 6. 28.
12. E. 3. Champerty 9.
18. E. 3. 2. Temps E. 1.
Quar. imp. 181.
[a] W. 2. ca. 5. 13. E. 1.
[g] 45. E. 3. 35. 38. E. 3. 4.
25. E. 3. 47. 13. El. Dy. 292.
Reg. 302, &c. 18. El. Dy. 348.
14. E. 4. 2. 7. H. 4. 32. 31. E. 1.
Quar. imp. 185. W. 2. ub. sup.
[h] 17. E. 3. 64.

(2. Infl. 336. 6. Rep. 29. a. 50. a.)

(3. Rep. 39. a. 50. a.)

9. H. 6. 32. & 56. 19. H. 6. 68.

(7. Rep. 27. Cro. Car. 74.
Doct. & Stud. 11. b. Lib. 6. 51.
Ant. 17. b.)

(10. Rep. 53. 5. Rep. 102.
6. Rep. 51. Hob. 201.
2. Cro. 93.)
18. E. 2. Presentment. 20.
50. E. 2. Encumbent 10.
21. H. 7. 8. a. & b. 9. Eliz.
Dyer. 260. F. N. B. 32.
14. H. 8. 31. 19. E. 2.
Dar. Pref. 21. 10. E. 3. 17.
9. H. 6. 31.
30. E. 3. tit. Quar. imp. Stath.
46. E. 3. 15. 9. H. 6. 39. 56.
19. H. 6. 68. L. 5. E. 4. 115.
9. E. 4. 30.

11. H. 4. 80.
(Hob. 151)

incumbent was not to be removed: and so it was at the common law, if an usurpation had beene had upon an infant or feme covert, having an advowson by descent, or upon tenant for life, &c. the infant, feme covert, and he in the reversion were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenarie generally was a good plea in a *quare impedit*, or assise of *darreine presentment*; and the reason of this was, to the intent that the incumbent might quietly intend and applie himselfe to his spirituall charge. And secondly, the law intended, that the bishop that had cure of soules within his diocese, would admit and institute an able man for the discharge of his dutie and his owne; and that the bishop would doe right to every patron within his diocese. But at the common law, if any had usurped upon the king, and his presentee had beene admitted, instituted, and inducted, (for without induction the church had not beene full against the king) the king might have removed him by *quare impedit*, and beene restored to his presentation; for therein he hath a prerogative, *quod nullum tempus occurrit regi*; but he could not present, for the plenarie barred him of that; neither could he remove him any way but by action, to the end the church might be the more quiet in the meane time. [*] Neither did the king recover dammages in his *quare impedit* at the common law. But the said statute [a] hath altered the common law in the cases aforesaid; as namely, *Quoad hoc, quod si pars rea accipiat de plenitudine ecclesie per suam propriam presentationem, non propter illam plenitudinem remaneat loquela, dummodo breve infra tempus semestris impetretur, &c.* and also hath provided remedy in the other cases, as by the said act appeareth.

[g] And if the king doe present to a church, and his clerke is admitted and instituted, yet before induction the king may repeale and revoke his presentation. But regularly no man can be put out of possession of his advowson, but by admission and institution upon an usurpation by a presentation to the church, *cum aliquis jus presentandi non habens presentaverit, &c.* and [not by collation of the bishop: [b] and therefore if the bishop collate without title, and his clerke is inducted, this shall not put the rightfull patron out of possession; for it shall be taken to be only provisionally made for celebration of divine service untill the patron doe present; and therefore he is not driven to his *quare impedit*, or assise of *darreine presentment*, in that case; but an usurpation by collation shall take away the right of collation that is in another. (1)

It is to be observed, that an usurpation upon a presentation shall not only put out of possession him that hath right of presentation, but right of collation also. Therefore at this day the incumbent shall be removed in a *quare impedit*, or assise of *darreine presentment*, if there be not a plenarie by six moneths before the *teste* of the writ; but then the incumbent must be named in the writ, or else he shall never be removed: yet at the common law, if the ordinary refused to admit and institute the clerke of the patron, or when any disturbed him to present, so as he could not preferre his clerke, he might have his *quare impedit*, or assise of *darreine presentment*; and if the church were not full, have a writ to the bishop to admit his clerke: but so odious was symonie in the eye of the common law, that before the statute of W. 2. he recovered no dammages. At the common law, if hanging the *quare impedit* against the ordinary for refusing of his clerke, and before the church were full, the patron brought a *quare impedit* against the bishop, and hanging the suit, the bishop admit and institute a clerke at the presentation of another, in this case if judgement be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent that came in *pendente lite* by usurpation; for *pendente lite nihil innovetur*; and therefore at the common law it was good policie to bring the *quare impedit* against the bishop as speedily as might be. And it is to be observed, that albeit the clerke that comes in *pendente lite*, by usurpation, shall be removed; yet if the rightfull patron, being a stranger to the writ, present *pendente lite*, and his clerke is admitted and instituted, he shall not be removed; for else by the bringing of such *quare impedit* against the ordinary, the rightfull patron might be defeated of his presentation: and therefore ever after the statute of *Westm. 2.* amongst other things it was enquired *ex officio*, if the church were full, and of whose presentation, &c. and if the plaintife should have a writ to the bishop, and his clerke admitted, (as in most cases hee ought) yet may the rightfull incumbent have his remedie by law.

And as it was good policie (as hath beene said) to bring a *quare impedit* as speedily as might be against the bishop, so it is good policie at this day to name the bishop in the *quare impedit*, for then he shall not present by laps. But seeing the bishop shall not present by laps because he is named in the writ, what then, after that the time be devolved to the metropolitan, shall not he present by laps, because he is not named? To this it is answered, that he shall not in that case present by laps; for the metropolitan shall never present or collate by laps after six moneths, but when the immediate ordinary might have collated by laps within the six moneths, and had surceased his time. And so it is if the time be devolved to the king for

(1) V. stat. 7. Ann. c. 18.

for the first step or beginning faileth; and in humane things, *Quod non habet principium, non habet finem*. And all these points were resolved [*] in a writ of error brought by *Richard* bishop of London and *John Lau* after against *Anthony Lowe* upon a judgement given against them in a *quare impedit* in the common-place for the church of Winbifhe. But now let us heare what our author will say unto us.

Sect. 649.

ITEM, si tenant en taile ad issue et soit disseise, et puis il releffa per son fait tout son droit a le disseisor: en cest case nul droit de taile poit estre en le tenant en taile, pur ceo que il avoit releas tout son droit. Et nul droit poit estre en l'issue en le taile durant le vie son pere. Et tiel droit del enheritance en le taile n'est pas tout ousterment expire per force de tiel releas, &c. Ergo, il covient que tiel droit demurt en abeyance*, ut supra, durant la vie le tenant en taile que releffa, &c. et apres son decease donque est tiel droit maintenant en son issue en fait, &c.

ALSO, if tenant in taile hath issue and is disseised, and after he releaseth by his deed all his right to the disseisor: in this case no right of taile can be in the tenant in taile, because hee hath released all his right. And no right can bee in the issue in taile during the life of his father. And such right of the inheritance in the taile is not altogether expired by force of such release, &c. Ergo, it must needs be that such right remaine in abeyance, ut supra, during the life of tenant in taile that releaseth, &c. and after his decease such right presently is in his issue in deed, &c.

LITTLETON having declared where a fee is in abeyance, and where a freehold and fee is in abeyance by act in law, and where a fee that is in abeyance may be charged; here he putteth two cases where a right of an estate taile may be in abeyance by the act of the partie, which are so cleere and evident, as there needs no further proote or argument, than *Littleton* hath justly and artificially made, albeit some objections of no weight have beene made against it. If tenant in taile of lands holden of the king be attainted of felonie, and the king after office seifeth the same, the estate taile is in abeyance, there said to be in suspence.

Grant son estate, concedit statum suum.

State or estate signifieth such inheritance, freehold terme for yeares, tenancie by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c. as much as he can grant shall passe, as here by *Littleton's* case appeareth. Tenant for life, the remainder in taile, the remainder to the right heires of tenant for life, tenant for life grant *totum statum suum* to a man and his heires, both estates doe passe.

(Hob. 338)

Pl. Com. fol. 562, 563. in *Walsingham's* case. 14. E. 3. Discont. 5.

(Cro. Car. 427, 8, 9. Ant. 117. a. Dyer 71. a.)

19. H. 6. 60. 20. Aff. p. *Walsingham's* case, ubi supra. (Ant. 263. b. 299. b. 331. a. 342. b.)

Vide Sect. 65. 524, 525, 526. 44. E. 3. 10. 14. Aff. 28. 43. Aff. 8. 5. H. 7. 30.

44. Aff. 28. 44. E. 3. 10.

Sect. 650.

EN mesme le maner est, lou tenant en taile granta tout son estate a un autre; en cest cas le grauntee n'ad estate forsque pur terme de

IN the same manner it is, where tenant in taile grant all his estate to another; in this case the grantee hath no estate but for terme of life of the tenant

Right, jus, sive rectum, (Flo. 484.)

(which *Littleton* often useth) signifieth properly, and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c. where it shall bee said, *quod jus descendit et non terra*. But (Right) doth also include the estate

20. H. 6. 9.

* &c. added L. and M. and Roh.

Lib. 3. Cap. II. Of Discontinuance. Sect. 650.

Vide Sect. 465. Pl. Com. 484. Lib. 8. fol. 153. Altham's case. 39. H. 6. 38.

(1. Cro. 429.)

[a] W. 2. cap. 3. Pl. Com. 484. & 487. b.]

Vid. Sect. 429. 659. &c. (Post. 347. b.)

6. H. 7. 8. 2. Altham's case ubi supra.

Pl. Com. fol. 374. in feignior Zouche's case; & fol. 487. & 448. in Nichol's case.

23. H. 8. taile Br. 32. 35. H. 8. Grant. Br. 150. Vide 16. Eliz. Dier 325. b. Titulum.

43. Aff. p. 13. 41. E. 3. tit. Waste 83. 11. H. 4. 67. 13. H. 7. 10. Pl. Com. 482. per Dier. 27. H. 8. 20.

42. E. 3. 23.

F. N. B. 60. H. 41. E. 3. Waste 83. 42. E. 3. 18.

estate *in esse* in conveyances; and therefore if tenant in fee simple make a lease for yeares, and release all his right in the land to the lessee and his heires, the whole estate in fee simple passeth.

And so commonly in fines, the right of the land includeth and passeth the state of the land; as *A. cognovit tenementa prædicta esse jus ipsius B.* &c. And the statute [a] saith, *jus suum defendere* (which is) *statum suum*. And note that there is *jus recuperandi*, *jus intrandi*, *jus habendi*, *jus retinendi*, *jus percipiendi*, *jus possidendi*.

Title, properly, (as some say) is, when a man hath a lawfull cause of entry into lands whereof another is seised, for the which hee can have no action, as title of condition, title of mortmain, &c. But legally this word (Title) includeth a right also, as you shall perceive in many places in *Littleton*: and title is the more generall word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *Titulus est justa causa possidendi quod nostrum est*, and signifieth the meanes whereby a man commeth to land, as his title is by fine or by feoffment, &c. And when the plaintife in assise maketh himselfe a title, the tenant may say, *Veniat assisa super titulum*; which is as much to say, as upon the title which the plaintife hath made by that particular conveyance. *Et dicitur titulus à tuendo*, because by it he holdeth and defendeth his land; and as by a release of a right a title is released, so by release of a title a right is released also. See more hereof in *Fitzherbert* and *Brookes' Abridgements* in the title of *Title*.

Interest. *Interesse* is vulgarly taken for a terme or chattle reall, and more particularly for a future tearme; in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legall understanding, it extendeth to estates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them: and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall passe. And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum statum suum* in lands, all his estates therein passe. *Et sic de cæteris*.

Ne unques avera brieve de waste, &c. So it is if tenant for life be, the remainder in taile, and he in the remainder release to the tenant for life, all his right and state in the land. Hereby it is said in our bookes, that the estate of the lessee is not enlarged, but the release serveth to this purpose, to put the estate taile into abeyance, so as after that he in the remainder cannot have an action of waste; yet in that case (saving reformation) the lessee for life hath an estate for the life of tenant in taile expectant upon his owne life. But if tenant in fee release to his tenant for life all his right, yet he shall have an action of waste. And if tenant in taile make a lease for his owne life, he shall have an action of waste.

vie del tenant en le taile, et le reversion de le taile n'est pas en le tenant en taile, pur ceo que il avoit graunt tout son estate et son droit, &c. Et si le tenant a que le graunt fuit fait fist wast, le tenant en le taile ne unque avera brieve de wast, pur ceo que nul reversion est en luy. Mes le reversion et le enberitance de le taile, durant le vie le tenant en le taile, est en abeiance, cest a savoir, tant solement en le remembrance, consideration, et intelligence de la ley.*

in taile, and the reversion of the taile is not in the tenant in taile, because he hath granted all his estate and his right, &c. And if the tenant to whom the grant was made make waste, the tenant in taile shall not have a writ of waste, for that no reversion is in him. But the reversion and inheritance of the taile, during the life of the tenant in taile, is in abeyance, that is to say, only in the remembrance, consideration, and intelligence of the law.

Titulus est justa causa possidendi

Sect.

* &c. added in L. and M. and Rob.

Sect. 651.

ITEM, si un evesque alien terres que sont parcel de son evesquery et devie, ceo est un discontinuance a son successor, pur ceo que il ne poit enter, mes est mis a son brieve de ingressu sine assensu capituli.

AL S O, if a bishop alien lands which are parcell of his bishopricke and die, this is a discontinuance to his successor, because he cannot enter, but is put to his writ of *de ingressu sine assensu capituli*.

(Ant. 342. a. F. N. B. 194.)

Of this sufficient hath beene said (how the law standeth at this day) before in this Chapter.

Sect. 652.

ITEM, si un dean alien terres * queux il ad en droit de luy et son chapitre, et morust, son successor † poit enter. ‡ Mes si le deane est sole seise come en droit son deanry, dunque son alienation est discontinuance a son successor, come est dit adevant.

AL S O, if a deane alien lands which he hath in right of him and his chapter, and dieth, his successor may enter. But if the deane bee sole seised as in right of his deanry, then his alienation is a discontinuance to his successor, as is said before.

(Ant. 342. a.)

HEREOF also that which was necessary is before said in this Chapter, and *Littleton's* owne words are plaine and evident.

22. E. 4. tit. Feoffment, & Faits, 29.
21. E. 4. 85, 86.

Sect. 653.

ITEM, peradventure ascuns voilont arguer et dire, que si un abbe et son covent sont seises en leur demesne come de fee de certaine terres a eux et a leur successors, &c. et l'abbe sans assent de son covent alien mesmes les terres a un autre et devie, ceo est un discontinuance a son successor, &c.

AL S O, peradventure some will argue and say, that if an abbot and his covent bee seised in their demesne as of fee of certaine lands to them and to their successors, &c. and the abbot without the assent of his covent alien the same lands to another and die, this is a discontinuance to his successor, &c.

Sect. 654.

PER mesme raison ils voilont dire, que lou un dean || en chapitre sont seises de certain terre a eux et a leur successors, si le deane alien mesme la terre, &c.

BY the same reason they will say, that where a deane and chapter are seised of certaine lands to them and their successors, if the deane alien the same lands,

ceo

* queux il ad en droit de luy et son chapitre, — parcel de son deanry; L. and M. and Roh. † ne added L. and M. and Roh.
† Mes poit aver brieve de ingressu sine assensu episcopi et capituli, &c. added L. and M. and Roh. and MSS. || en—et le;
L. and M. and Roh.

*ceo ferroit un discontinuance a son
successeur, issint que son successeur
ne poit enter, &c. A ceo poit
estre respondue, que il y ad grand
diversitie perenter les * deux ca-
ses.*

&c. this shall be a discontinuance
to his successor, so as his successor
cannot enter, &c. To this it may
be answered, that there is a great
diversitie betweene these two
cases.

Sect. 655.

(Ant. 343. a.)

CAR quant un abbe et le covent
sont seises †, uncore s'ils sont
disseise, l'abbe avera assise en son
nosme demesne, sans nosmer le co-
vent, ‡ &c. Et si ascun voile
suer præcipe quodd reddat, &c.
de mesmes les terres quant ils fue-
ront en le maine l'abbe et covent,
il covient que tiel action real soit
sue envers l'abbe solement sans
nosme la covent ||, pur ceo que
touts sont morts persons en la ley,
forsque l'abbe que est le souveraigne,
&c. Et ceo est per cause del
souveraigntie §; car autrement il
ferroit forsque come ¶ un de
les auters moignes de le covent,
&c.

FOR when an abbot and the
covent are seised, yet if they
bee disseised, the abbot shall have
an assise in his owne name, with-
out naming the covent, &c. And
if any will sue a *præcipe quodd red-
dat*, &c. of the same lands when
they were in the hands of the
abbot and covent, it behoveth
that such action reall be sued
against the abbot only without
naming the covent, because they
are all dead persons in law, but the
abbot who is the souveraigne, &c.
And this is by reason of the sove-
raignty; for otherwise he should
bee but as one of the other monkes
of the covent, &c.

Sect. 656.

MES un dean et le chapter ne
sont morts persons en la ley,
&c. car chescun de eux poit aver
action per soy en divers cases. Et
de tiels terres ou tenements que
le deane et chapter ont en com-
mon, &c. s'ils soient disseises,
le deane et chapter averont un
assise, et nemy le deane sole,
** &c. Et si auter voile aver
action real de tiels terres ou te-
nements envers le deane, &c. il
covient de suer envers le deane
et chapter, et nemy envers le
deane sole, &c. et issint il ap-
piert

BUT deane and chapter are not
dead persons in law, &c. for
every of them may have an action
by himselfe in divers cases. And
of such lands or tenements as the
deane and chapter have in com-
mon, &c. if they bee disseised, the
deane and chapter shall have an
assise, and not the deane alone, &c.
And if another will have an action
reall for such lands or tenements
against the deane, &c. he must sue
against the deane and chapter,
and not against the deane alone,
&c. and so there appeareth a
piert

* dites added L. and M. and Roh.
|| &c. added L. and M. and Roh.
** &c. not in L. and M. nor Roh.

† &c. added L. and M. and Roh.
§ &c. added L. and M. and Roh.

‡ &c. not in L. and M. nor Roh.
¶ not in L. and M. nor Roh.

appiert grand diuersitie perenter great diuersitie betweene the two
les deux cafes, &c. cafes, &c.

THESE are apparent, and need no explanation. Saving in the 655. Section mention is made of the *præcipe quod reddat*, which in this place is intended of a reall action whereby land is demanded, and is so called of the words in every such writ. (10. Rep. 132. F. N. B. 2. c. 131. e. 192. b.)

And the reason of this diuersitie betweene the case of the abbot and covent, and deane and chapter is, for that (as hath beene said) the monkes are regular, and civilly dead, and the chapter are secular, and persons able and capable in law. But by the policie of law the abbot himselfe (here termed the soveraigne) albeit he be a monke and regular, yet hath he capacitie and abilitie to sue and be sued, to enfeoffe, give, demise, and lease to others, and to purchase and take from others; for otherwise they which right have should not have their lawfull remedie, nor the house remedie against any other that did them wrong; neither could the house without such capacitie and abilitie stand. And the covent have no other abilitie or capacitie, but only to assent to estates made to the abbot, and to estates made by him, which for necessitie's sake, though they be civilly dead, they may doe. Vid Sect. 200. S. E. 3. 27. 11. H. 4. 84. 21. E. 4. 86. 11. II. 7. 12.

Sect. 657.

ITEM, si le master d'un hospitall ALSO, if the master of an hos- (Ante 342. a.)
discontinue certaine terre de son pitall discontinue certaine
hospitall, son successeur ne peut en- land of his hospitall, his successor
ter, mes est mis a son brieve de in- cannot enter, but is put to his
gressu sine assensu confratrum et writ of *de ingressu sine assensu con-*
** confrorum, &c. Et tous tiels* *fratrum et confrorum, &c.* And
briefes pleinement appareront en le all such writs fully appeare in (Flo. 22. b.)
Registre, &c. the Register, &c.

THIS must also be understood where the master of the hospitall hath sole and distinct possessions, and not where he and his brethren are seised as a body politike aggregate of many. And here Littleton (as divers times before) doth cite the Register.

Sect. 658.

ITEM, si terre soit lessé a un ALSO, if land be lett to a man (1. Roll. Abr. 634.)
home pur terme de sa vie, le for terme of his life, the re-
remainder a un autre en le taile, mainder to another in taile, saving
savant le reversion al lessor, et the reversion to the lessor, and af-
puis celui en le remainder dis- ter he in the remainder disseiseth
seist le tenant a terme de vie, et the tenant for terme of life, and
fait un feoffment a un autre en maketh a feoffment to another in
fee, et puis morust sans issue, et fee, and after dyeth without issue,
le tenant a terme de vie morust; and the tenant for life dyeth; it
il semble en cest cas, que celui en la seemeth in this case, that hee in
reversion bien puit enter sur le the reversion may well enter upon
feoffee, pur ceo que celui en le the feoffee, because he in the re-
remainder que fist le feoffment, mainder which made the feoff-
ne fuit unque seise en le taile per ment, was never seised in taile by
force de mesme le remainder, &c. force of the same remainder, &c.

HERE

* *confrorum—frorum*, L. and M. and Roh.

Vid. Sect. 637. 592. 596. 597.
601. 640. 641. Vide Sect. 637.
(10. Rep. 35. 1. Roll. Abr. 634.)

HERE it appeareth, that albeit the feoffor hath an estate taile in him expectant upon an estate for life, yet his feoffment worketh no discontinuance. Wherein *Littleton* doth adde a limitation to that which in this Chapter he had generally said, viz. That an estate taile cannot be discontinued, but where he that maketh the discontinuance was once seised by force of the taile; which is to be understood, when he is seised of the freehold and inheritance of the estate in taile, and not where he is seised of a remainder or a reversion expectant upon a freehold; which freehold (as often hath beene said) is ever much respected in law.

CHAP. 12.

Of Remitter.

Sect. 659.

HERE our author having next before treated of a Discontinuance, very aptly beginneth this Chapter with a description of a Remitter.

Remitter est un antient terme en la ley, and is derived of the Latine verbe *remittere*, which hath two significations; either, to restore and set up againe, or to cease. Therefore a remitter is an operation in law upon the meeting of an ancient right remediable, and a latter state in one person where there is his follie in him, whereby the ancient right is restored and set up againe, and the new defeasible estate ceased and vanished away. And the reason hereof is, for that the law preferreth a sure and constant right, though it be little, before a great estate by wrong and defeasible; and therefore the first and more ancient is the most sure and more worthy title; *Quod prius est, verius est, Et quod prius est tempore, potius est jure*: [a] therefore many bookes in stead of remitter say, that he is *en son primer estate, or en son meior droit, or en son meior estate, or the like.* (1)

Lou home ad deux titles. Here this word

(Titles) is taken in the largest sense, including rights: for being properly taken, [b] as in case of a condition, mortmaine,

*REMITTER est un antient terme en la ley, et est lou home ad deux titles a terres ou tenements, scilicet, un plus antient title, et un auter title plus darrein; et s'il vient a la terre per le plus darreine title, uncore la ley luy adjudgera eins per force del plus eigne title, pur ceo que le plus eigne title est le plus sure title, et plus digne title. Et donque quant home est adjudge eins per force de son eigne title, ceo est a luy dit un remitter, pur ceo que la ley luy mitter d'estre eins en la terre per le plus eigne * et sure title. Sicome tenant en le taile discontinua la taile, et puis il disfeist son discontinuee, et issint morust seise, per que les tenements discendent a son issue ou cosine inheritable*

REMITTER is an antient terme in the law, and is where a man hath two titles to lands or tenements, viz. one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthie title. And then when a man is adjudged in by force of his elder title, this is sayd a remitter in him, for that the law doth admit him to be in the land by the elder and surer title. As if tenaunt in taile discontinue the taile, and after hee disseiseth his discontinuee, and so dieth seised, whereby the tenements descend to his issue or cosine inheritable by

(1. Roll. Abr. 422.)

[a] 25. Aff. pl. 4. 35. Aff. pl. 11.
26. E. 3. 69. 11. H. 4. 50. a.
41. E. 3. 17. b. Et tit. Remit. 11.
6. E. 3. 17.

(3. Rep. 153.)

[b] Vide Sect. 429. & 659, &c.
34. H. 8. tit. Remitter Br. 50.
44. E. 3. Attaint. 22.
38. Aff. pl. 7.
(Flo. 484. Ant. 345.)

* *et sure* not in L. and M. nor Roh.

(1) I. *As to the general doctrine of remitter*:—In note 1, p. 239. a notice was taken of the different degrees of title, which a person disseising another of his lands acquires in them in the eye of the law, independently of any anterior right: That if *A.* is disseised by *B.* while the possession is in *B.* it is a mere naked possession, unsupported by any right; and that *A.* may restore his possession, and put a total end to the possession of *B.* by an entry on the land, without any previous action: but that if *B.* dies, the possession descends on his heir by act of law. That, in this case, the heir comes to the possession of the land by a lawful title, and acquires in the eye of the law an apparent right of possession, which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an action at law. That the actions used in these cases are called possessory actions; but that if *A.* permits the possession to be withheld from him beyond a certain period of time, without claiming it, or suffers judgment in a possessory action to be given against him by default; or, if being tenant in tail, he makes a discontinuance; in all these cases, *B.*'s title is strengthened, and *A.* can no longer recover by a possessory action, and his only remedy there is, by an action on the right. That these last actions are called droiturel actions, and that they are the ultimate resource of the person disseised.—Now, if in any of these three different stages of the adverse title, the disseisee, without any default in him, comes to the possession of the estate by a defeasible title, he is considered to be in not as of his new right, but as of his ancient and better right; and consequently, the right of the person, who, supposing the disseisee still to be in as of his defeasible estate, would be entitled to the lands, upon the ceasing or determination of that estate, is gone for ever. In these circumstances, the disseisee is said to be *remittered* to his ancient estate. The principal reason for his being remitted is, that the person so remitted cannot sue or enter upon himself; so that in these cases where the possession is recoverable by entry, the remitter has the effect of an entry; and in those cases where it is recoverable by action, it has the effect of a judgment at law. But there is no remitter where he who comes to the defeasible estate, comes to it by his own act, or his own assent. Hence, the defeasible estate, to intitle the party to be remitted, must be made to him during infancy or coverture, or must come to him by descent, or act of law: neither is there any remitter where the ancient estate is recoverable, neither by action, nor by entry. So that in those cases where the disseisee is beyond the three stages mentioned in the beginning of the note, if he afterwards comes to the estate by a defeasible title, he remains seised as of that estate, and is not remitted to his more ancient title. These are the

per force de le taile ; en cest case, ceo est a luy a que les tenements descendent, que ad droit per force de le taile un remitter a le taile, pur ceo que le ley luy mitte et adjudge d'estre eins per force de le taile, que est son eigne title: car s'il ferroit eins per force de le discent, donques le discontinuee puissoit aver briefe de entre sur disseisin en le per envers luy, et recouvreroit les tenements et ses dammages, &c. Mes entant que il est eins en son remitter per force de le taile, le title et le interest le discontinuee est tout ousterment anient et defeat, &c.*

force of the taile ; in this case, this is to him to whom the tenements descend, who hath right by force of the taile a remitter to the taile, because the law shall put and adjudge him to bee in by force of the taile, which is his elder title: for if hee should bee in by force of the discent, then the discontinuee might have a writ of entrie sur disseisin in the per against him, and should recover the tenements and his dammages, &c. But inasmuch as he is in his remitter by force of the taile, the title and interest of the discontinuee is quite taken away and defeated, &c. (1)

assent to a ravisher, and the like, there is no remitter wrought unto them, because these are but bare titles of entrie, for the which no action is given; but a remitter must be to a precedent right: and *Littleton* in this Chapter putteth all his cases onely of remitters, to rights remediable.

Et un auter title plus darreine, &c. Here is to be observed, that an estate must worke a remitter to an ancient right; for albeit two rights doe descend, there can be no remitter, because one right cannot worke a remitter to another: for regularly to every remitter there be two incidents, viz. an ancient right and a defeasible estate of freehold coming together.

Le plus eigne title est le plus sure title, et plus digne title. So as the eldest title is worthily (as hath bene said) preferred, because it is the more sure and more worthy.

Sicome tenant en taile discontinuee le taile, &c. Here our author, according to his accustomed manner;

to illustrate his description putteth an example of a remitter, where the law preferreth the ancient estate by right, before a new estate defeasible. And this remitter is wrought by an estate cast upon the issue in taile by discent, which is an act in law; and the discent of the land in possession, and the right of estate taile descend together.

Est tout ousterment anient et defeat, &c. Here be two things implied and to be understood: First, that this remitter is wrought in this case by operation of law upon the freehold in law descended without any entrie. Secondly, that the law so favoureth a remitter (being a restoring to right), that if the discontinuee be an infant or a feme covert, and tenant in taile after a discontinuance disseise them and die seised, the issue shall be remitted without any respect of the privilege of infancie or coverture; and therefore our author said, *le title et interest le discontinuee est tout ousterment anient et defeat.*

Donques le discontinuee, &c. Here is a reason added in this particular case, that sitteth not other cases of remitter; for in this case and many other, the law that abhorreth fruits of vexation, doth avoid circuitie of action; for the rule is, *Circuitus est evitandus.*

19. H. 6. 59. 78. 45. tit. Entre Cong. 3. Pl. Com. 246. a. (3. Rep. 1.)

19. H. 6. 61, 62.

(Post. 390. 2. Ant. 246. 2. Post. 357. 2.)

11. E. 4. 1.

11. E. 3. 3. tit. Aff. 85.
4. E. 4. 35. 11. R. 2. Bar. 242.
30. E. 3. 8. 6. E. 3. 7.
19. H. 6. 63. 24. E. 3. 70.
14. H. 4. 27. 10. H. 7. 11.
F. N. B. Mesne & Wall.

Sect. 660.

ITEM, si le tenant en taile enseoffa son fies en

ALSO, if tenant in taile infeoffe his sonne in fee,

OUR author having put one example where both the rights descend together, now puts another example, where

Temp. E. 1. Remit. 13.
11. E. 3. Age 5. 38. E. 3. 24.
40. E. 3. 43. 21. E. 4. 19.

* &c. not in L. and M. nor Roh.

(1) I. Here the ancient right and the defeasible estate come together. It is immaterial whether they come by discent or by act of law. See the instances brought by *Littleton* afterwards, Sect. 665, 666. and 678.

the doctrines of the common law respecting remitter. But they are greatly altered by the statute of the 27 Hen. VIII. That statute executes the possession to the party in the same plight, manner, and form, as the use was limited to him: It operates only with respect to the first taker, and therefore the issue of the issue is remitted. By the statute of 32 Hen. VIII. it is enacted, that no fine, feoffment, or other act by the husband, of the wife's lands, shall be any discontinuance; but that the wife and her heirs, and such others to whom the right shall appertain after her decease, shall, notwithstanding such fine, or other act, lawfully enter into her lands, according to their rights and titles therein. This takes from the wife, and those claiming under her, the effect of the statute of the 27 Hen. VIII. so that she has her election to take by the 27 Hen. VIII. or to enter by the 32 Hen. VIII. upon which she shall be remitted. See *Duncombe v. Wingfield*, Hobart 254.—Sir W. Blackstone, 3. Com. Cha. 10, observes, that the doctrine of remitter might seem superfluous to an hasty observer, who perhaps would imagine, that since the tenant hath now both the right, and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned, by shewing that defect in a writ of entrie; and then he must have been driven to his writ of right to recover his just inheritance; which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action: the law, therefore, remits him to his prior title, and puts him in the same condition as if he had recovered the land by writ of entrie. Without the remitter, he would have had *jus et seisinam* separate, a good right, but a bad possession; now, by the remitter, he hath the most perfect of all titles, *juris et seisinam conjunctionem*.

where the issue in taile claimeth by purchase in the life of tenant in taile, and the ancient right descendeth after to the same issue.

Car coment que tiel heire fuit de pleine age al temps del mort, &c.

The reason is, because no follie can be adjudged in the infant at the time of the acceptance of the feoffment. Therefore the law respecteth the time of the feoffment, and not the time of the death: and albeit he might have waived the estate which he had by the feoffment at his full age, yet here it appeareth, that the right of the estate taile descending to him either within age, or of full age, shall worke a remitter in him; for that the waiver of the state should have beene to his losse and prejudice.

Since *Littleton* wrote, and after the statute of 27 H. 8. cap. 10. if tenant in taile make a feoffment in fee to the use of his issue being within age, and his heires, and dieth, and the right of the estate taile descend to the issue being within age; yet he is not remitted, because the statute executeth the possession in such plite, manner and forme, as the use was limited: *Et sic de similibus*, so as there is a great change of remitters since *Littleton* wrote. (1)

But if the issue in taile in that case waive the possession, and bring a formedon in the discender, and recover against the feoffees, he shall thereby bee remitted to the estate taile; otherwise the lands may be so incumbered, as the issue in taile should be at a great inconvenience: but if no formedon be brought, if that issue dieth, his issue shall be remitted; because a state in fee simple at the common law descendeth unto him.

Esleant de pleine age, il charge per son fait,

*fee, ou son cosine inheritable per force de le taile, le quel fuit ou cosin al temps de feoffment est deins age, et puis le tenant en le taile devia, et celui a que le feoffment fuit fait est son heire per force de le taile; ceo est un remitter al heire en le taile a que le feoffment fuit fait. Car coment que durant la vie le tenant en le taile que fist le feoffment, tiel heire serra adjudge eins per force de le feoffment, uncore apres la mort le tenant en le taile, l'heire serra adjudge eins per force de le taile, et nemy per force de le feoffment. * Car coment que tiel heire fuit de pleine age al temps de le mort de le ternaunt en le taile que fist le feoffment, ceo ne fait ascun matter, si l'heire fuit deins age al temps del feoffment fait a luy. Et si tiel heire esleant deins age al temps de tiel feoffment, vient al pleine age, vivant le tenant en le taile que fist le feoffment, et issint esleant de pleine age, il charge per son fait mesme la terre ove*

or his cosine inheritable by force of the taile, which sonne or cosine at the time of the feoffment is within age, and after the tenant in taile dieth, and hee to whom the feoffment was made is his heire by force of the taile; this is a remitter to the heire in taile to whom the feoffment was made. For albeit that during the life of the tenant in taile who made the feoffment, such heire shall bee adjudged in by force of the feoffment, yet after the death of tenant in taile, the heire shal be adjudged in by force of the taile, and not by force of the feoffment. For altho' such heire were of full age at the time of the death of the tenant in taile whomade the feoffment, this makes no matter, if the heire were within age at the time of the feoffment made unto him. And if such heire beeing within age at the time of such feoffment, commeth to full age, living the tenant in taile that made the feoffment, and so beeing of full age he charges by his deed

un

27. H. 8. c. 10. of Uses.

35. H. 8. Dy. 54. b. 6. E. 6.

ib. 77. 1. & 2. P. & M. 116.

2. & 2. P. & M. 129. 191.

28. H. 8. 27. b. Pl. Com. Amy

Townshend's case, fol. 111.

34. H. 8. tit. Remit. Br. 49.

(Dyer 106. Sid. 63. 1. Leo. 91.

Hob. 255. 298.)

Pl. Com. ub. sup.

(2. Roll. Abri. 419. 421.

1. Roll. Rep. 260.)

* Car not in L. and M., nor Rob.

(1) The effect of this statute on the doctrine of Remitter is very fully explained in *Duncombe v. Wingfield*, Hob. 254. See 2. Leo. 222. Sid. 63. Dyer, 351.

un common de pasture, ou ove un rent charge, et puis le tenant en le taile mortuif; ore il semble que le terre est discharge del common, et de le rent, pur ceo que le heire est eins de autre estate en la terre que il fuit al temps de le charge fait, entant que il est en son remitter per force de le taile, et issint l'estate que il avoit al temps de le charge, est ousterment defeat, &c.*

the same land with a common of pasture, or with a rent charge, and after the tenant in taile dieth; now it seemeth that the land is discharged of the common, and of the rent, for that the heire is in of another estate in the land than he was at the time of the charge made, in as much as hee is in his remitter by force of the taile, and so the estate which hee had at the time of the charge, is utterly defeated, &c. (1)

&c. The reason is, because the grantor had not any right of the estate in taile in him at the time of the grant, but only the estate in fee simple gained by the feoffment, which (as Littleton here saith) is wholly defeated. And the state of the land out of which the rent issued, being defeated, the rent is defeated also.

But if tenant in taile make a lease for life whereby he gaineth a new reversion in fee, so long as tenant for life liveth, and he granteth a rent-charge out of the reversion, and after tenant for life dieth, whereby the grantor becommeth tenant in taile againe, and the reversion in fee defeated; yet because the grantor had a right of the entaile in him, cloathed with a defeasible fee simple, the rent-charge remaineth good against him, but not against his issue; which diversitie is

(2. Roll. Abr. 419. 421. 3. Rep. 5. b. Hob. 45.)

11. H. 7. 21. Edriche's case. (Mo. 319. 1. Rep. 148. Ant. 278. a.)

worthy of observation, for it openeth the reason of many cases.

If the heire apparent of the disseisee disseise the disseisor, and grant a rent-charge, and then the disseisee dieth, the grantor shall hold it discharged; for there a new writ of entrie doth descend unto him, and therefore he is remitted. (2. Roll. Abr. 422.)

So if the father disseise the grandfather, and granteth a rent-charge, and dieth, now is the entry of the grandfather taken away, if after the grandfather dieth, the sonne is remitted, and he shall avoid the charge. So as where our author putteth his example of a fee taile, it holdeth also in case of a fee simple.

Un common de pasture, ou un rent charge, &c. Here Littleton putteth his case of things granted out of the land. But what if the issue at full age by deed indented or deed poll make a lease for yeares of the land, and after by the death of tenant in taile he is remitted, whether shall he avoid the lease or no? And it is holden, he shall not, because it is made of the land it selfe, and the land is become by the lease in another plight than it is in the case of a grant of a rent-charge, which I gather out of our author's owne words in another place.

33. H. 8. Dier 51. b.

Vide Sect. 289.

La terre est discharge del rent, &c. Littleton doth adde these words materially, because the whole grant is not thereby avoided; but the land discharged of the rent-charge; for the grantee shall have notwithstanding a writ of annuitie, and charge the person of the grantor. Li. 2. f. 26. b. Ward's case.

Sect. 661.

ITEM, un principall cause pur que tiel heire en les cases avantdits, et auters cases semblables, serra dit en son remitter, est pur ceo que il n'y ad ascun person envers que il poet fuer son brieve de

ALSO, a principall cause why such heire in the cases afore-said; and other like cases, shall bee said in his remitter, is for that there is not any person against whom he may sue his writ of formedon. For against

UN principall cause pur que, &c. And of this opinion is [d] Littleton in our bookes. [d] 12. E. 4. 20.

41. E. 3. 18. 11. H. 4. 50.

Il n'ad ascun person envers que, &c. sicome il avoit loialment recover mesme la terre vers un autre, &c. Here it is to be understood, that regularly a man shall not be remitted to a right

(6. Rep. 58. b. 1. Sid. 63. 2. Roll. Abr. 419.)

* &c. not in L. and M. nor Roh.

(1) 11. Here the ancient right comes after the defeasible estate.

Lib. 3. f. 3. the Marquess of Winchester's case.

(3. Rep. 2.)

(Ant. 122. b.)
5. H. 7. 35.

Britton fol. 126.

[c] Brañ. li. 4. f. 243. b.

8. R. 2. Quare Imp. 199.
2. H. 4. 18. 14. H. 6. 15, 16.
8. H. 6. 17. 33. H. 6. 15.
F. N. B. 35. B. & 36 F.
24. E. 3. Discont. 16.
33. H. 8. Dier 48. b.
(Ant. 324. b. 333. b.)
Post. 363. b.)

right remediable, for the which he can have no action; for *Litleton* here saith, that there is no person against whom the issue when he commeth to the land without folly may bring his action; and saith also, that this is the principall cause of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in taile suffer a common recovery in which there is error, and after tenant in taile disseiseth the recoveror and dieth, here the issue in taile hath an action, viz. a writ of error; but as long as the recovery remaineth in force, he hath no right, and therefore in that case there is no remitter. (1)

If *B.* purchase an advowson, and suffereth an usurpation and six moneths to passe, and after the usurper granteth the advowson to *B.* and his heires, *B.* dieth, his heire is not remitted, because his right to the advowson was remediable, viz. a right without an action. (2).

Tenant in taile of a manor whereunto an advowson is appendant maketh a discontinuance, the discontinuance granteth the advowson to tenant in taile and his heires, tenant in taile dieth, the issue is not remitted to the advowson, because the issue had no action to recover the advowson before he recovered the manor whereunto the advowson was appendant. And so it is of all other inheritances regardant, appendant, or appurtenant; a man shall never be remitted to any of them before he recontinueth the manor, &c. whereunto they are regardant, appendant, or belonging.

Car nul ne poet clamer droit en les appurtenances ne en les accessories que nul droit ad en le principall.

[c] *Item, excipi potest, &c. quavis jus habeat in tenemento et pertinentiis, primò recuperare debet tenementum ad quod pertinet advocatio, et tunc postea presentet et non ante, et de hac materia in Rotulo de termino Sancti Michaelis, anno regis Henrici tertio in comitatu Norff. de Thomā Bardolfe.*

But, on the other side, if a man be remitted to the principall, he shall also be remitted to the appendant or accessory, albeit it were severed by the discontinuance, or other wrong doer. And therefore if tenant in taile be of a manor whereunto an advowson is appendant, and infeofeth *A.* of the manor with the appurtenances, *A.* re-infeoffeth the tenant in taile, saving to himselfe the advowson, tenant in taile dieth; his issue being remitted to the manor, is consequently remitted to the advowson, although at that time it was severed from the manor. So it is in the same case if tenant in taile had bene disseised, and the disseisor suffer an usurpation, if the disseisee enter into the manor, he is also remitted to the advowson.

formedon. Car envers luy mesme il ne poit suer, et il ne poit suer envers nul autre, car nul autre est tenant del franktenement; et pur cel cause la ley luy adjudge eins en son remitter, scilicet, en tiel plite, sicome il avoit loialment recover mesme la terre envers un autre, &c.

himselfe he cannot sue, and hee cannot sue against any other, for none other is tenant of the freehold; and for this cause the law doth adjudge him in his remitter, *scilicet*, in such plite, as if hee had lawfully recovered the same land against another, &c.

Sect. 662.

ITEM, si terre soit taile a un home et a sa feme, et a les heires de lour deux corps engendres, les queux ont issue file, et le feme devy, et le baron prent autre feme, et ad issue un autre file, et discontinua le taile, et puis disseise le discontinuee et issint morust seise, ore le terre disce-

ALSO, if land be entailed to a man and to his wife, and to the heires of their two bodies begotten, who have issue a daughter, and the wife dieth, and the husband taketh another wife, and hath issue another daughter, and discontinue the taile, and after he disseiseth the discontinuee and

(1) III. By what sir Edward Coke says here, and in other parts of this Chapter, it appears, that there is no remitter to a bare title, to an immediate right, or to a bare right of action, nor in those cases where the freehold does not accrue to the right. It is upon the last ground, that where tenant in tail makes a discontinuance, the issue in tail is not remitted; neither is there a remitter to a term for years. Hence, if lessee for years to commence at a future day enters before that day (which is a disseisin), and continues in possession till the term commences, he shall not be remitted, for the disseisor acquires by the disseisin an estate of freehold; which, tho' it be tortious, the law will not divest from him for a term which is of no account. See 2. Roll. Abr. 420. l. 25. Com. Dig. vol. 5. 417, 418, 419, 420.

(2) This seems to be altered by the afore-mentioned statute of 7. Ann. c. 18. Note to the 11th edition.

*dera a les deux files. * Et en cest cas quant al eigne file, que est inheritable per force de le tayle, ceo † n'est un remitter forsque de le moity. Et quant al auter moity, el est mis a suer son action de formedon envers sa soer. Car en cest cas les deux soers ne sont pas tenants en parcenary, mes sont tenants en common, pur ceo que ils sont eins per divers titres. Car l'un soer est eins en son remitter per force de le taile, quant a ceo que a luy affiert; et l'auter soer est eins quant a ceo que a luy affiert en fee simple per le discent son pier, ‡ &c.*

so die seised, now the land shal descend to the two daughters. And in this case as to the eldest daughter, who is inheritable by force of the tayle, this is no remitter but of the moitie. And as to the other moitie, she is put to sue her action of formedon against her sister. For in this case the two sisters are not tenants in parcenarie, but they are tenants in common, for that they are in by divers titles. For the one sister is in in her remitter by force of the entaile, as to that which to her belongeth; and the other sister is in as to that to her belongeth in fee simple by the discent of her father, &c.

CEO n'est remitter forsque pur le moitie, &c. Here Littleton putteth a case where the issue in taile shall be remitted to a moitie, because but a moity of the land descended unto her, and there cannot be any remitter, but for so much as cometh to the issue by discent, or by any other meanes without his folly; and in this case by act in law the coparcenary is defeated, for the daughters are in by severall titles, viz. the eldest daughter is tenant in taile *per formam doni*, by the remitter of the one moitie; and the youngest seised in fee simple by discent of the other moitie, against whom the other sister in taile may have her formedon. (1)

44. E. 3. 26. 19. H. 6. 59. (Flo. 246. 2.)

Sect. 663.

EN mesme le man-
ner est, si tenant
en taile enfeoffa son
heire apparant en le
taile (estant l'heire
deins age), et un au-
ter jointenant en fee,
et le tenant en taile
morust; ore l'heire en
taile est en son re-
mitter quant a l'un
moity, et quant a l'au-
ter moitie il est mis
a son brieve de for-
medon, || &c.

IN the same manner
it is, if tenant in
taile enfeoffe his heire
apparant in taile (the
heire being within
age) and another join-
tenant in fee, and the
tenant in taile dieth;
now the heire entaile
is in his remitter as
to the one moitie, and
as to the other moitie
hee is put to his writ
of formedon, &c.

LE beire, &c. est en
son remitter quant
a l'un moitie, &c. (2. Roll. Abr. 41.)

Hereby it appeareth, that albeit joyntenants be seised *pro indiviso per my et per tout*, yet each of them hath in judgement of law but a right to a moitie; and therefore the issue in taile in this case is remitted but to a moity, and is tenant in common but with the other feoffee. And so it is if the discontinuee, after the death of tenant in taile, make a charter of feoffment to the issue in taile, being within age, who hath right, and to a stranger in fee, and make livery to the infant in name of both; the issue is not re-

Vide Sect. 288.

mitted to the whole, but to the halfe: for first he taketh the fee simple, and after the remitter is wrought by operation of law, and therefore can remit him but to a moitie. But of this sufficient hath bene said in the Chapter of Joyntenants.

Sect.

* Et not in L. and M. nor Roh.
in L. and M. nor Roh.

† n'est—est, L. and M. and Roh.

(&c. not in L. and M. nor Roh.)

&c. not

(1) IV. By this and the following Section it appears, that if part of the estate comes to the right, it is remitted for that part.

Sect. 664.

ITEM, si tenant en taile enfeoffa son heire apparant, l'heire esteant de pleine age al temps de feoffment, et puis le tenant en taile morust; ceo n'est remitter al heire, pur ceo que il fuit sa folly, que il esteant de pleine age voile prendre tiel feoffment, &c. Mes tiel folly ne poit estre adjudge en l'heire esteant deins age * al temps del feoffment, &c.

AL SO, if tenant in tail enfeoffe his heire apparant, the heire being of full age at the time of the feoffment, and after tenant in taile dieth; this is no remitter to the heire, because it was his folly, that being of full age hee would take such feoffment, &c. But such folly cannot be adjudged in the heire being within age at the time of the feoffment, &c.

(Ant. 171. b. 187. a. 246. a. 337. b. 308. b.)
40. E. 3. 44. 18. E. 4. 25.

BY this feoffment albeit the heire apparent hath some benefit in the life of his ancestor, yet is he thereby (besides his owne) subject during his life to all charges and incumbrances made or suffered by his ancestor. And therefore our author saith well, *que il fuit son folly que il esteant de pleine age voile prendre tiel feoffment*, but folly shall not be judged in one within age in respect of his tender yeares, and want of experience.

Sect. 665.

(Ant. 202. b.)

HERE *Linleton* putteth a case where the husband within age by the intermarriage may be remitted, albeit he gaineth but a freehold during the coverture *en auter droit*.

Also here is to bee observed, that the estate which doth in this case worke the remitter, could not have continuance after the decease of the wife. And so on the other side, if the husband make a discontinuance, and take backe an estate to him and his wife, during the life of the husband, this is a remitter to the wife presently, albeit the estate is not by the limitation to have continuance after the decease of the husband; which case is proved by the reason of the case which our author here putteth. And here our author observeth the diversity when the husband is within age, and when hee is of full age; for when he is within age, no folly can be adjudged in him, as in this Chapter hath bene often said.

ITEM, si tenant en taile enfeoffa un feme en fee, et morust, et son issue deins age prent mesme la feme † a feme; ceo est un remitter al enfant ‡ deins age, et la feme donque n'ad rien, pur ceo que le baron et la feme sont forsque come un person en ley. Et en cest cas le baron ne poit suer brieve de formedon, sinon que il voiloit suer envers luy mesme, le quel seroit enconvenient; et pur cel cause la ley adjudgera l'heire en son remitter, pur ceo que nul folly poit estre || adjudge en luy esteant

AL SO, if tenant in taile enfeoffe a woman in fee, and dyeth, and his issue within age taketh the same woman to wife; this is a remitter to the infant within age, and the wife then hath nothing, for that the husband and his wife are but as one person in law. And in this case the husband cannot sue a writ of *formedon*, unlessse he will sue against himselfe, which should bee inconvenient; and for this cause the law adjudgeth the heire in his remitter, for that no folly can bee adjudged in him being *deins*

* &c. added L. and M. and Roh.
|| adjudge—*avette*, L. and M. and Roh.

† a feme not in L. and M. nor Roh.

‡ deins age not in L. and M. nor Roh.

deins age al temps d'espousels, &c. Et si l'heire soit en son remitter per force de le taile, il ensuist per reason, que la feme n'ad riens, &c. Car entant que le baron et sa feme sont come un person, la terre ne poit estre seveire per moities; et pur cel cause le baron est en son remitter de l'entiertie. Mes autrement est si tiel heire juit de pleine age al temps de les espousels, car donques le heire n'ad riens forsque en droit sa feme, &c.

within age at the time of the espousels, &c. And if the heire bee in his remitter by force of the entaile, it followeth by reason, that the wife hath nothing, &c. For inasmuch as the husband and wife be as one person, the land cannot be parted by moities; and for this cause the husband is in his remitter of the whole. But otherwise it is if such heire were of full age at the time of espousels, for then the heire hath nothing but in right of his wife, &c.

Here is also to be noted, that presently by the marriage within age, the husband is remitted, and the freehold and inheritance of the wife banished cleane away.

Priſt meſme la feme (4. Rep. 29.)

al feme. Here it is good to be seene what things are given to the husband by marriage. (1) First, it appeareth here by *Littleton*, that if a man taketh to wife a woman seised in fee [f], he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to worke a remitter, and yet the estate which the husband gaineth dependeth upon uncertainty, and consisteth in privitie [g]; for if the wife be attainted of felony, the lord by escheat shall enter and put out the husband: otherwise it is if the felony be committed after issue had. Also, if the husband be attainted of felony, the king gaineth no freehold, but a pernanie of the

[f] 13. H. 4. 6. Stanf. 1. 7. b.
18. E. 4. 5. 11. H. 7. 19.
10. H. 6. 11. 7. H. 6. 9. b.

Vide Sect. 58.

[g] 4. Aff. p. 4. 4. E. 3.
Aff. 166.

(1. Rep. 30. a.
1. Roll. Abr. 343, 344.
5. Rep. 17. Hob. 285.)

[h] Pl. Com. fol. 260. b. Dame
Hale's case. 50. Aff. 5.

38. H. 6. 23. 21. F. 4. 35.
7. E. 4. 6. 7. H. 7. 2. 10. H. 6. 11.

[i] Mich. 26. & 27. Eliz. inter
Amnor & Lodington in brieve
de error adjudge in both Courts.
Lib. 8. fol. 96. Mat. Manning's
case.

7. H. 6. fol. 2.
(1. Roll. Abr. 346.)

Vid. Sect. 58.

Pl. Com. fol. 294. Osborne's
case, and there fol. 192. b.
Wrottesley's case.

[j] Pasch. 32. Eliz. in Cancellar.
in Wytham's case. Hill. 38. Eliz.
in Cancell. in Waterhouse's case.
Wrottesley's case, ubi sup.

13. E. 3. Quar. Imp. 57.
14. H. 4. 12. 38. E. 3. 35. b.
50. E. 3. 13. 10. H. 6. 11.
F. N. B. 121. 22. H. 6. 25.
29. E. 3. 40. 11. R. 2.
Account 49. 12. R. 2.
Briefe 639 5. E. 3. Execut. 99.

[k] 50. E. 3. 13. 28. H. 6. 9.
7. H. 7. 2.

But

* &c. not in L. and M. nor Roh.

(1) On the interest which the husband takes in the chattels real and things in action of his wife.—Some observations have been offered to the reader, in a former part of this work, upon the nature of the estate which the husband takes in his wife's lands of freehold or inheritance. See ante 325. b. note 2. The following observations are now submitted to his consideration, upon the nature of the interest which the husband takes in his wife's chattels real and things in action.—I. *Where the husband survives the wife*.—At the common law no person had a right to administer. It was in the breast of the ordinary to grant administration to whom he pleased, till the statute of the 21st of Hen. VIII. which gave it to the next of kin; and if there were persons of equal kin, whichever took out administration first was entitled to the surplus. The statute of distribution was made to prevent this injustice, and to oblige the administrator to distribute. In those cases where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See the commentary above, and 4. Inst. 87. Roll. Abr. 346. All. 15. Wytham v. Waterhouse, Cro. Eliz. 466. 3. Rep. in Cha. 27. and Gilb. Ca. in Eq. 234.—By the 22 and 23 Car. II. c. 10. administrators are liable to make distributions; but as the act makes no express mention of the husband's administering to his wife, and as no person can be in equal degree to the wife with the husband, he was not held to be within the act. To obviate all doubts upon this question, by the 29 Car. II. c. 3. § 25. it is declared, that the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before the statute of the 22d and 23d of that reign.—Upon the construction of these statutes it has been held, that the husband may administer to his deceased wife, and that he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her and reduced into possession, or contingent, or recoverable only by action or suit.—It was, however, made a question after the statute of 29 Car. II. c. 3. § 25. whether, if the husband, having survived his wife, afterwards died during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next of kin, were entitled to the benefit of it.—But by a series of cases it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death, after the wife, to be granted to the next of kin of the husband. See Mr. Hargrave's Law Tracts, 475. And that if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. See

26. E. 2. 64. 10. H. 6. 11.
F. N. B. 121. 22. H. 6. 25.
[1] Lib. 4. fol. 51. in Ongel's
case. Hil. 17. El. Rot. 457. in
Com. Banco, Sharp's case.
21. E. 4. 4. 21. H. 7. 29.
11. H. 7. 4. 26. H. 8. 7.
43. E. 3. 10. 3. H. 6. 23. 37.
4. H. 6. 5. 14. E. 2. Det. 73.
5. E. 2. Ibid. 169. 30. E. 3.
48. E. 3. 12. 12. R. 3.
Bre. 638, 639. 16. E. 4. 8.
16. H. 6. Bre. 939.
[m] 43. E. 3. 8. V. 10. H. 6. 11.
39. E. 3. 17.

But if the arrerages had become due, or the church had fallen voyd before the marriage, there they were meere in action before the marriage; and therefore the husband should not have them by the common law, although he survived her. And so it is of releefes, *mutatis mutandis*. [1] But now by the statute of 32. H. 8. cap. 37. if the husband survive the wife, he shall have the arrerages as well incurred before the marriage, as after.

But the marriage is an absolute gift of all chattels personals in possession in her owne right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unlesse he and his wife recover them. And of personall goods *en auter droit*, as executrix or administratrix, &c. the marriage is no gift of them to the husband, although he survive his wife. (1)

[m] If an estray happen within the mannor of the wife, if the husband die before seisure, the wife shall have it, for that the propertie was not in the wife before seisure.

But as to personall goods, there is a diversitie worthy of observation betweene a propertie in personall goods (as is aforesaid) and a bare possession; for if personall goods be bailed to a feme, or if she finde goods, or if goods come to her hands as executrix to a bailiffe, and taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against the husband and wife.

But now let us heare *Littleton*.

Le quel ferra inconvenient. This argument *ab inconvenienti*, our author hath used in many places.

Vide Sect. 87, &c.

Sect. 666,

*ITEM, si feme seisie de certaine terre en fee prent baron, le quel aliena mesme la terre a un auter en fee, * l'alienee lessa mesme la terre al baron et sa feme pur terme de leur deux vies, savant le reversion al lessor et a ses heires; en cest cas la feme est eins en son remitter, et el est seisie en fait en son demesne come de fee, sicome el fuit adevant, pur ceo que le reprisal del estate ferra adjudge en ley le fait le baron, et nemy le fait la feme; issint nul folly poit estre adjudge en la feme, que est covert en tiel case. Et en cest case le lessor n'ad + rien en le reversion, pur ceo que la feme est seisie en fee, † &c.*

(Ant. 330. b.)

ALSO, if a woman seised of certaine land in fee taketh husband, who alieneth the same land to another in fee, the alienee letteth the same land to the husband and wife for terme of their two lives, saving the reversion to the lessor and to his heires; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee, as shee was before, because the taking backe of the estate shall be adjudged in law the fact of the husband, and not the fact of the wife; so no folly can be adjudged in the wife, which is covert in such case. And in this case the lessor hath nothing in the reversion, for that the wife is seised in fee, &c.

21. E. 3. 26. 29. E. 3. 43.
41. E. 3. Remit. 11. 19. E. 3.
Remit. 14. 35. Aff. 12.
38. E. 3. 24. 39. E. 3. 29. 30.
41. E. 3. 17. 46. E. 3. 20. b.
26. E. 3. 69. Vi. Sect. 676.
11. R. 2. Remit. 12. 44. E. 3. 17.

LA feme est en son remitter.

By this it appeareth, that albeit there be no moities betweene husband and wife, yet this is a remitter presently, and standeth not upon the survivor of the wife, as some have thought: for if the estate gained by intermarriage be a sufficient estate to worke a remitter; *a fortiori*, an estate made to the husband and wife shall worke a remitter in the wife. And so it is if tenant in taile infeoffe his issue being within age, and his wife in fee, and dieth; this is a remitter to the issue presently, by the death of tenant in taile; though some have thought the contrarie.

Here

* et added L. and M. and Roh.

+ *afun* added L. and M. and Roh.

† &c. not in L. and M. nor Roh.

(1) But they shall go to the administrator *de bonis non*; for should they go to the husband, the creditors, legatees, &c. of the deceased would be thereby wronged. Note to 11th edition.

Squibb v. Wynne, 1. P. W. 378. *Carr v. Reeve*, ib. 382.—II. If the wife survives the husband:—As to this point, there is a material difference with respect to chattels real, and goods, cattle, money, and other chattels personal. All chattels personal become the property of the husband immediately upon the marriage; he may dispose of them without the consent or concurrence of his wife; and at his death, whether he dies in her life-time or survives her, they belong to his personal representative.—With respect to her chattels real, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. To explain this fully, it seems proper to mention, that it was formerly held, that a disposition of a term of years to a man for his life was such a total disposition of the term, that no disposition could be made of the possible residue of the term, or at least, that if it was made, the first devisee might dispose of the whole term, notwithstanding the devise of the residue. This is reported by Dyer 74. to have been determined by all the judges in a case in the 6th of Edw. VI.—The court of chancery first broke through this rule, and supported such future dispositions when made by way of trust. Their example was followed by the courts of law in *Matt. Manning's case*, 8. Rep. 94. b. and *Lampet's case*, 10. Rep. 46. b.—This disposition of the residue of a term, after a previous disposition of the term to a person for his life, operates by way of executory devise, and the interest of the devisee of the residue is called a possibility. This possible interest in a term of years differs from a contingent interest, created by way of remainder.—If a person limits a real estate to A. for life, and after the decease of A. and if B. dies in A.'s life-time, to C. for a term of years, this operates not as an executory devise, but as a remainder, and therefore is not to be considered as a possibility, but as a contingent interest. Now, if a person marries a woman possessed of, or entitled to, the trust of a present actual and vested interest in a term of years, or any other chattel real, it so far becomes his property, that he may dispose of it during her life; and if he survives her, it vests in him absolutely; but if he makes no disposition of it, and she survives him, it belongs to her, and not to his representatives: nor is he, in this case, entitled to dispose of it from her by will. See *Pred in Chan.* 418. *Factor v. Samyne*, 2. Vern. 270. If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is, such an interest as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it, unless, perhaps, in those cases where the possibility or contingency is of such a nature, that it cannot happen during the husband's life-time. Ante 46. b. 10. Rep. 51. a. *Hutt.* 17. 1. *Salk.* 326. But it is an exception to this rule, at least in equity, that if a future or executory interest in a term or other chattel is provided for the wife, by or with the consent of the husband, there the husband cannot dispose of it from the wife; as it would be absurd and unfair in the highest degree that he should be allowed to defeat

Here also it appeareth, that no follie in this case can be adjudged in a feme covert, for the taking backe of the estate shall be adjudged in law the act of the husband. The Marques of Winch. case, ub. sup. (Hob. 71.)
 Note in the case of the feme covert, she may be remitted in the life of the discontinuor, because she hath a present right: but in the case of tenant in taile, the issue cannot be remitted in the life of the discontinuor, because the issue hath no right untill his decease.

Sect. 667.

*MES en cest case si le lessour voile fuer action de wast vers le baron et sa feme, pur ceo que le baron avoit fait wast, le baron ne poit barrer le lessor pur monstre ceo, que le reprisel del estate fait a luy et a son feme fuit un remitter a sa feme, pur ceo que le baron est estoppe a dire ceo * que est encounter son feoffment, et son reprisel demesne del estate pur terme de vie a luy et a sa feme. Et uncore le lessor n'ad † un reversion, pur ceo que le fee simple est en la feme. Et issint home poit veier un matter en ceo case, que home serra estoppe per un matter en fait, coment que nul escripture soit fait per fait indent ou auterment.*

BUT in this case if the lessor wil sue an action of wast against the husband and his wife, for that the husband hath committed wast, the husband cannot barre the lessor by shewing this, that the taking backe of the estate to him and to his wife was a remitter to his wife, because the husband is stopped to say that which is against his owne feoffment, and taking backe of the estate for terme of life to him and to his wife. And yet the lessor hath no reversion, for that the fee simple is in the wife. And so a man may see one thing in this case, that a man shall bee stopped by matter in fact, though there bee no writing by deed indented, or otherwife.

PUR ceo que baron est estoppe a dire, &c.

Estoppe commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or clofeth up his mouth to alleage or plead the truth: and *Littleton's* case here proveth this description.

Touching estoppels, which is an excellent and curious kinde of learning, it is to be observed, that there be three kinde of estoppels, viz. by matter of record, by matter in writing, and by matter *in pais*.

[a] By matter of record, viz. by letters patents, fine, recoverie, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance.

[b] By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll,

[c] by defeasance by deed indented or deed poll.

By matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate, as here in the case that *Littleton* putteth; whereof *Littleton* maketh a speciall observation, that a man shall be estopped by matter in the country, without any writing. (1)

To make the reader more capable of the learning of estoppels, these few rules, amongst others, are to be knowne.

[d] First, that every estoppel ought to be reciprocally, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel: [e] privies in blood, as the heire; privies in estate, as the feoffee, lessee, &c. privies in law, as the lords by escheat; tenant by the curtesie, tenant in dower, the incumbent

[d] 33. H. 6. 19. 50. 30. H. 6. 2. 31. E. 3. Ellop. 240. 33. Aff. 18. 30. Aff. 51. 14. Aff. 9. 18. E. 4. 1. (3. Mod. 141.)
 [e] 8. Aff. 53. Br. Fines, 73. 8. H. 6. 17. 21. E. 3. 35. 38. E. 3. 31. 20. E. 3. Ellop. 187.

* que est not in L. and M. nor Roh.

† un—null, L. and M. and Roh.

(1) The reasons why estoppels are allowed, seem to be these: No man ought to alledge any thing but the truth for his defence, and what he has alledged once, is to be presumed true, and therefore he ought not to contradict it; for as 'tis said in the 4. Inst. 272. *allegans contraria non est audiendus*. Secondly, as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out but by evidence; and therefore 'tis reasonable that some evidence should be allowed to be of so high and conclusive a nature, as to admit of no contradictory proof. Note to the 11th edition.

his own agreement. But this supposes the provision to be made before the marriage; for if it be made subsequent to the marriage, it is a mere voluntary act, and void against an assignee for a valuable consideration. 1. Cha. Ca. 225. Lanc. 54. Sir Edward Turner's Case, 1. Vern. 7. Pitt v. Hunt, 1. Vern. 18. Walker v. Saunders, 1. Eq. Ca. Abr. 58.—*With respect to things in action*, they do not vest in the husband, until he reduces them into possession. It has been held, that the husband may sue alone for a debt due to the wife upon bond, but that if he joined her in the action, and recovered judgment and died, the judgment would survive to her. Oglander v. Baston, 1. Vern. 396. See Aileyn 36. 2. Lev. 107. & 2. Vez. 677. The principle of this distinction appears to be, that his bringing the action in his own name alone, is a disagreement to his wife's interest, and implies it to be his intention that it should not survive to her; but if he brings the action in the joint names of himself and his wife, the judgment is, that they both should recover: so that the surviving wife, not the representative of the husband, is to bring the *scire facias* on the judgment. His bringing the action, therefore, in the joint names of himself and his wife, does not, in effect, alter the property, or shew it to be his intention that it should be altered. In 3. Alk. 21. Lord Hardwicke is reported to say, that, at law, if the husband has recovered a judgment for a debt of the wife, and dies before execution, the surviving wife, not the husband's executors, is entitled. This appears to be the general principles of the courts of law, respecting the interest which the husband takes in, and the power given him over, the things in action of his wife: but the courts of equity have admitted many very nice distinctions respecting them. 1st, a settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in his wife's life-time, to the whole of her things in action; but it has been said, that if it is not made in consideration of her fortune, the surviving wife will be entitled to the things in action, the property of which has not been reduced by the husband in his life-time: so, if it is in consideration of a particular part of her fortune, such of the things in action as are not comprised in that part, it has been said, survive to the wife. See Cleland v. Cleland, Cha. Prec. 63. 2. Vern. 502. Adams v. Cole, Cas. Temp. Talbot 168. In the case of Blois and the Countess of Hereford, 2. Vern. 501. a settlement was made for the benefit of the wife, but no mention was made of her personal estate. Lord-Keeper decreed that it should belong to the representative of the husband; and said, that in all cases where there

[f] 21. E. 4. 4. 23. Aff. 14.
 27. H. 6. Eltop. 273.
 18. E. 3. 30. 7. H. 7. 6. & 16.
 [g] 46. E. 3. 33. 29. Aff. 38.
 Pl. Com. 393.
 [h] 35. H. 6. 33. 46. E. 3. 12.
 49. E. 3. 14. 8. Aff. 3. 45. Aff. 5.
 3. El. Dy. 195. 41. El. 1b. 280.
 9. H. 6. 60.
 [i] 5. E. 4. 7. 8. E. 4. 19.
 10. E. 4. 12. 22. E. 4. 38.
 32. Aff. 9. 35. H. 6. 20.
 [k] 33. H. 6. 16. 4. E. 3. 22.
 6. H. 4. 7. 31. E. 1. Gard. 155.
 F. N. B. 142. E.
 [l] 12. H. 7. 4. 20. H. 6. 29.
 3. H. 4. 9. 41. E. 3. 4.
 11. H. 4. 30.
 [m] 2. R. 3. 14. 2. R. 2.
 Eltopell. 20. 40. E. 3. 21.
 12. E. 4. 13. 18. E. 3. 31. 35.
 44. E. 3. 45. 17. Aff. 27.
 45. E. 3. 2. 21. H. 7. 24.
 5. E. 4. 7. 7. E. 4. 19.
 3. E. 4. 11. 4. E. 3. 54. 7. E. 6.
 B1. Eltop. 162. 11. H. 4. 30.
 3. E. 3. 21. 31. Aff. 14.
 [n] 37. Aff. 17. 38. H. 6. 12.
 5. El. Dy. 223.
 [o] 7. El. Dy. 244.

[p] B1. fo. 420. 26. Aff. 64.
 39. Aff. 10. 11. H. 4. 84.
 7. H. 6. 7. 35. Aff. 5. 11. E. 3.
 Eltop. 279. 21. E. 3. 39.
 19. R. 2. Eltop. 282. 3. E. 3.
 1b. 23. 33. E. 3. Eltop. Stath.
 Le Stat. de 9. H. 6. ca. 11.
 30. H. 6. 2. Doct. & Stud. 69.
 34. H. 6. 39. 18. E. 4. 1. b.
 40. E. 4. 16.

20. E. 1. Defensio juris.

[a] W. 2. ca. 3.
 [b] B1. fo. 303. Min. lib. 3.
 cap. Exceptions.

cumbent of a benefice, and others that come under by act in law, or in the *poss*, shall be bound and take advantage of estoppels; and that a rebutter is a kinde of estoppel.

[f] Secondly, that every estoppel, because it concludeth a man to allege the truth, must be certaine to every intent, and not to be taken by argument or inference.

[g] Thirdly, every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not be spoken impersonally; as if it be said, *Ut dicitur, quia impersonalitas non concludit, nec ligat: impersonalis dicitur, quia sine personā.* [b] Neither doth a recital conclude, because it is no direct affirmation.

[i] Fourthly, a matter alleged that is neither traversable nor materiall, shall not estoppe.

[k] Fifthly, regularly a man shall not be concluded by acceptance or the like, before the title accrued.

[l] Sixthly, estoppel against estoppel doth put the matter at large.

[m] Seventhly, matters alleged by way of supposall in counts, shall not conclude after non-suit: otherwise it is after judgement given; and after non-suit, albeit the supposall in the count shall not conclude, yet the barre, title, replication, or other pleading of either partie, which is precisely alleged, shall conclude after non-suit; and hereby are the bookes reconciled.

Eighthly, where the veritie is apparant in the same record, there the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to allege the truth, when the truth appeareth of record. [n] If a fine be levied without any originall, it is voydable, but not void; but if an original be brought, and a *retraxit* entred, and after that a concord is made, or a fine levied, this is void, in respect the veritie appeareth of record. [o] An impropriation is made after the death of an incumbent, to a bishop and his successors; the bishop by indenture demiseth the parsonage for *fortie* yeares, to begin after the death of the incumbent; the deane and chapter confirme it, the incumbent dieth; this demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent.

[p] Ninthly, where the record of the estoppel doth run to the disability or legitimation of the person, there all strangers shall take benefit of that record; as outlawrie, excommenement, profession, attainder of *præmunire*, of felonie, &c. bastardie, mulietie, and shall conclude the partie, though they be strangers to the record. *Vide in Littleton cap. Villenage, Sec. 196, 197, &c.* But of a record concerning the name of the person, qualitie, or addition, no stranger shall take advantage, because he shall not be bound by it. But *nota*, reader, that in case of the mulietie *primâ facie*, an stranger shall take benefit of it, &c. But yet because he may be a *mulier* by the ecclesiasticall law, and a bastard by the common law, therefore against such a certificate pleaded, the adverse partie may allege the speciall matter, and confesse the certificate of the bishop according to the ecclesiasticall law, and allege further the speciall matter according to the common law, whereunt the adverse partie must answer; and so are the books that treat of this matter to be reconciled. (1) But now let us returne to *Littleton*.

Sect. 668.

(Ant. 192. b.)

*LA feme pria d'estre
 receve et soit re-
 sceive.*

Receipt, *receptio*, cometh of the Latine verbe *recipere*, so called because the wife, upon the default of her husband, is received as a feme sole alone, without her husband, to defend her right; and it is also called *defensio juris*; and in this case the wife may bee received by the [a] statute: and yet [b] ancient authors who wrote before the statute, doe speake of a kind of receipt at the common law. The civilians call receipt, *admissionem tertii pro sui interesse*, which more properly is resembled to the receipt of him in the reversion or remainder, that is no part to the wife.

*MES si en action
 de wast le ba-
 ron fait default a
 le graund distresse,
 et la feme pria d'estre
 receve et soit receve,
 el monstra bien tout
 le matter, et coment
 el est en son remit-
 ter, et el barrera le
 lessor de son action,
 &c.*

BUT if in the action of wast the husband make default to the grand distresse, and the wife pray to be received, and is received, shee may well shew the whole matter, and how shee is in her remitter, and shee shall barre the lessor of his action, &c.

Sect.

* &c. not in L. and M. nor Roh.

(1) See note 1. to page 245. a.

there was a settlement equivalent to the wife's portion, it should be intended that he is to have the portion, though there is no agreement for that purpose. See Eq. Ca. Abr. p. 69. 2d. If the husband cannot recover the things in action of his wife but by the assistance of a court of equity, the court, upon the principle that he who seeks equity must do equity, will not give him their assistance to recover the property, unless he either has made a previous provision for her, or agrees to do it out of the property prayed for; or unless the wife appears in court, and consents to the property being made over to him. 2. P. W. 641. 3. P. W. 12. *Tantfield v. Davenport*, Tothill 179. 2. Vez. 569. Neither will the court, where no settlement is made for the wife, direct the fortune to be paid the husband, in all cases where she appears in court personally, and consents to it. 2. Vez. 579. It appears to be agreed that the interest is always payable to the husband, if he maintains his wife, 2. Vez. 561. 2.; yet, where the husband receives a great part of the wife's fortune, and will not settle the rest, the court will not only stop the payment of the residue of her fortune, but will even prevent his receiving the interest of the residue, that it may accumulate for her benefit. 3. Atk. 21. 3d. *Volunteers and assignees* on a commission of bankruptcy, are, in cases of this nature, subject to the same equity as the husband; and are therefore required by the court, if they apply for its assistance in recovering the wife's fortune, to make a proper provision for her out of it. 2. Atk. 420. *Jacobson v. Williams*, 1. P. W. 382. But if the husband assigns either the trust term of his wife, or a thing in action for a valuable consideration, the court does not compel the assignee to make a provision for the wife. See *Mr. Edward Turner's Case*, 1. Vern. 7. In the case of *Pitt v. Hunt*, 1. Vern. 18. Lord Chancellor Nottingham expressed great surprize at the determination in *Mr. Edward Turner's case*, but he thought himself bound by it. Lord Thurlow, by the manner in which he is reported to have expressed himself in the cause of *Worral v. Marlbar*, and *Bushnan v. Poll*, (see Mr. Cox's very valuable edition of *Peere Williams's Reports*, note to page 459, vol. 1.) seems to be of the same way of thinking. His lordship there said, "he had considered the several cases upon this subject, and did not find it any where decided, that if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned; but that a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law: for as to the latter, his lordship declared it to be his opinion, that when the equitable interest of the wife

Sect. 669.

*CAR en chescun cas lou feme est receive pur default son baron, el pledera et avera mesme l'avantage en plee ple-dant, come el fuissoit feme sole, * &c. Et coment que l'alienee fist le leas al baron et a sa feme per fait en-dent, uncore ceo est remitter a la feme. Et auxy, coment que l'alienee rendist mesme la terre al baron et a sa feme per fine pur terme de lour vies, uncore ceo est un re-mitter al feme, pur ceo que feme covert que prent estate per fine, ne serra my ex-amine per les justices, † &c.*

FOR in every case where the wife is received for default of her husband, she shall plead and have the same advantage in pleading, as shee were a woman sole, &c. And albeit that the alienee made the lease to the husband and wife by deed indented, yet this is a remitter to the wife. And also, albeit the alienee rendereth the same land to the husband and his wife by fine for terme of their lives, yet this is a remitter to the wife, because a feme covert which takes an estate by fine, shall not be examined by the justices, &c.

CÔME el fuissoit feme sole, &c. In

this Section four things are to be understood.

First, when a feme covert is received, that she shall plead as if she were sole. And this is regularly true, yet holdeth not in all cases; [c] for if a [c] 37. Aff. 1. feme covert be received in an assise, and plead a record and faille, therefore she shall not be adjudged a disseisor, as shee should be if shee were sole, &c. So if a feme covert onely levie a fine executorie, and a *scire facias* is brought against her and her husband, if shee be received upon the default of her husband, shee shall barre the consuee, which if she had been sole, shee could not doe, and in some other cases.

Secondly, that though the estate taken backe be by deed indented, yet that shall not hinder the remitter in case of a feme covert, or an infant.

Thirdly, that though it be by fine *sur render*, yet that shall not hinder the remitter; because a feme covert is not to be examined upon any fine, but when shee and her husband passe some estate or in-

[c] 37. Aff. 1.

17. Aff. 17. 29. E. 3. 43. 5. E. 3. Voucher 178.

(10. Rep. 43.)

terest, or release her right by a fine of the lands or tenements.

Fourthly, if the husband levie a fine of his wife's lands, and the consuee grant and render the land to the husband and wife, although the wife be not partie to the original, nor to the consuees, and therefore she ought not by the law to take any present estate but by way of remainder only; yet here it is proved by *Littleton*, that the grant and render *de facto* to the wife in *presenti* is not void; for then it could not worke a remitter, but voidable by writ of error; and that avoidable estate doth worke a remitter. (1)

Trin. 27. Eliz. inter Owen & Morgan. Rot. 276. in banco communi. L. 3. fol. 5. the marriage of Winchester's case. 7. E. 3. 64. 13. E. 3. Voucher 119.

Ne serra my examine per les justices, &c. The examination of a feme covert ought to be secret; and the effect is to examine her, whether shee be content to levie a fine of such lands (naming them particularly and distinctly, and the state that passeth by the fine) of her owne voluntary free will, and not by threats, menaces, or any other compulsorie means.

(3. Rep. 5. a.)

Sect. 670.

ET hic nota, que quant ascun chose passera de la feme que est covert de baron per force

AND here note, that when any thing shall passe from the wife which is covert of a husband by *d'un*

* &c. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

(1) V. From this passage, and others mentioned both by *Littleton* and *Coke*, it appears to be a general rule, that the remitter shall take effect, though the estate which made the remitter is voidable; as if it be taken from an infant, a feme covert, or upon condition. See Com. Dig. vol. 5. 415.

"was transferred to the creditor of the husband by mere operation of the law, he should exactly be in the place of the husband, and was subject precisely to the same equity in respect of the wife." 4th, But notwithstanding the uniform and earnest solicitude of the courts of equity to make some provision for the wife out of her fortune, in those cases where the husband, or those claiming under him by act of law, cannot come at it, without the assistance of the courts, still it does not appear that they have ever interfered to prevent its being paid the husband, or to inhibit him from recovering it at law. 2. Atk. 420. In Cha. Prec. 414. it is observed, that if the trustees pay the wife's fortune, it is without remedy. 5th, Money due upon a mortgage is considered as a thing in action. It seems to have been formerly understood, that as the husband could not dispose of lands mortgaged in fee without the wife, the estate remaining in the wife carried the money along with it to her and her representatives; but that as the husband had the absolute power of a term of years, there was nothing to keep a mortgage debt, secured by a term, from going to the husband's representatives; but this distinction no longer prevails; and it is now held, that though, in the case of a mortgage in fee, the legal fee of the lands in mortgage continues in the wife, she is but a trustee, and the trust of the mortgage follows the property of the debt. See *Boswell v. Brander*, 1st Peere Williams 458. *Bates v. Dandy*, 2. Atk. 267. 6th, If baron and feme have a decree for money in the right of the feme, and then the baron dies, the benefit of the decree belongs to the feme, and not to the executor of the husband. This was certified by Hyde chief-justice, and his certificate confirmed by lord chancellor, Michaelmas, 15. Car. II. *Manners v. Martin*, 1. Cha. Ca. 27. If the wife has a judgment, and it is extended upon an *elegit*, the husband may assign it without a consideration: so if a judgment be given in trust for a feme sole, who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason, if the feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without any consideration, for it is in nature of an extent. 3. Peere Williams 200.

*d'un fine : sicome le baron et la feme
feson un conufance de droit a un
auter, &c. ou fesoient un grant et
render a un auter, ou releffent per
fine a auter, et sic de fimilibus, lou
le droit del feme passeroit del feme
per force de mesme le fine ; en tous
tielx cases la feme serra examine
devaunt que la fine soit accept, pur
ceo que tiels fines concluderont tiels
femes coverts a tous jours, * &c.
Mes lou riens est move en le fine
forsque tantsolement que le baron
et la feme preignent estate per
force de mesme le fine, ceo ne con-
cluder la feme ; pur ceo que en tiel
cas el jammes ne serra my examine,
† &c.*

force of a fine : as if the husband
and wife make conufance of right
to another, &c. or make a grant
and render to another, or release
by fine unto another, *et sic de simi-
libus*, where the right of the wife
shall passe from the wife by force
of the same fine ; in all such cases
the wife shall be examined before
that the fine be taken, because that
such fines shall conclude such
femes coverts for ever. But where
nothing is moved in the fine but
onely that the husband and wife doe
take an estate by force of the said
fine, this shall not conclude the
wife ; for that in such case she shall
not be at all examined, &c.

*QUANT aucun chose passera de la feme covert, &c. per force d'un
fine, &c.* And of this opinion is [d] Littleton in our bookes.

[d] 15. E. 4. 28. 24. E. 3. 31.
42. E. 3. 6. 3. H. 6. 42.
20. E. 3. tit. Cui in vita 10.
[*] 29. E. 3. 43. 46. E. 3. 5.

* Therefore if the husband and wife be tenants in speciall tayle, and they levie a fine at the
common law, and after the husband and wife take backe an estate to them and their heires ;
in this case the estate tayle is not barred ; and yet against a fine levied by her selfe she cannot
be remitted, because thereupon she was examined : but in that case if the land descend to her
issue, he shall be remitted. (1)

Sect. 671.

*ITEM, si tenant en taile dis-
continua le taile, et ad ‡ issue
file, et morust, et la file esteant
de pleine age prent baron, et le
discontinuee fait un releas de ceo
al baron et a sa feme pur terme
de lour vies, ceo est un remit-
ter al feme, et la feme est eins
per force de le taile, causâ quâ
supra.*

ALSO, if tenant in taile discon-
tinue the taile, and hath issue
a daughter, and dieth, and the
daughter being of full age taketh
husband, and the discontinuee
make a release of this to the hus-
band and wife for terme of their
lives, this is a remitter to the wife,
and the wife is in by force of the
taile, *causâ quâ supra*, &c.

ET la feme esteant de plein age prent baron, &c.

Here it appeareth, that
her full age when she tooke baron is not materiall, but her coverture at the taking
backe of the estate. And so note a diversitie betweene a remitter and a discent : for if a wo-
man be disseised, and being of full age taketh husband, and then the disseisor dieth seised, this
discent shall binde the wife, albeit she was covert when the discent was cast, because she was
of full age when she tooke husband, as appeareth before in the Chapter of Discents. But
albeit the wife that hath an ancient right, and being of full age, taketh a husband, and the
discontinuee letteth the land to the husband and wife for their lives, this is a remitter to the
wife ; for remitters to ancient rights are favoured in law.

(Ante 246.)

Sect.

* &c. not in L. and M. nor Roh.

† &c. not in L. and M. nor Roh.

‡ issue not in L. and M. nor Roh.

(1) Since Littleton wrote, several statutes have been passed, which have given rise to a great extension of the doctrine respecting
alienations by husbands of their wives estates. These are chiefly the statutes of the 4. H. 7. respecting the force and effect of fines,
the 27. H. 8. for transferring uses into possession, and the 32. H. 8. for preserving the estates of wives against the alienations of their
husbands. The reader will find the effect of these statutes upon the doctrine of remitter, investigated in a very copious and masterly
manner in lord chief-justice Hobart's account of his argument on giving judgment in the case of *Duncomb v. Wingfield*. See his
Rep. page 254.

Sect. 672.

ITE M, si terre soit done a le baron et a sa feme, aver et tener a eux et a les heirs de leur deux corps engendres, et puis le baron aliena la terre en fee, et reprent estate a luy et a sa feme pur terme de leur deux vies; en cest cas il est remitter en fait a le baron et a sa feme, maugre le baron. Car il ne poit estre un remitter en cest cas a la feme, sinon que soit un remitter a le baron, pur ceo que le baron et sa feme sont tout un mesme person en ley, coment que le baron est estoppe de claymer. Et pur ceo, ceo est un remitter en luy enconter son alienation et son reprisel demesne, come est dit adevant †.

A L S O, if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the husband alien the land in fee, and take backe an estate to him and to his wife for terme of their two lives; in this case this is a remitter in deed to the husband and to his wife, mauger the husband. For it cannot be a remitter in this case to the wife, unlesse it be a remitter to the husband, because the husband and wife are all one same person in law, though the husband be stopped to claime it. And therefore this is a remitter against his owne alienation and reprisel, as is said before.

H E R E it appeareth, that the husband against his owne alienation, if he had taken the estate to him alone, could not have beene remitted. But when the estate is made to the husband and wife, albeit they be but one person in law, and no moities betweene them; yet for that the wife cannot be remitted in this case, unlesse the husband be remitted also, and for that remitters, as hath beene often said, are favoured in law, because thereby the more ancient and better rights are restored againe; therefore in this case, in judgement of law, both husband and wife are remitted; which is worthy of great observation.

Sect. 673.

ITE M, si terre soit done a un feme en taile, le remainder a un autre en taile, le remainder a le tierce en taile, le remainder al quart en fee, et la feme prent baron, et le baron discontinua la terre en fee; per cel discontinuance tous les remainders sont discontinues. Car si la feme deviait sans issue, ceux en le remainder n'averont aucun reme- die forsque de suer leur briefes de formedon en le remainder,

A L S O, if land be given to a woman in taile, the remainder to another in taile, the remainder to the third in taile, the remainder to the fourth in fee, and the woman taketh husband, and the husband discontinue the land in fee; by this discontinuance all the remainders are discontinued. For if the wife die without issue, they in the remainder shall not have any reme- die but to sue their writs of for- medon in the remainder, when
quant

† Et pur ceo not in L. and M. nor Roh.

† &c. added L. and M. and Roh.

quant il avient a leur temps*. Mes si apres tiel discontinuance, estate soit fait a le baron et sa feme pur terme de leur deux vies, ou pur terme d'auter vie, ou auter estate, &c. pur ceo que ceo est un remitter al feme, ceo est † auxy un remitter a tous ceux en le remainder. Car apres ceo que la feme que est en son remitter morust sans issue, ceux en le remainder poyent enter, &c. sans aucun action suer, &c. En mesme le maner est de ceux que ont la reversion apres tiel tailles‡.

it comes to their times. But if after such discontinuance, an estate be made to the husband and wife for terme of their two lives, or for terme of another man's life, or other estate, &c. for that this is a remitter to the wife, this is also a remitter to all them in the remainder. For after that that the wife which is in her remitter be dead without issue, they in the remainder may enter, &c. without any action suing, &c. In the samemanner is it of those which have the reversion after such entail.

41. E. 3. 17. 41. Aff. 1.
36. Aff. p. 4.

44. Aff. p. 15. 44. E. 3. 30.
(1. Roll. Ab. 421. 3. Cro. 145.
W. Jones, 199.)
20. E. 3. Aid. 29.

Wid. Pl. Com. 489. Nichol's
case, & fol. 553. in Walsing-
ham's case. 17. Eliz. Dier. 344.
25. E. 3. 48. tit. Rescit. 28.
49. E. 3. 16.
[a] Seignior Stafford's case, lib.
8. fol. 76. b.
[b] Cholmley's case, lib. 2. 53.
7. R. 2. Aide le Roy, 61.
22. E. 3. 7.

LITTLETON having spoken of remitters to the issue in taile, who is privie in bloud, and to the wife, who is privie in person, now he speaketh of remitters to them in reversion or remainder expectant, upon an estate taile, who are privie in estate. And this case proveth that the wife is remitted presently; for the equitie of the law requireth, that as the discontinuance of the estate in taile is a discontinuance of the reversion or remainder; so, that the remitter to the estate in taile, should be a remitter to them in the reversion or remainder.

Tenant for life the remainder to *A.* in taile, the remainder to *B.* in fee, tenant for life is disseised, a collaterall ancestor of *A.* releaseth with warrantie and dieth, whereby the estate taile is barred; the tenant for life re-entreteth, the disseisor hath an estate in fee simple determinable upon the state taile, and the remainder of *B.* is revested in him; and so note in this case the estate for life and the remainder in fee are revested and remitted, and an estate of inheritance left in the disseisor. If a fine be levied *sur grant et render* to one for life or in taile, the remainder in fee, if tenant for life, or in taile, execute the estate for life or in taile, this is an execution of the remainder.

A gift in taile is made to *B.* the remainder to *C.* in fee, *B.* discontinueth and taketh backe an estate in taile, the remainder in fee to the king by deed inrolled; tenant in taile dieth, his issue is remitted, and consequently the remainder, as *Littleton* here saith; and the diversity is [a] betweene an act in law, for that may devest an estate out of the king, and a tortious act, or entry, or a false and a feined recovery against tenant for life or in taile, which shall never devest any estate, remainder, or reversion out of the king. [b] But a recovery by good title against tenant for life, or in taile, where the remainder is to the king by defeasible title, shall devest the remainder out of the king, and restore and remit the right owners. (1)

Sect. 674, 675.

(5. Rep. 85. 2. Infl. 350.
11. Rep. 62.)

FEINT et faux action, 1. *Adio fida et falsa*, but hereof *Littleton* speaketh himselfe in this Chapter.

Quod ei deforceat, is a writ that is given by [c] statute to any tenant for life or in taile upon a recovery by default against them in a *præcipe*, and lyeth against the

ITEM, si home les-
sa un mease a un
feme pur terme de sa
vie, savant le rever-
sion al lessour, et puis
un suist un feint et
faux action envers la
feme, et recoversast
le mease envers luy
per default, issint que

ALSO, if a man let a
house to a woman
for terme of her life,
saying the reversion to
the lessor, and after one
sue a feyned and false
action against the wo-
man, and recovereth
the house against her
by default, so as the
la

[c] W. 2. cap. 4.

(Ant. 331. b.)

* &c. added L. and M. and Roh.

† auxy not in L. and M. nor Roh.

‡ &c. added L. and M. and Roh.

(1) VI. Thus it may be laid down as another general rule, that a remitter to the particular estate, is a remitter to him in the reversion or remainder. See Com. Dig. vol. 5. 417.

la feme puit aver envers luy un quod ei deforceat, solongue le statute de Westm. 2. ore le reversion le lessor est discontinue, issint que il ne poit aver ascun action de wast. Mes en cest case si la feme prent baron, et celui que recoverast lessa le mease al baron et a sa feme pur terme de lour deux vies, la feme est eins en son remitter per force del primer lease.

woman may have against him a quod ei deforceat, according to the statute of Westm. 2. now the reversion of the lessor is discontinued, so that he cannot have any action of waste. But in this case if the woman take husband, and he which recovereth let the house to the husband and his wife for terme of their two lives, the wife is in her remitter by force of the first lease.

Sect. 675.

ET si le baron et la feme font wast, le primer lessor avera envers eux breve de wast, pur ceo que entant que la feme est en son remitter, il est remise a son reversion. Mes semble en cest cas, si celui que recoverast per le faux action, voile porter auter brieve de wast envers le baron et sa feme, le baron n'ad auter remedy envers luy, mes de faire default a la graund distres, &c. et causer la feme d'estre receive, et de pleder cel matter envers le second lessor, et monstrier comment l'action per que il recoverast fuit faux et feint en ley, &c. issint le feme poit luy barrer, &c.

AND if the husband and wife make waste, the first lessor shall have a writ of waste against them, for that inasmuch as the wife is in her remitter, he is remitted to his reversion. But it seemeth in this case, if hee that recovereth by the false action, will bring another writ of waste against the husband and his wife, the husband hath no other remedie against him, but to make default to the grand distresse, &c. and cause the wife to be received, and to plead this matter against the second lessor, and shew how the action wherby hee recovered was false and fained in law, &c. so the wife may bar him.

recoveror and his heires, in which case the particular tenant was without remedie at the common law, because hee could not have a writ of right. And it is called a quod ei deforceat, for that they are part of the words of that writ, viz. *Præcipe A. quod, &c. reddat B. unum mesuagium, &c. quod clamat esse jus et maritagium suum, et quod idem A. ei injuste deforceat.*

Bracton lib. 4. 367.
Pleta lib. 5. cap. 22. & 26.
cap. 14. 7. E. 3. 62.
F. N. B. 155.
(6. Rep. 8. b.)

(Cro. Jac. 292.
Cro. Car. 178. 414.)

Recoverast, &c. per

default. There hath beene a question in our bookes upon these words (by default): as for example, whether a recoverie had by default in an action of waste against tenant in dower, or by the courtesie, a quod ei deforceat lyeth by the said statute. And divers hold opinion, that in that case no quod ei deforceat lieth, for that judgement is not given by default; for notwithstanding the default, there goeth out a writ to enquire de wasto facto, et quod wastum prædictum A. (le defendant) fecit; so as the defendant may give evidence, and the jurors may finde for the defendant, that no waste was done: as in the assise albeit it bee awarded by default, yet may the tenant give evidence, and the recognitors of the assise may finde for the tenant; and therefore in those cases, the defendant or tenant non amittit per defaultem, as the statute and Littleton speaketh, and they cite F. N. B. in the point. (1)

(F. N. B. 155. b.)

W. 1. cap. 4.

F. N. B. fol. 155. E.

Secondly, they hold that a quod ei deforceat lieth where the tenant can have no remedie by attain; but in this case (say they) an attain doth lie.

2. H. 4. 2. 21. H. 6. 56.
41. E. 3. 8. 3. H. 6. 29.
22. E. 3. 19.

Thirdly, they hold, that in an action of waste, although it be brought against a tenant in dower, or tenant by the courtesie that have a freehold, yet the damages are the principall; for they were recoverable against tenant in dower and by the courtesie by the common law; and the statute of Gloucester gave the

(8. Rep. 85.)

* luy not in L. and M. nor Roh.

(1) Co. MSS. 215. p. 33. *Eliz. Elmer v. Thacker.* The case was this. Elmer and his wife, tenant in dower, brought quod ei deforceat versus W. Thacker, who pleaded, that 30. Eliz. he brought waste against the demandants who appeared, and upon nihil dicit W. Thacker recovered damages and had judgment. The demandants replied, null wast fait. The tenant demurred in law; and these points were moved, 1st, Whether quod ei deforceat lies upon recovery by default against tenant in dower in waste. 2d, Admitting that it does, whether quod ei deforceat lies upon the recovery by nihil dicit, as this case is. As to the second point, the whole court resolved clearly, that quod ei deforceat does not lie; for in as much as the judgment upon nihil dicit is after appearance, there the default is not the cause of the judgment; and the statute says, per defaultem: and for this reason judgment was given against the demandant, as appears afterwards in page 356. But as to the 1st point it was objected, that quod ei deforceat does not lie upon default of tenant in dower in waste, as is the case here; for if it should lie in this case, he shall avoid the verdict of twelve men, which was not the intention of the statute, but only to relieve the tenant where he makes default; therefore, in as much as the tenant, notwithstanding the default, might give evidence to the jury, then every person in policy might make default, if afterwards he might prevail upon evidence to have quod ei deforceat: and the reason of F. N. B. is, that the verdict has found waste. 2. Hen. 2. If in waste the jury find falsely, attain lies, and 21 Hen. 6. 56. 34 Hen. 6. 12.; so where the assise is awarded for default, yet the tenant may have attain, if it be found against him by false oath. 17 Ed. 2. Attain 89. 34 Hen. 6. 7. Prior recovers in waste, and has a writ of enquiry in waste, and the sheriff returns the waste 20 marks, and awards that he shall recover the place wasted, and treble damages, and that he shall have execution for the damages immediately, licet cesset execution for the thing wasted till the collusion should be enquired into, therefore the damages are the principal; for it is no where found that execution should be awarded of the accessory before the principal: and for this reason, 12 Rich. 2. Estrepement 6. judgment shall not be given in the estrepement, because it is only the accessory, until judgment shall be given in the principal plea. And in Elmer's case, ante 355. it was resolved, that this writ lies upon recovery by default in waste against tenant in dower, or any other tenant for life.—Lord Nott. MSS.

(7. Rep. 68. b.)

[d] 34. H. 6. 7. 40. E. 3. 37.
& 38. E. 3.

[e] 9. H. 5. 15.

30. H. 6. tit. Bar. 59.

[*] 17. E. 3. 58. 29. E. 3. 42.

F. N. B. 98. b. 12. H. 4. 4.

19. E. 2. Disceit 56.

W. 2. cap. 3. 3. H. 4. fol. 1.

W. 2. ca. 3. 9. E. 4. 16.

41. E. 3. 8. b. 2. H. 4. 2.

21. H. 6. 56. 44. E. 3. 42.

Br. tit. quod ei deforc. 4. Pasch.

33. El. Rot. 1125. inter Ed. El-

mer & El. fa feme, ten. en dower

demandants, & Wil. Thacker

ten. in quod ei deforceat.

(Cro. Eliz. 263.)

[f] 33. E. 3. quod ei deforc.

Pl. ult. F. N. B. 156.

V. Flet. 1. 5. c. 21. 48. E. 3. 19.

40. Aff. 23. 33. H. 6. 25.

39. H. 6. 1. F. N. B. 107.

[g] 17. E. 2. Attaint 69.

21. H. 6. 56. 34. H. 6. 12.

(1. Cro. 414. Mo. 184.

F. N. B. 107. c. 6. Rep. 8. b.

17. Rep. 5.)

34. H. 6. 7. Waff 50.

10. Rep. 115. 1. Leo. 297.

6. Rep. 44.)

[h] 6. E. 3. 47. 48. E. 3. 19.

(2. Rep. 68. b. Ant. 139. a.

285. a.)

the place wasted but for a penaltie, so as the nature of the action (say they) remaineth still to bee personall, for that the damages are the principall; [d] and in prooffe hereof they cite divers authorities in law. And if two bring an action of waste, the release of one of them is a good barre against the other, [e] and so resolved by the whole court; which proveth (say they) that the damages are the principall: for if the land were the principall, the release of one of them should not barre the other, no more than in an assise, a writ of ward, an *ejectione firma*, &c.

Lastly, they say, that in actions where damages are to be recovered, and the land is the principall, the demandant never counteth to damages, and yet shall recover them: but in an action of waste the plaintiff counteth to his damage; and if the damages be the principall, then cleereely no *quod ei deforceat* lieth.

Others doe hold the contrarie: and as to the first they say, that albeit that in the writ of waste, judgement is not only given upon the default, yet the default is the principall, and the cause of awarding of the writ to enquire of the waste as an incident thereunto: and the law alwayes hath respect to the first and principall cause; and therefore upon such a recoverie [g] a writ of deceit lieth; and that writ lieth not but where the recoverie is by default. So in an action of waste against the husband and wife, upon the default of the husband, the wife shall be received; and yet the statute there speaketh also, *per defaultam*. So upon such a recoverie in waste against the baron and feme by default, the wife shall have a *cui in vita* by the statute; and it speaketh where the recoverie is *per defaultam*. And albeit the defendant may give in evidence, if he knoweth it; yet when he makes default, the law presumeth he knoweth not of it, and it may be that he in truth knew not of it; and therefore it is reason, that seeing the statute, that is a beneficiall statute, hath given it him, that he be admitted to his *quod ei deforceat*, in which writ the truth and right shall be tried. And so it is of a recoverie by default in an assise; albeit the recognitors of the assise give a verdict, a *quod ei deforceat* lieth. And all this as to this point was resolved by the whole court of common pleas; and so the doubt in 41. E. 3. 8. well resolved. *Nota*, if tenant for life make default after default, and he in the reversion is received and plead to issue, and it is found by verdict for the demandant, the default and the verdict are causes of the judgement; and yet the tenant shall have a *quod ei deforceat*.

As to the second objection, that the defendant may have an attain. First it was utterly denied of the other part, [f] that an attain did lie in this case; for though it be taken by the oath of twelve men, yet it is but an enquest of office, whereupon no attain did lye on either partie, as upon an enquire of collusion, although it be by one jurie, nor upon a verdict of *quale jus*. Secondly, admitting that an attain did lie in that case, yet it followeth not *ex consequenti*, that a *quod ei deforceat* did not lie; [g] for if an assise bee taken by default, a *quod ei deforceat* doth lie; and yet the partie may have an attain; for this is no enquest of office, but a recognition by the recognitors of an assise, who were returned the first day, and not returned upon the awarding of the assise by default. And as to the second objection, of this opinion was the whole court in *Edward Elmer's* case above mentioned. As to the third objection, that the damages should bee the principall, because they were at the common law; that is an argument (say the other side) that they are more antient, but not that they are more principall; and treble damages were not at the common law (for the common law never giveth more damage than the losse amounteth unto), but are given by the statute of *Gloucester*; but the place wasted is worthier being in the realtie, than damages that be in the personaltie: *Et omne majus dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius et à digniori debet fieri denominatio*. And it is confessed, that in an action of waste against tenant for life, or for yeares, the place wasted is the principall, because the statute of *Gloucester* doth give the place wasted and treble damages at one time; for no prohibition or action of waste lay against them at the common law; and in an action of waste, if the defendant confesse the action, the plaintiff may have judgement for the place wasted, and release the damages; which proveth (and so *Fitzherbert* collecteth) that the damages are not the principall; for a man shall never release the principall, and have judgement of the accession: and an action of waste against tenant for life, is as reall as an action against tenant in dower. And as to the case of 9. H. 5. cited on the other side, it was answered, that it was an action in the *tenuit*, which is only in the personaltie, and then the release of the one doth barre both; neither could summons and severance lie in that case; [h] but in an action of waste (in the *tenet*), either against tenant for life or for yeares, the release of the one doth not barre the other; and in both those cases summons and severance doth lie: and this point was also resolved accordingly in *Edward Elmer's* case. But when these three points were resolved by the court for the demandant, then the counsell of the tenant moved in arrest of judgement another point, viz. that the judgement was given upon a *nihil dicit*, which is alwayes after appearance, and not *per defaultam*; and thereupon judgement was stayed. (1)

But

(1) Sir Edward Coke, in his commentary on the statute of Gloucester, 2. Inst. 286. observes, that regularly in personal and mixed actions damages were to be recovered at the common law; but that in real actions no damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not; and the demandant in real actions demands no damages either by writ or count. The assise was a mixed action; and therefore if upon the trial the demandant made out his title, his seisin, and his disseisin by the tenant, he had judgment to recover his seisin and his damages for the injury sustained. But the damages in these cases were awarded against the disseisors only, and not against their alienees or tenants. The statute of Marlbridge, 52. Hen. III. c. 16. gave damages in a writ of mortuanceffor against the chief lord. The statute of Gloucester, 6. Ed. 1. was a considerable extension of the law of damages. It ordained, that if the disseisor should alien the lands, and should not have whereof damages might be levied, the person into whose hands the tenements came should be charged with the damages, so that each should answer for the time he held them; that the disseisor should recover damages on a writ of entry *sur disseisin* against him who was found tenant against the disseisor; that damages should for the future be recovered in a writ of mortuanceffor, as in one of novel disseisin; and also in writs of cosinage, aiel, and besaiel; and generally, that damages should in all cases be rendered where the land was recovered against a man upon his own intrusion, or his own act. The statute then mentions, that till that time damages had been taxed only to the value of the issues of the land: it was therefore provided, that a demandant in future should recover the costs of the writ purchased, together with the damages, not only in the above instances, but generally in cases where he was entitled to recover damages. Tho' this statute only mentions the costs of the writ, the construction of it has been extended to the whole expence of carrying on the suit. Before this statute the justices in eyre used, where the plaintiff obtained a verdict, to compute the expences of the suit, and in assessing damages, assessed a sum sufficient to satisfy that expence, as well as the damages. The statute of Marlbridge gave costs in particular cases to the defendant; so that it is a mistake to say, that the statute of Gloucester was the first statute by which costs were given. See Sayer's Law of Costs, p. 3. The general law of costs still rests on the statute of Gloucester; so that where costs were not recoverable before that statute, they are not recoverable now, unless in those cases where they have been given by some subsequent statute.

But to returne to *Littleton*. Here he openeth a secret of law ; for the cause of this remitter is, for that the tenant for life in this case might have a *quod ei deforceat*, for so *Littleton* saith : *issint que il poit aver quod ei deforceat* : Now it appeareth by our bookes, that the tenant for life at the common law was remediable, because he could not have (as hath bene sayd) a writ of right ; and consequently the feme covert in this case could not bee remitted by the taking of an estate to her husband and her, because her right was remediable, and could have no action. But when an act of parliament or a custome doth alter the reason and cause thereof, thereby the common law it selfe is altered, if the act of parliament and custome be pursued ; for *Alteratâ causâ et ratione legis, alteratur et lex, et cessante causâ seu ratione legis cessat et lex* : as in this case the statute of *W. 2.* giving remedie to this feme tenant for life, in this it giveth her abilitie to bee remitted, because her right is not now remediable, but shee hath an action to recover it.

And *Littleton* warily putteth his case, that the recoverie was had against the feme while she was sole ; for there was a time when it was a question, whether a recoverie beeing had by default against the husband and wife, (the wife being tenant for life) the said statute gave a *quod ei deforceat* to the husband and wife, for that the statute gave it against tenant in dower and tenant for life, &c. and here the husband is not tenant for life, but seised in the right of his wife, and therefore out of the statute : and of this opinion is one [g] booke ; but (*Apices juris non sunt jura, et parùm differunt quæ re concordant*) the contrarie hath bene adjudged, and so that point is now in peace : and the like in case of receipt for him in reversion. But if the husband and wife lose by default, and the husband die, the wife shall not have a *quod ei deforceat* ; for a *cui in vitâ* is given to her in that case by a former statute, viz. *W. 2. cap. 3.* These things are worthy of due observation, and points of excellent learning ; and *Littleton* in our bookes speakes of another kinde of *quod ei deforceat* at the common law, upon a disseisin, which you may read. But now let us heare him in his booke.

Le reversion est discontinue, issint que il ne poit aver action de waste.

Here it appeareth, that when the reversion is devested, the lessor cannot have an action of waste, because the writ is, that the lessee did waste *ad exheredationem* of the lessor, and that inheritance must continue at the time of the action brought. And it is to bee observed, that in an action of waste brought by the lessor against the lessee, the lessee in respect of the privitie cannot plead generally, *riens en le reversion*, viz. [b] that the lessor hath nothing in the reversion, but he must shew how and by what meanes the reversion is devested out of him ; and this holdeth (as hath been said) betweene the lessor and the lessee : but if the grantee of a reversion bringeth an action of waste, the lessee may plead generally, that he hath nothing in the reversion. And yet in some speciall cases an action of waste shall lie, albeit the lessor had nothing in the reversion at the time of the waste done. As if tenant for life make a feoffment in fee upon condition, and waste is done, and after the lessee re-enter for the condition broken ; in this case the lessor shall have an action of waste. And so if a bishop make a lease for life or yeares, and the bishop die, the lessee, the fee being void, doth waste, the successor shall have an action of waste. So if lessee for life be disseised, and waste is done, the lessee re-enter, an action of waste shall be maintained against the lessee ; and so in like cases : and yet in none of these cases the plaintiffe in the action of waste had any thing in the reversion at the time of the waste made ; but these especiall cases have their severall and especiall reasons, as the learned reader will easily finde out.

Here note, that albeit the action be false and feigned, yet is the recoverie so much respected in law, as it worketh a discontinuance. [i] But if tenant for life suffer a common recoverie, or any other recoverie by covine and consent betweene the tenant for life and the recoveror, this is a forfeiture of his estate, and he in the reversion may presently enter for the forfeiture. Since our author wrote, the statute of 14 *El. cap. 8.* hath bene made concerning this matter, which is to be considered, [k] and hath bene well construed and expounded, and needs not here to be repeated.

And it is to be observed, that although the discontinuance groweth by matter of record, yet the remitter may be wrought by matter *in pais* : and of the residue of these two Sections sufficient hath bene said before.

(8. Rep. 62. 356. F. N. B. 155. b. 2. Inst. 350.)

Vide for the cases upon this ground, 14. H. 7. 11. per Fineux. 27. H. 8. 4. b. Aid. 35. H. 6. Gard. 72. 29. E. 3. 5. per Wilbie Custome. Lib. 3. fol. 86. Justice Windham's case, a. & b.

[g] 4. E. 3. 38. 33. E. 3. Avowrie 255. 5. E. 3. 4. F. N. B. 156. a. 5. E. 3. 5. 2. E. 4. 13. F. N. B. 156. C. 33. H. 6. 46. 2. E. 4. 11. 19. E. 4. 2.

45. E. 3. 21. 44. E. 3. 34. 35. F. N. B. 60. 23. H. 8. tit. Wast. Br. 138. (Cro. Car. 405. Ant. 327. a. 334. b.)

[h] 46. E. 3. 20. 8. H. 6. 17. 30. H. 6. 7.

(Ant. 54. a. Mo. 52.)

(F. N. B. 112. h.)

(Post. 362. a.)

[i] 5. Aff. pl. 3. 5. E. 3. Ent. Cong. 42. 15. E. 3. Age 95. 41. E. 3. 18. per Finchden. 22. E. 3. 2. b. Lib. 1. fol. 15. Sir Will. Pelham's case. 14. El. cap. 8. [k] Lib. 3. fol. 60. Lib. 1. fol. 15.

Sect. 676.

ITEM, si le baron discontinua le terre de sa feme, et puis reprist estate a luy et a sa feme, et al tierce person pur terme de lour vies, ou en fee, ceo * n'est un remitter a la feme, forsque quant a la moity; et pur l'auter moity el covient apres la mort son baron de fuer un brieve de cui in vitâ †.

{1. Infl. 343 F. N. B. 193. a.)

ALSO, if the husband discontinue the land of his wife, and after taketh backe an estate to him and to his wife, and to a third person for terme of their lives, or in fee, this is no remitter to the wife, but as to the moitie; and for the other moitie shee must after the death of her husband sue a writ of cui in vitâ.

44. E. 3. 17. 44. Aff. 2.
45. Aff. 3. Vid. Sect. 666.

CEO n'est remitter forsque quant al moitie, &c. Albeit there is authoritie in our bookes to the contrarie, yet the law is taken as *Littleton* here holdeth it, and as before it appeareth in the like case in this Chapter, and for the reason therein expressed.

Sect. 677.

ET puis le baron revient, et agreea,

15. E. 4. 1. b. 7. H. 4. 17.
1. H. 7. 16. b. 39. E. 3. 30.
27. H. 8. 24.

&c. In this case the estate is in the feme covert presently by the liverie before any agreement by the husband; and of this opinion is *Littleton* in our bookes.

Ala ouster le mere.

If hee had beene within the realme, it doth not alter the case.

Quere en cest case

si le baron, &c. Here is a question moved by *Littleton*, whether the disagreement of the husband shall ouste the wife of her remitter. And it seemeth that the disagreement shall not devest the remitter.

First, because the state made to the wife which wrought the remitter is banished and wholly defeated, and therefore no disagreement of the husband can devest the state gained by the lease, which by the remitter was devested before.

Secondly, for that the law having once restored her ancient and better right, will not suffer the disagreement of the husband to devest it out of her, and to revive the dis-

ITEM, si le baron discontinua la terme sa feme, et ala ouster le mere, et le discontinuee lessa mesme la terre al feme pur terme de sa vie, et liver a luy seisin; et puis le baron revyent, et agreea a cel liverie de seisin, ceo

est un remitter a la feme: et uncore si la feme fuisset sole al temps de le leas fait a luy, ceo ne serroit a luy un remitter.

Mes entant que el fuit covert de baron al temps de la leas, et de le liverie de seisin fait a luy, coment que el prist solement le liverie de seisin, ceo fuit un remitter a luy, pur ceo que feme covert serra adjudge

ALSO, if the husband discontinue the land of his wife, and goeth beyond sea, and the discontinued let the same land to the wife for terme of her life, and deliver to her seisin; and after the husband commeth backe, and agreeth to this liverie of seisin, this is a remitter to the wife: and yet if the wife had beene sole at the time of the lease made to her, this should not be to her a remitter. But inasmuch as she was covert baron at the time of the lease, and liverie of seisin made unto her, albeit shee taketh only the liverie of seisin, this was a remitter

ficome

* n'est—est, L. and M. and Roh.

† &c. added L. and M. and Roh.

*comme enfant deins age en tiel cas, &c. Quære en cest cas si le baron quant il revient, voil disagee a le leas et livery de seisin fait a son feme en son absence, si * ceo oustera son feme de son remitter †, ou nemy, &c.* to her because a feme covert shall be adjudged as an infant with- in age in such a case, &c. *Quære* in this case if the husband when hee comes backe, will disagee to the lease and livery of seisin made to his wife in his absence, if this shall ouste his wife of her remitter, or not, &c.

the will. As if lands be given to the husband and wife, and a feoffment in fee, the feoffee giveth the land to the husband and wife and the heires of their two bodies, the husband dieth; in this case the wife may elect which of the estates shee will; for both estates are waivable, and her time of election and power of wayver accrewed to her first after the decease of her husband. If lands be given to a man and the heires females of his body, and he maketh a feoffment in fee, and take backe an estate to him and his heires, and dieth, having issue a daughter, leaving his wife *grossment enfant* with a sonne and dieth, the daughter is remitted; and albeit the sonne be afterward borne, he shall not devest the remitter. (1)

continuance, and reveest the wrongfull estate in the dis-continuee.

Thirdly, for that remitters tending to the advancement of ancient rights are favoured in law.

And so it is for the same causes, if the wife survive her husband, she cannot claime in by the purchase made during the coverture; but the law adjudgeth her in her better right. But if both estates be waivable, there albeit the wife *prima facie* is remitted; yet after the decease of her husband, she may elect which of the estates

41. E. 3. 18.
(Flo. 114. b.)

18. Eliz. Dier 351.

(2. Rep. 37. 3. Rep. 26. b. 32. a.
2. Roll. Abr. 421, 422, 423.
9. Rep. 140. b. 2. Cro. 489.
Ante 246. a. 348. 3. Leon. 2.)

Sect. 678.

ITEM, si le baron discontinua les tenements son feme, et le discontinuee est disseise, et puis le disseisor lessa mesmes les tenements a le baron et a son feme pur terme de vie, ceo est un remitter a la feme. Mes si le baron et son feme fueront de covin † et consent que le disseisin doit estre fait, donques il n'est remitter a son feme, pur ceo que el est disseisereffe. Mes si le baron fuit de covin et consent a le disseisin, et nemy la feme, donque

ALSO, if the husband discontinue the lands of his wife, and the discontinuee is disseised, and after the disseisor letteth the same lands to the husband and wife for terme of life, this is a remitter to the wife. But if the husband and his wife were of covine and consent that the disseisin should be made, then it is no remitter to his wife, because she is a disseisereffe. But if the husband were of covin and consent to the disseisin, and not the wife

ET puis le disseisor lessa mesme les tenements, &c. Note, so much are remitters favoured in law, that the state made by the disseisor (which cometh to the land by wrong, and upon whom the entry of the discontinuee is lawfull) doth remit the wife, and devesteth all out of the discontinuee, albeit he hath a warrantie of the land.

18. E. 4. 2. b.
(F. N. B. 98. c.)

Mes si le baron et feme fueront de covin et consent, &c. Here it appeareth that covin and consent of the husband and wife doth hinder the remitter of the wife; for covine and consent in many cases to do a wrong, doth choak a meere right, and the ill manner doth make a good matter unlawfull.

18. E. 4. ubi supra.

Covin, *Covina*, com- Pl. Com. 546. in Wimbithe's meth of the French word case.
Convine, and is a secret assent deter.

* *ceo—jeo*, L. and M. and Roh.

† *ou nemy*, &c. not in L. and M. nor Roh. nor MSS.

‡ *et—ou*, L. and M. and Roh.

(1) VII. The remitter defeats the wrongfull estate immediately without entry; yet where both estates are waivable by a wife, without prejudice to a third person, she may waive which she pleases. But if a third person is interested, she must take her ancient estate. Thus, if there be a feoffment to the husband and wife in tail, remainder to A. the husband discontinues, and takes back an estate to him and his wife in tail, remainder to B. though the wife in respect to herself may take either the original estate tail, or the estate tail created by the feoffment, both the estates being after marriage; yet she ought to take the first, being for the benefit of A. the rightful remainder-man. Hob. 71. 255.

(Ant. 35. a. 4. Rep. 82. b.
F. N. B. 98. d.)

44. E. 3. 46. 11. H. 4. 60.
44. Aff. 29. 19. H. 8. 12.
18. H. 8. 5. 11. E. 4. 2.
7. H. 7. 11.

(3. Rep. 78. Plo. 51. a. 54.
Ant. 35. a.)

41. Aff. p. 28. 25. Aff. p. 1.
27. Aff. 74. 15. E. 4. 4. a.
12. Aff. p. 10.

11. E. 4. 2. 15. E. 4. 23.
14. H. 8. 13. 33. H. 6. 5.
12. E. 4. 21. b.

F. N. B. 179. g. 12. E. 4. 9.
35. Aff. 5. 44. E. 3. 9. 23.
13. Aff. 1. Temps E. 1.
Waste 128. 16. Aff. p. 7.
21. E. 4. 53. 21. H. 7. 35.
3. H. 4. 17.
(1. R. II. Abr. 278. 660.
F. N. B. 117. g.)

determined in the hearts of two
or more to the defrauding and
prejudice of another.

A woman is lawfully intitled to have dower, and she is of covine and consent, that one shall disseise the tenant of the land, against whom she may recover her lawfull dower, all which is done accordingly; the tenant may lawfully enter upon her, and avoid the recovery in respect of the covine. But if a disseisor, intruder, or abator, doe endow a woman that hath lawfull title of dower, this is good, and shall binde him that right hath, if there were no such covine or consent before the disseisin, abatement, or intrusion.

And so it is in all cases where a man hath a rightfull and just cause of action; yet if he of covine and consent doe raise up a tenant by wrong against whom he may recover, the covine doth suffocate the right, so as the recovery, though it be upon a good title, shall not binde or restore the demandant to his right.

If tenant in taile and his issue disseise the discontinuee to the use of the father, and the father dieth, and the land descendeth to the issue, he is not remitted against the discontinuee in respect he was privie and partie to the wrong; but in respect of all others he is remitted, and shall deraigne the first warrantie. And so note a man may be remitted against one, and not against another.

A. and B. joynttenants be intitled to a recall action against the heire of the disseisor, A. cause the heire to be disseised, against whom A. and B. recover and sue execution. B. is remitted, for that he was not partie to the covine, and shall hold in common with A.; but A. is not remitted, for the reason that *Littleton* here sheweth.

Pur ceo que el est disseisoresse. Nota, it is regularly true, that a feme covert cannot be a disseisoresse by her commandement or procurement precedent, nor by her assent or agreement subsequent; but by her actual entry, or proper act, she may be a disseisoresse. And therefore some doe hold that *Littleton* must be intended, that the husband and wife were present when the disseisin was done; and others doe hold that *Littleton* is good law, albeit she were absent; for that if her procurement or agreement be to doe a wrong, to cause a remitter unto her in this speciall case, she shall faile of her end, and remitted she shall not be; but in this speciall case she shall be holden as a disseisoresse by her covine and consent *quatenus* to hinder the remitter. And here it appeareth, that albeit the husband be of covine and consent, &c.; yet if the wife were not of covine and consent also, she shall be remitted, because, as *Littleton* saith, there was no default in the wife.

Sect. 679.

ITEM, si tiel discontinuee fe-
soit estate de franktenement
al baron et a son feme per fait en-
dent sur condition, scilicet, reser-
vant al discontinuee un certaine
rent, et pur default de payment un
re-entry, et pur ceo que le rent est
aderere le discontinuee enter; don-
ques de cel entrie le feme avera un
assise de novel disseisin, apres la
mort son baron envers le discon-
tinnee, pur ceo que le condition
fuit tout ousterment aniente, en-
tant que la feme fuit en son remit-
ter; uncore le baron ovesque sa

ALSO, if such discontinuee make
an estate of freehold to the hus-
band and wife by deed indented
upon condition, *scilicet*, reserving to
the discontinuee a certain rent, and
for default of payment a re-entrie,
and for that the rent is behind the
discontinuee enter; then for this
entrie the wife shall have an assise
of novel disseisin, after the death of
her husband against the disconti-
nnee, because the condition was
altogether taken away, inasmuch
as the wife was in her remitter;
yet the husband with his wife can-
feme

feme ne poient aver assise, pur ceo que le baron est estoppe, &c. not have an assise, because the husband is estopped, &c. (4. Rep. 52.)

IT is hereby to be observed, that the wife is presently remitted, and that the conditions, and rents, and all other things annexed to, or reserved upon the state (that is vanished and defeated by the remitter) are defeated also. (1) Pl. Com. in Amy Townshend's Case. 12. R. 2. tit. Remitter. 12.

Sect. 680, 681.

ITEM, si le baron discontinua les tenements sa feme, et reprist estate a luy pur terme de sa vie, le remainder apres son decease a sa feme pur terme de sa vie; en cest cas ceo n'est un remitter a la feme durant la vie le baron, pur ceo que durant la vie le baron, la feme n'ad riens en le franktenement. Mes si en ceo cas la feme survesquist le baron, ceo est un remitter a la feme, pur ceo que un franktenement en ley est ject sur luy maugre le soen. † Et entant que el ne poit aver action envers nul auter person, et envers luy mesme el ne poit aver action, pur ceo el est en son remitter. Car en cest cas coment que la feme ne entra pas en les tenements, uncore un estrange que ad cause de aver action, poit suer son action envers la feme de mesmes les tenements, pur ceo que el est tenant en ley, coment que el ne soit tenant en fait.

ALSO, if the husband discontinued the tenements of his wife, and take backe an estate to him for life, the remainder after his decease to his wife for terme of her life; in this case this is no remitter to the wife during the life of the husband, for that during the life of the husband, the wife hath nothing in the freehold. But if in this case the wife surviveth the husband, this is a remitter to the wife, because a freehold in law is cast upon her against her will. And inasmuch as she cannot have an action against any other person, and against herself shee cannot have any action, therefore she is in her remitter. For in this case although the wife doth not enter into the tenements, yet a stranger which hath cause to have an action, may sue his action against the wife for the same tenements, because shee is tenant in law. albeit that she be not tenant in deed. (Sid. 69.) (Hob. 260.)

Sect. 681.

CAR tenant de franktenement en fait est celui, que, s'il soit disseise de * franktenement, il poit aver assise: mes tenant de franktenement en ley devant son entre † en fait, n'avera my assise. Et si home ‡ soit seise § de certaine terre, § et ad issue firs quel prent

FOR tenant of freehold in deed is he, who, if hee be disseised of the freehold, may have an assise: but tenant of freehold in law before his entrie in deed, shall not have an assise. And if a man bee seised of certaine land, and hath issue a sonne who taketh wife, and

feme

† soen—feme, Paper M. S. * soen added L. and M. and Roh. † en fait not in L. and M. nor Roh. ‡ soit not in L. and M. nor Roh. § en fee added L. and M. and Roh. § et not in L. and M. nor Roh.

(1) VIII. The remitter defeats entirely the wrongful estate, and consequently every thing annexed to or issuing out of it. See ant. Sect. 659. 665, 666. and post. Sect. 686, 687. But an estate made of the land itself by him who is remitted, as a lease for years, is not defeated by the remitter.—See Com. Dig. vol. 5. 416.

(4. Rep. 8.)

(Plo. 416. b.)

18. H. 8. 3.
(3. Rep. 26. a.)Vide Sect. 447.
Bracton, lib. 4. fol. 206. 237.
Britton, 83. b.
Fleta, lib. 3. cap. 15.
(Plo. 229. b. 230. a.
Cro. Car. 338. Hob. 256.)

feme, et le pier devie seisie, et puis le fits devie devant ascun entrie fait per luy en la terre, le feme le fits ferra endowe en le terre, et uncore il n'avoit nul franktenement en fait, mes il avoit un fee et franktenement en ley. Et issint nota, que præcipe quod reddat poit auxy bien estre maintenus envers celuy que ad franktenement en ley, sicome envers celuy que ad le franktenement en fait.

the father dieth seised, and after the sonne dies before any entrie made by him into the land, the wife of the sonne shall be endowed in the land, and yet he had no freehold in deed, but hee had a fee and freehold in law. And so note, that a *præcipe quod reddat* may as well bee maintained against him that hath the freehold in law, as against him that hath the freehold in deed.

HERE five things are to be observed. First, that a remainder expectant upon an estate for life worketh no remitter, but when it fall in possession: for before his time he can have no action, and no freehold is in him. Secondly, though the woman might waive the remainder, yet because she is presently by the death of the husband tenant to the *præcipe*, it is within the rule of remitter, and her power of waiver is not materiall. Thirdly, that a freehold in law being cast upon the woman by act of law, without any thing done or assented to by her, doth remit her, albeit she be then sole and of full age. Fourthly, that a *præcipe* lyeth against one that hath but a freehold in law. Fifthly, that a woman shall be endowed where the husband hath the inheritance, and but a freehold in law, as hath beene said in the Chapter of Dower.

Sect. 682.

ITEM, si tenant en taile ad issue deux fits de pleine age, et il lessa la terre taile al eigne fits pur terme de sa vie, le remainder al fits puisne pur terme de sa vie, et puis le tenant en taile morust; en cest cas l'eigne fits n'est pas en son remitter, pur ceo que il prent estate de son pier. Mes si l'eigne fits morust sauns issue de son corps, donque ceo est un remitter al puisne frere, pur ceo que il est heire en le taylor, et un franktenement en le ley est escheate, et jecte sur luy per force de le remainder, et il y ad nul envers que il poit fuer son action *.

ALSO, if tenant in taile hath issued two sons of full age, and he letteth the land tailed to the eldest son for terme of his life, the remainder to the younger son for terme of his life, and after the tenant in taile dieth; in this case the eldest sonne is not in his remitter, because hee tooke an estate of his father. But if the eldest die without issue of his bodie, then this is a remitter to the younger brother, because he is heire in taile, and a freehold in law is escheated, and cast upon him by force of the remainder, and there is none against whom he may sue his action.

[a] 12. E. 4. 20.
[b] Sect. 684, 685.

OF this opinion is [a] *Litleton* in our bookes; and of this sufficient hath beene said in the next Section before. See hereafter [b] some explanation hereof.

Sect.

* &c. added L. and M. and Rob.

Sect. 683.

EN mesme le maner est, lou home soit disseise, et le disseisor morust seise, et les tenements descendent a son heire, et l'heire le disseisor fait un leas a un home de mesmes les tenements pur terme de * vie, le remainder a le disseisee pur terme de vie, ou en taile, ou en fee, † le tenant a terme de vie morust, ore ceo est un remitter al disseisee, &c. causâ quâ supra, ‡ &c.

IN the same manner it is, where a man is disseised, and the disseisor dieth seised, and the tenements descend to his heire, and the heire of the disseisor make a lease to a man of the same tenements for terme of life, the remainder to the disseisee for terme of life, or in taile, or in fee, the tenant for life dieth, now this is a remitter to the disseisee, &c. causâ quâ supra, &c.

AND this standeth upon the same reason that the cases in the two Sections precedent doe. See the next Section following.

Sect. 684.

§ * *NOTA*, si tenant en taile enfeoffa son firs et un autre per son fait de la terre taile, en fee, et livery de seisin est fait a l'auter accordant al fait, || et le firs rien conusant de ceo ¶ agreea a le feoffment, et puis celui que prist le livery de seisin devy, et le firs ne occupia la terre, ne prent ascun profit del terre durant la vie le pier, et puis le pier morust, ore ceo est un remitter al firs, pur ceo que le franktenement est ject sur luy per le survivor; et nul default s'uit en luy, pur ceo que il ne unque

NOTE, if tenant in taile infeoffe his sonne and another by his deed of the land intailed, in fee, and livery of seisin is made to the other according to the deed, and the son not knowing of this agreeth not to the feoffment, and after hee which tooke the livery of seisin dieth, and the son doth not occupie the land, nor taketh any profit of the land during the life of the father, and after the father dieth, now this is a remitter to the sonne, because the freehold is cast upon him by the survivor; and no default was in

* IT should seeme by this marke, that this was an addition to *Littleton*; but it is of *Littleton's* owne worke, and agreeth with the originall, saving the originall begun this Section thus: *Item si tenant en taile, &c.*

Per son fait, &c.

(Ant. 49. b. 52. a. 297. b.)

Here *Littleton* materially addeth by his deed; for if a man intendeth to [b] make a feoffment by *parol* to *A.* and *B.* and he and *B.* come upon the land, *A.* being absent, and make livery to *B.* in the name both of *B.* and *A.* and to their heires, this shall enure onely to *B.*; for neither can a man absent take livery, nor make livery without deed.

[b] Temps H. 8. Feoffments. Br. 72. 40. E. 3. 41. 10. E. 4. 1. a. 15. E. 4. 18. 18. E. 4. 12. 22. H. 6. 12.

Et livery de seisin (9. Rep. 136.)

est fait a l'auter accordant al fait, &c.

Note, livery being made to one according to the deede, enureth to both, because the deede whereunto the livery referreth is made to both; for the rule is, that *Verba relata hoc maxime operantur per referentiam ut in eis in esse videntur.*

(Ant. 49. b. 52. a.)

Et

* *son* added L. and M. and Roh.

† *et* added in L. and M. and Roh.

‡ *&c.* not in L. and M. nor Roh.

§ *Nota—item,*

L. and M. and Roh.

|| *&c.* not in L. and M. nor Roh.

¶ *ne* added L. and M. and Roh.

Et le firs nient conu- agreea, &c. en la vie
sant de ceo, ne agreea a son pier, et il ad nul
le feoffement. Here it ap- *envers que il poit*
 peareth, that if the sonne be *fuier brieve de forme-*
 conusant, and agreeth to the *don, &c.*
 feoffement, &c. this is no re-
 mitter to him. And therefore
 if the feoffement were made

him, because he did ne-
 ver agree, &c. in the
 life of his father, and
 hee hath none against
 whom hee may sue a
 writ of *formedon*, &c.

Vide Sect. 682.

by deed indented, and the sonne with the other sealeth the counterpart, and then the feoffor maketh livery to the other according to the deed, and the other dieth, the son is not remitted, because he was conusant of the feoffement, and agreed to the same; and *Littleton* saith in the case that he putteth, that there was no default in the son, because he agreed not to the feoffement in the life of the father: and so it seemeth, that if *A.* be seised in taile, and have issue two sons, and by deed indented betweene him of the one part, and the sons of the other part, maketh a lease to the eldest for life, the remainder to the second in fee, and dieth, and the eldest son dieth without issue, the second son is not remitted, because he agreed to the remainder in the life of the father; or if the like estate had been made by parol, if in the life of the father the tenant for life had been impleaded, and made default, and he in the remainder had been received, and thereby agreed to the remainder, after the death of the father and the eldest son without issue, the second son should not be remitted, because he agreed to the remainder in the life of the father; all which is well warranted by the reason yielded by our author in this Section.

Sect. 685.

CAR si bome soi disseise de cer-
 taine terre, et le disseisor fait
 un fait de feoffment per que il
 infeoffa B. C. et D. et le liverie
 de seisin est fait a B. et C. mes
 D. ne fuit al liverie de seisin, ne
 unque agreea a le feoffment, ne un-
 que voile prender les profits, &c.
 et puis B. et C. devieront, et D.
 eux survesquist, et le disseisee port
 son brieve sur disseisin en le per
 envers D. * il monstra tout le
 matter, † coment il ne unques
 agreea a le feoffment, et issint il
 dischargera luy de damages, issint
 que le demandant ne recovers
 ascuns dammages envers luy, co-
 ment que il soit tenant del frank-
 tenement del terre. Et uncore
 le statute de Gloucester, ‡ cap. 1.
 voit, que le disseisee recovers da-
 mages en brieve de entre, foundue
 sur § disseisin vers celuy que est
 trouve tenant. Et ceo est un
 proove en l'auter case, que entant

FOR if a man be disseised of cer-
 taine land, and the disseisour
 make a deed of feoffement where-
 by he infeoffeth *B. C.* and *D.* and
 liverie of seisin is made to *B.* and
C. but *D.* was not at the liverie of
 seisin, nor ever agreed to the feoff-
 ment, nor ever would take the pro-
 fits, &c. and after *B.* and *C.* die,
 and *D.* survive them, and the dis-
 seisee bringeth his writ upon dis-
 seisin in the *per* against *D.* hee shall
 shew all the matter, how he never
 agreed to the feoffement, and hee
 shall discharge himselfe of dam-
 mages, so as the demandant shall
 recover no damages against him,
 although he be tenant of the free-
 hold of the land. And yet the
 statute of *Gloucester cap. 1.* will,
 that the disseisee shall recover
 damages in a writ of entrie
 founded upon a disseisin against
 him which is found tenant. And
 this is a proove in the other case,
 que

* il mesme celuy D. L. and M. and Roh.
 † le novel added L. and M. and Roh.

† et added L. and M. and Roh.

‡ cap. 1. not in L. and M. nor Roh.

que l'issue en le taile avient a le franktenement, et * nemy per son fait, ne per son agreement, † mes apres la mort son pier, ceo est un remitter a luy, entant que il ne poit fuer action de formedon envers nul auter person, &c.

that forasmuch as the issue in taile came to the freehold, and not by his act, nor by his agreement, but after the death of his father, therefore this is a remitter to him, inasmuch as he cannot sue an action of *formedon* against any other person, &c.

THIS case standeth upon the same reason that the next precedent case doth.

Mes celui que est trouve tenant, &c. Here it appeareth, that acts of parliament are to be so construed, as no man that is innocent, or free from injurie or wrong, be by a literall construction punished or endamaged: and therefore in this case, albeit the letter of the statute is generally to give damages against him that is found tenant, and the case that *Littleton* here putteth, *D.* being survivor, is consequently found tenant of the land; yet because he waived the estate, and never agreed to the feoffment, nor tooke any profits, he shall not be charged with the damages.

(8. Rep. 1.
Post. 365. b. 366. a. 369. 381.
Ant. 11. b. 115. a.
Flo. 365.)

Sect. 686, 687.

ITEM, si un abbe aliena la terre de son meason a un auter en fee, et l'alienee per son fait charge la terre ove un rent charge en fee, et puis l'alienee infeoffe l'abbe ove licence, a aver et tener al abbe et a ses successors a tous jours, et puis l'abbe morust, et un auter est eslieu, et fait abbe: en cest case l'abbe que est le successor, et son covent, sont en lour remitter, et tiendront la terre discharge, pur ceo que mesme l'abbe ne poit aver aucun action, † ne briefe d'entre sine assensu capituli, de mesme la terre envers nul auter person. (1)

ALSO, if an abbot alien the land of his house to another in fee, and the alienee by his deed charge the land with a rent-charge in fee, and after the alienee infeoffe the abbot with licence, to have and to hold to the abbot and to his successors for ever, and after the abbot die, and another is chosen, and made abbot: in this case the abbot that is the successor, and his covent, are in their remitter, and shall hold the land discharged, because the same abbot cannot have an action, nor a writ of *entre sine assensu capituli*, of the same land against any other person.

(2. Roll. Abr. 522.)

Sect. 687.

EN mesme le maner est, lou un evesque, ou un deane, ou auters tiels persons aliena, &c. sans assent, &c. et l'alienee charge la terre, &c. et puis l'evesque reprist estate de mesme la terre per licence, a luy et a ses

IN the same manner it is, where a bishop or a deane, or other such persons alien, &c. without assent, &c. and the alienee charge the land, &c. and after the bishop takes backe an estate of the same land by licence, to him and his succes-

* see added L. and M. and Roh.

† mes — que, L. and M. and Roh.

‡ ne — de, L. and M. and Roh.

(1.) VIII. Here *Littleton* begins to treat of remitter to bodies politic.

successors, et puis l'evesque devie; sours, and after the bishop dieth; son successor est en son remitter, his successor is in his remitter, as come en droit de son esglise, et defeat the charge, &c. causâ quâ supra, &c.

OUR author having spoken of remitters to singular or naturall persons, as issues in taile, and to feme coverts, and to their heires, and to them in reversion or remainder, and their heires; now he speaketh of remitters to bodies politike and incorporate, as to abbots, bishops, deanes, &c. And as descents doe remit the heire which comes in the *per*, so succession doth remit the successor, albeit he cometh in the *post*. And so in other cases where the issue in taile of full age shall be remitted, there in the like case shall the successor be remitted also, and defeat all meane charges and incumbrances.

Ove licence, &c. That is, of the king and the lords immediate and mediate, to dispense with the statutes of mortmaine; whereof see more before, *Se^ct. 140.*

Se^ct. 688.

ITEM, si home fust faux action envers le tenant en taile, sicome home voile fuer envers luy un brieve d'entre en le post, supposant per son brieve que le tenant en taile n'ad pas entre sinon per A. de B. que disseisist l'ayel le demandant, et ceo est faux, et il recover envers le tenant en le taile per default, et fust execution, et puis le tenant en taile morust, son issue poit aver brieve de formedon envers luy que recovera; et s'il voile pleader le recoverie envers le tenant en taile, l'issue poit dire, que le dit A. de B. ne disseisist poynt l'ayel celuy que recoverast, en le maner come son brieve supposa, et issint il fauxera * le recoverie. Auxy politico que ceo fust voyer, que le dit A. de B. disseisist l'ayel le demandant que recoverast, et que apres le disseisin le demandant, ou son pier, ou son ayel per un fait avoyent releffe al tenant en taile tout le droit que il avoit en la terre, &c. et ceo nient contriste-

ALSO, if a man sue a false action against tenant in taile, as if one will sue against him a writ of entrie in the *post*, supposing by his writ that the tenant in taile had not his entrie but by A. of B. who disseised the grandfather of the demandant, and this is false, and he recovereth against the tenant in taile by default, and sueth execution, and after the tenant in taile dieth, his issue may have a writ of *formedon* against him which recovereth; and if hee will plead the recoverie against the tenant in taile, the issue may say, that the said A. of B. did not disseise the grandfather of him which recovered, in manner as his writ suppose, and so he shall falsifie his recovery. And admit this were true, that the said A. of B. did disseise the grandfather of the demandant which recovered, and that after the disseisin, the demandant, or his father, or his grandfather by a deed had released to the tenant in taile all the right which hee had in the

ant

* *le—son*, L. and M. and Rob.

ant il fust un brieve d'entre en le
post envers le tenant en taile, en
le manner come est avaunt dit,
et le tenant en taile pleda a
celuy, que le dit A. de B. ne dis-
seist pas son aiel, en le manner
come son brieve supposa; et sur ceo
sont a issue, et l'issue est trove pur
le demandant, per que il ad judge-
ment de recover, et fust execu-
tion; et puis le tenant en le taile
morust, son issue poit avoir un
brieve de formedon envers celuy
que recovers; et s'il voile plead le
recoverie per l'action trie envers
son pier* que fuit tenant en taile,
donque il poit monstrier et pleader
le release fait al son pier, et
issint l'action que fuit sue, feint
en ley †.

land, &c. and notwithstanding this
hee sueth a writ of entrie in the
post against the tenant in taile, in
manner as is aforesaid, and the te-
nant in taile plead to him, that the
said A. of B. did not disseise his
grandfather, in such manner as his
writ suppose; and upon this they
are at issue, and the issue is found
for the demandant, wherby he hath
judgment to recover, and sueth ex-
ecution; and after the tenant in taile
dieth, his issue may have a writ of
formedon against him that recover-
ed; and if he will plead the reco-
very by the action tried against his
father who was tenant in taile, then
he may shew and plead the release
made to his father, and so the ac-
tion which was sued, feint in law.

IL recovers envers le tenant en taile per default. *Littleton* addeth (by default)

because if the [c] recovery passed upon an issue tried by verdict, he shall never falsifie in the point tried, because an attain might have beene had against the jurors; and albeit all the jurors be dead, so as the attain doe faile, yet the issue in taile shall not falsifie in the point tried, which, untill it be lawfully avoided, *pro veritate accipitur*. As if the tenant in taile be impleaded in a *formedon*, and he traverseth the gift, and it is tried against him, and thereupon the demandant recover; in this case the issue in taile shall not falsifie in the point tried; but he may falsifie the recovery by any other matter: as that the tenant in taile might have pleaded a collateral warrantie, or a release, as *Littleton* here putteth the case, or to confesse and avoid the point tried. And *Littleton's* case holdeth not only in a recovery by default, whereof he speaketh, but also upon a *nihil dicit*, or confession or demurrer.

[c] 12. E. 4. 19. 13. E. 4. 3.
11. H. 4. 89. 7. H. 4. 17.
14. H. 7. 10, 11. 28. Aff. 32. 52.
34. Aff. 7. 10. H. 6. 5.
19. H. 6. 39. Brooke tit. Fauxi-
fier de Recoverie 55.
22. H. 6. 28. 34. H. 6. 2.
26. H. 6. 32. 36. H. 6. Fauxer.
de Recoverie 27.
(6. Rep. 7. 1. Roll. Rep. 443.)

Sect. 689.

ET il semble, que feint action est
autant a dire en English, a
fained action, c'est a scavoir, tiel
action que coment que les parolx
de le brieve sont voyers, uncore
per certaine causes il n'ad cause
ne title per la ley de recover
per mesme l'action. Et faux ac-
tion est, lou les parolx de brieve
sont faux. Et en les deux cas
avaunt dits, si le cas fuit tiel, que
apres tiel recovery, et execution

AND it seemeth, that a faint ac-
tion is as much to say in En-
glish, a *fained action*, that is to say,
such an action as albeit the words of
the writ be true, yet for certaine
causes hee hath no cause nor title
by the law to recover by the same
action. And a false action is, where
the words of the writ bee false.
And in these two cases afore-
said, if the case were such, that af-
ter such recovery, and execution
ent

* que fuit not in L. and M. nor Roh.

† &c. added L. and M. and Roh.

*ent fait, le tenant en taile uſt diſſeie celui que recouera, et ent moruſt ſeiſie, per que la terre diſcendiſt a ſon iſſue, ceo eſt un remitter al iſſue, et l'iſſue eſt eins per force de le taile; et pur cel cauſe jeo aye mis les deux caſes precedents, pur enformer toy, mon ſits, que l'iſſue en taile per force d'un diſcent fait a luy apres un recovery et execution * fait envers ſon auncether, poit eſtre auxy bien en ſon remitter, ſicome il ſerroit per le diſcent fait a luy apres un diſcontinuance fait per ſon auncether de les terres tayles per feoffement en pais, ou auterment, &c.*

thereupon done, the tenant in tayle had diſſeiſed him that recovered, and thereof died ſeiſed, whereby the land deſcended to his iſſue, this is a remitter to the iſſue, and the iſſue is in by force of the taile; and for this cauſe I have put theſe two caſes precedent, to enforme thee (my ſonne) that the iſſue in taile by force of a diſcent made unto him after a recovery and execution made againſt his anceſſour, may be as well in his remitter, as he ſhould be by the diſcent made to him after a diſcontinuance made by his anceſſour of the entayled lands by feoffement in the countrey, or otherwiſe, &c.

HERE Littleton explaineth what a faint action is, and what a falſe action is, which is plaine and perſpicuous. And here it is to be obſerved, that a remitter may be had after a recovery upon a faint action by a diſſeiſin and a diſcent, aſwell as by a diſcent after a diſcontinuance by a feoffement, &c.

Sect. 690.

28. Aff. 32. 34. Aff. pl. 7.
15. E. 3. Age 95. 11. H. 4. 89.
7. H. 4. 17. 33. E. 3. Enrie
Cong. 31. 21. H. 6. 13.
10. H. 6. 6. 12. E. 4. 20.
14. H. 7. 11. 23. Eliz. Dier 376.
Lib. 1. fol. 100. Shelley's caſe.
Pl. Com. 55.
(Cro. Car. 388. Pl. 14.)

See hereafter Sect. 709.
15. E. 3. Bucke 34. 41. E. 3. 53.
41. E. 3. 21. 46. E. 3. 11.
1. E. 4. 5. 5. E. 4. 2.

[d] 10. E. 4. 20. Dier
23. Eliz. 375. Lib. 10. fol. 37. 38.
in Mary Portington's caſe.

HERE it appeareth, that if a judgement be given againſt a tenant in taile upon a faint or falſe action, and tenant in taile die before execution, no execution can be ſued againſt the iſſue in taile. But if in a common recoverie judgement bee had againſt tenant in taile where he voucheth, and hath judgement to recover over in value, albeit the tenant in taile dyeth before execution, yet the recoverer ſhall execute the judgement againſt the iſſue in taile in reſpect of the intended recompence; and for that it is the common aſſurance of the realme, and is well warranted [d] by our bookes, and was not invented by juſtice *Choke*, who was a grave and learned judge in the time of *E. 4.* (as ſome hold by tradition); but it may bee

ITEM, en les caſes avantdits, ſi le cas ſuit tiel, que apres ceo que le demandant avoit judgement de recover envers le tenant en taile, et meſme le tenant en taile moruſt devaunt aſcun execution ewe envers luy, per que les tenements diſcendent a ſon iſſue, et celui que recouera ſuiſt un ſcire facias hors de le judgement d'aver execution de le judgement envers l'iſſue en taile, l'iſſue pledera le

ALSO, in the caſes aforeſaid, if the caſe were ſuch, that after that the demandant have judgement to recover againſt the tenant in taile, and the ſame tenant in taile dieth before any execution had againſt him, whereby the tenements deſcend to his iſſue, and he who recovereth ſueth a ſcire facias out of the judgement to have execution of the judgement againſt the iſſue in taile, the iſſue ſhal plead the matter

*matter come avaunt est dit; et issint pro- va que le * dit recovery fuit faux ou feint en ley, et issint luy barre- ra d'aver execution de le judgement +.*

ter as aforesaid; and so prove that the said recovery was false or faint in law, and so shall barre him to have execution of the judgement.

If a recoverie bee had against tenant for life without consent or covine, though it be without title, and execution be had, and tenant for life dieth, the reversion or remainder is discontinued, so as he in the reversion or remainder cannot enter; but if such a recovery be had by agreement and covine between the demandant and the tenant for life, then, as hath beene said, it is a forfeiture of the estate for life, and he in the reversion or remainder may enter for the forfeiture. So it is if the tenant for life suffer a common recovery at this day, it is a forfeiture of his estate; for a common recovery is a common conveyance or assurance, whereof the law taketh knowledge. Since *Littleton* wrote, there were two statutes [e] made for preservation of remainders and reversions expectant upon any manner of estate for life; the one in 32. H. 8. the other in 14. Eliz.: but 32. H. 8. extended not to recoveries, when tenant for life came in as vouchee, &c. and therefore that act is repealed by 14. Eliz. and full remedie provided for preservation of the entrie of them in reversion or remainder. But the statute of 14. Eliz. extendeth not to any recovery, unlesse it be by agreement or covine. Secondly, [f] if there be tenant for life, remainder in taile, the reversion or remainder in fee, if tenant for life be impleaded by agreement, and he vouches tenant in taile, and he vouch over the common vouchee, this shall barre the reversion or remainder in fee, although he in the reversion or remainder did never assent to the recovery; because it was not the intent of the act to extend to such a recovery, in which a tenant in taile was vouched; for he hath power by common recovery, if he were in possession, to cut off all reversions and remainders. And so if tenant for life had surrendered to him in remainder in taile, he might have barred the remainders and reversions expectant upon his estate. Thirdly, where the proviso of that act speaketh of an assent of record by him in reversion or remainder, it is to be understood, that such assent must appeare upon the same record, either upon a voucher, *aid prier*, receipt, or the like; for it cannot appeare of record, unlesse it be done in course of law, and not by any extrajudiciall entrie, or by *memorandum*.

that it was upon former authorities and opinions of judges discovered by him, assented unto by the rest of the judges.

If a recoverie bee had against tenant for life without consent or covine, though it be without title, and execution be had, and tenant for

5. Aff. 3. 5. E. 3. Entre Cong. 42. Li. 1. fol. 15, 16. Sir William Pelham's case. (6. Rep. 8. b. Ant. 356. a.)

[e] 32. H. 8. cap. 31. 14. Eliz. cap. 8. (Sect. 675. 10. Rep. 49.)

[f] Lib. 3. fol. 60, 61. Lincolne College case.

(2. Roll. Abr. 23. 146.)

Sect. 691.

ITEM, si tenant en taile discontinua le taile, et mourust, et son issue port son briefe de formedon envers le discontinuee (estant tenant de franktenement del terre) et le discontinuee pleda que il n'est tenant, mes ousterment disclama de le tenancy en la terre; en cest cas le judgement serra, que le tenant alast sans jour, et apres tiel

ALSO, if tenant in taile discontinue the taile, and dieth, and his issue bringeth his writ of *formedon* against the discontinuee (being tenant of the freehold of the land) and the discontinuee plead that he is not tenant, but utterly disclaymeth from the tenancy in the land; in this case the judgement shall be, that the tenant goeth without day, and after such

HERE it appeareth, that upon the plea of non-tenure, or of disclaimer of the tenant in a *formedon* in the discender, albeit the expresse judgement be that the tenant shall goe without day, yet in judgement of law the demandant may enter according to the title of his writ, and bee seised in taile, notwithstanding the discontinuance. And here, *Littleton* saith, the demandant shall be adjudged in his remitter; where hee taketh remitter in a large sence: for in this case the demandant hath not two rights, but hath onely one antient right, and restored to the same by course of law; and so remitter here is taken for a recontinuance of the right.

(Doct. Pla. 133.) 5. E. 4. 1. 36. H. 6. 29. 6. E. 3. 8. 4. E. 4. 38. (3. Rep. 26.)

Non-tenure. Vide *Bracton*, lib. 5. fol. 431, 432. & 414. Britton, cap. 84.

Or

* dit not in L. and M. nor Roh.

+ &c. added L. and M. and Roh.

Ou le demandant ne recouvrera damages.

Here is to be observed, that in such a *præcipe* where the demandant is to recover damages, if the tenant pleade non-tenure or disclaim, [*f*] there the demandant may averre him to be tenant of the land, as his writ suppose for the benefit of his damages, which otherwise hee should lose, or pray judgement and enter. [*g*] But where no damages are to be recovered, as in a *formedon* in the descender, and the like, there hee cannot averre him tenant, but pray his judgement and enter, for thereby hee hath the effect of his suite: *Et frustra fit per plura, quod fieri potest per pauciora.*

Averrer. To averre or avouch, or verifie, *verificare*, whereof cometh *averrificatio*, an averment; and is so said as well in English as in French; and is two-fold, viz. generall and particular. A generall averment, which is the conclusion of every plea to the writ, or in barre of replications and other pleadings (for counts or avowries in nature of counts need not be averred) containing matter affirmative, ought to be averred, *et hoc paratus est verificare, &c.* Particular averments are, as when the life of tenant for life, or tenant in taile, are averred; and there, tho' this word (*verificare*) be not used, but the matter avouched and affirmed, it is upon the matter an averment. And an averment containeth as well the matter as the forme thereof.

Que le tenant alast sans jour, Quod tenens eat sine die. This is the entrie of the judgement in that case, that the tenant shall goe without day, that is, to be discharged of further attendance; and this is some-

judgement l'issue en le taile que est demandant poit entrer en la terre, nyent contristant le discontinuance, et per tiel entrie il serra adjudge eins en son remitter. Et la cause est, pur ceo que si ascun home fust præcipe quod reddat envers ascun tenant de franktenement, en quel action le demandant ne recouvrera damages, et le tenant pledast nontenure, *ou auterment disclama en le tenancie, le demandant ne poit averrer son briefe, † et dirra que il est tenant, come le briefe suppose. Et pur cel cause le demandant apres ceo que judgement est done que le tenant alast sans jour, poit entrer en les tenements demands, le quel serra auxy graund advantage a luy en ley, sicome il avoit judgement de recouvrer envers le tenant, et per tiel entrie il est en son remitter per force del taile. Mes lou le demandant recouvrera damages envers le tenant, la le demandant poit averrer, que il est tenant, come le briefe suppose, et ceo pur l'avantage

judgement the issue in the taile that is demandant may enter into the land, notwithstanding the discontinuance, and by such entrie hee shall be adjudged in his remitter. And the reason is, for that if any man sue a *præcipe quod reddat* against any tenant of the freehold, in which action the demandant shall not recover damages, and the tenant pleads non-tenure, or otherwise disclaime in the tenancie, the demandant cannot averre his writ, and say that hee is tenant, as the writ supposeth. And for this cause the demandant after that that judgement is given that the tenant shall goe without day, may enter into the tenements demanded, the which shall be as great an advantage to him in law, as if he had judgement to recover against the tenant, and by such entry hee is in his remitter by force of the entaile. But where the demandant shall recover damages against the tenant, there the demandant may averre, that he is tenant, as the writ supposeth, and that for the advantage

[*f*] 13. H. 7. 28. 36. H. 6. 29.
22. H. 6. 44. 4. E. 4. 38.
5. E. 4. 1. 6. E. 3. 8.
(7. Rep. 40.)

[*g*] 8. E. 3. 434. 24. E. 3. 9.
11. H. 4. 16. & 7. H. 6. 17.

5. E. 4. 1.
(5. Rep. 68. Doct. Pla. 49.)

(Ant. 303. a.)

(9. Rep. 7. Sid. 264. 310.)

* ou—mes, L. and M. and Roh.

† et dirra, not in L. and M. nor Roh.

*del demandant pur recou-
coverer ses damages, ou au-
auterment il ne recou-
veroit ses damages, queux
sont * ou fueront a luy
dones per la ley.*

tage of the demandant
to recover his dam-
mages, or otherwise
hee shall not recover
his damages, which
are or were given to
him by the law.

time finall for that action,
whereof *Littleton* here put-
teth an example; and some-
time temporarie, whereof *Li-
tleton* also hath put an ex-
ample: as when excommen-
gement is pleaded in disabilitie
of the plaintiffe or demandant,
there the award is, that the
tenant or defendant shall goe
without day; and yet when

Vide Sect. 201.

(8. Rep. 68.)

the demandant or plaintiffe have purchased his letters of absolution, upon shewing them to the court, he may have a refoptions or reattachment to recontinue the cause againe. But it is to be knowne, that when judgement is given for the tenant or defendant upon a plea in barre, or to the writ, &c. the judgement is all one, viz. *quod tenens*, or *defendens eat inde sine die*, and shall have reference to the nature and matter of the plea, and so be taken either to goe in barre, or to the writ. So when judgement is given against the plaintiffe, either in barre of his action, or in abatement of his writ, &c. the judgement is all one, viz. *nihil capiat per breve*; and it appeareth by the record, whether the plea did goe in barre, or to the writ. And the cause of the judgement is never entred in the record in any case; for that upon consideration had of the record, it appeareth therein.

3. H. 4. s. 11.

(Ant. 135. b.)

Sect. 692.

ITEM, si home soit disseise, et le disseisor devy, son heire esteant eins per discent, ore l'entrie de le disseisee est tolle; et si le disseisee porta son brieve d'entrie sur disseisin en le per, envers l'heire, et l'heire disclaime en le tenancy, &c. le demandant poit averer son brieve que il est tenant come le brieve suppose, s'il voit, pur recoucover ses damages: mes uncore s'il voit relinquisher le averment, &c. il poit loyalment entrer en la terre per cause del disclaimer, nient obstant que son entrie adevant fuit tolle. Et ceo fuit adjudge devant mon master sir R. Danby, jades chiefe justice de la common banke et ses compagnions, &c.

ALSO, if a man be disseised, and the disseisor die, his heire being in by discent, now the entrie of the disseisee is taken away; and if the disseisee bring his writ of entrie sur disseisin in the per, against the heire, and the heire disclaime in the tenancy, &c. the demandant may averre his writ that hee is tenant as the writ suppose, if he will, to recover his damages: but yet if hee will relinquish the averment, &c. he may lawfully enter into the land because of the disclaimer, notwithstanding that his entrie before was taken away. And this was adjudged before my master sir R. Danby, late chiefe justice of the common place and his companions, &c.

(F. N. B. 192. b.
1. Roll. Abr. 631.
Doct. Pla. 133.)

(3. Lev. 330.)

ITEM, si home soit disseise, &c.

Albeit in this case, and in the case before, the entrie of the demandant is his owne act, and the demandant hath no expresse judgement to recover, yet shall he be remitted; because he in judgement of the law shall be in according to the title of his writ, and by his entrie defeat the discontinuance, and consequently is remitted to his antient estate.

36. H. 6. fol. 29

Sir Robert Danby, knight, was a gentleman of an ancient and faire descended family, and chiefe-justice of the court of common-pleas; a grave, reverend, and learned judge, of

3. E. 4. 41. 4. E. 4. 38.

* ou fueront not in L. and M. nor Roh.

of whom our author speaketh here with verie great reverence, as you may perceive. And here is to be noted how necessarie it is, after the example of our author, to observe the judgements and resolutions of the sages of the law.

Sect. 693.

29. Aff. p. 26. 43. Aff. p. 3.
11. H. 7. 20. 3. H. 6. 19.
40. E. 3. 43.
(Sec. 683.)

(Hob. 256.)

(Ant. 49. b. 350. a.)

8. R. 2. Quar. imp. 199.
19. H. 6. 30. 8. H. 6. 17.
21. H. 6. 2. 3. H. 4. 8.
14. H. 6. 15. 16. 37. H. 6. 18.
26. H. 8. 4. F. N. B. 36. f.
& 35. b.
(3. Rep. 3. b. Sect. 661.)

22. Aff. p. 32. en le case de
Theobald Grunville.
(3. Rep. 3.)

13. H. 4. 5. 3. H. 4. 17.
8. H. 4. 8. 12. H. 4. 19.
35. Aff. 8. 17. Aff. 3.
29. Aff. 53. 43. E. 3. 17.
Parker's case 44. E. 3. Ettop. 10.
21. H. 6. 2. per Pollon.
8. H. 6. 17. per Confinere.
(1. Roll. Abr. 869. 878.
4. Rep. 52.)

HERE appeareth a diversitie betweene a right of entrie and a right of action; for if a man of full age having but a right of action, taketh an estate to him, hee is not remitted: but where hee hath a right of entrie and taketh an estate, he by his entrie is remitted, because his entrie is lawfull. And if the disseisor infeoffe the disseisee and others, the disseisee is remitted to the whole, for his entrie is lawfull: otherwise it is if his entrie were taken away.

Lou l'entrie est congeable. A. is disseised of a mannor, whereunto an advowson is appendant, an estranger usurpe to the advowson, if the disseisee enter into the mannor, the advowson is recontinued againe, which was severed by the usurpation. And so it is if

tenant in tayle be of a mannor whereunto an advowson is appendant, the tenant in tayle discontinueth in fee, the discontinuance granteth away the advowson in fee, and dieth, the issue in tayle recontinueth the mannor by recoverie, he is thereby remitted to the advowson; and in both cases hee that right hath shall present when the church becommeth voyd.

The patron of a benefice is outlawed, and the church becommeth voyd, an estranger usurpeth, and six moneths passe, the king doth recover in a *quare impedit*, and remove the incumbent, &c. the advowson is recontinued to the rightfull patron. And so note a diversitie betweene a recontinuance and a remitter; for a remitter cannot be properly, unlesse there be two titles; but a recontinuance may be where there is but one.

Per fait indent, &c. Here it appeareth, that if the disseisor by deed indented make a lease for life, or a gift in tayle, or a feoffment in fee, whereunto liverie of seisin is requisite; yet the deed indented shall not suffer the liverie made according to the forme and effect of the indenture, to worke any remitter to the disseisee, but shall eslop the disseisee to claime his former estate; and if the disseisor upon the feoffment doth reserve any rent or condition, &c. the rent or condition is good: and the reason wherefore a deed indented shall conclude the taker more than the deed poll, is, for that the deed poll is only the deed of the feoffor, donor, and lessor; but the deed indented is the deed of both parties, and therefore aswell the taker as the giver is concluded.

Ou per record. As by fine, deed indented, and inrolled, and the like.

*ITEM, lou l'entrie d'un home est congeable, coment que il prent estate a luy quant il est de pleine age pur terme de vie, ou en taile, ou en fee, ceo est un remitter a luy, si tiel priseil de estate ne soit per fait indent, ou per matter de record, que * concludera ou esloppera. Car si home soit disseisee, et † represente estate de le disseiser sans fait, ou per fait poll, ceo est ‡ un remitter al disseisee, || &c.*

ALSO, where the entrie of a man is congeable, although that he takes an estate to him when hee is of full age for terme of life, or in taile, or in fee, this is a remitter to him, if such taking of the estate be not by deed indented, or by matter of record, which shall conclude or estop him. For if a man be disseised, and takes backe an estate from the disseisor without deed, or by deed poll, this is a remitter to the disseisee, &c.

S E C T.

* added L. and M. and Rob.
† &c. not in L. and M. nor Rob.

† represent—ent prent, L. and M. and Rob.

‡ as—ben, L. and M. and Rob.

Sect. 694.

ITEM, si home lessa terre pur terme de vie a un auter, le quel aliena a un auter en fee, et l'alienee fait estate a le lessor, ceo est un remitter al lessor, pur ceo que son entrie fuit congeable, * &c.

ALSO, if a man let land for terme of life to another, who alieneth to another in fee, and the alienee make an estate to the lessor, this is a remitter to the lessor, because his entrie was congeable, &c.

This is evident enough upon that which hath beene said.

Sect. 695.

ITEM, si home soit disseise, et le disseisor lessa la terre al disseisee per fait pol, ou sans fait, pur terme des ans, per que le disseisee entra, cest entre est un remitter a le disseisee. Car en tiel case lou l'entre d'un home est congeable, et un lease est fait a luy, coment que il claiama per parolx en pais, que il ad estate per force de tiel lease, ou dit overtment, que il ne claiama riens en la terre sinon per force de tiel lease, uncore ceo est un remitter a luy, car tiel † disclaimer en le pais n'est riens a purpose. Mes s'il ‡ disclaimer en court de record, que il || n'ad estate forsque per force de tiel lease, et nemy auterment, donque il est conclude, &c.

ALSO, if a man bee disseised, and the disseisor let the land to the disseisee by deed pol, or without deed, for terme of yeares, by which the disseisee entreth, this entrie is a remitter to the disseisee. (Hob. 256.) For in such case where the entrie of a man is congeable, and a lease is made to him, albeit that he claimeth by words in pais, that he hath estate by force of such lease, or saith openly, that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer in pais is nothing to the purpose. But if hee disclaime in court of record, that he hath no estate but by force of such lease, and not otherwise, then is he concluded, &c.

HERE appeareth a diversitie betweene a claime in pais of an estate, and a claime of record, for a claime in pais shall not hinder a remitter. Otherwise it is of a claime of record, because that doth worke a conclusion. (3. Rep. 25.)

Sect. 696.

ITEM, si deux joyntenaunts sei-
fie de certaine tene-
ments en fee, l'un

ALSO, if two joynt-
tenants seised of
certaine tenements in
fee, the one being of

HERE note a diversitie (2. Inst. 308.)
worthy the observation,
that where joyntenaunts or co-
parceners have one and the
same remedie, if the one enter,
the other shall enter also: but
where

* &c. not in L. and M. nor Roh.
|| n'ad—ad, L. and M. and Roh.

† disclaimer—clayme, L. and M. and Roh.

‡ disclaimer—clayme, L. and M. and Roh.

10. H. 6. 10. 19. H. 6. 45.
31. H. 6. tit. Ent. Cong. 54.

where remedies bee severall, there it is otherwise. As if two joyntenants or coparceners joyne in a reall action, where their entrie is not lawfull, and the one is summoned and seivered, and the other pursueth and recovereth the moitie, the other joyntenant or coparcener shall enter and take the profits with her, because their remedie was one and the same. But where two coparceners be, and they are disseised, and a discent is cast, and they have issue and die, if the issue of the one recover her moitie, the other shall not enter with her, because their remedies were severall; and yet when both have recovered, they are coparceners againe. So here in this case that *Littleton* putteth, the two joyntenants have not equall remedie; for the infant hath a right of entry, and the other a right of action; and therefore the infant being remitted to a moitie, the other shall not enter and take the profits with her.

If *A.* and *B.* joyntenants in fee, be disseised by the father of *A.* who dieth seised, his sonne and heire entreth, he is remitted to the whole, and his companion shall take advantage thereof. Otherwise here in the case of *Littleton*, for that the advantage is given to the infant, more in respect of his person, than of his right; whereof his companion shall take no advantage. But if the grandfather had disseised the joyntenants, and the land had descended to the father, and from him to *A.* and then *A.* had died, the entrie of the other should be taken away by the first discent; and therefore he should not enter with the heire of *A.*

But here in the case of *Littleton*, if after the discent the other joyntenant had died, and the infant survived, some say that he should have entered into the whole, because hee is now, in judgement of law, solely in by the first feoffment, and he claimeth not under the discent.

*esteant de pleine age, l'auter deins age, sont disseises, * Ec. et le disseisor morust seise, et son issue entra, l'un de les joyntenants esteant adonques deins age, et apres que il vient al pleine age, l'heire le disseisor lesa les tenements a mesmes les joyntenants pur terme de leur † deux vies, ceo est un remitter (quant al moitie) a celui que fuit deins age, pur ceo que il est seise de cest moitie que affiert a luy en fee, pur ceo que son entre fuit congeable. Mes l'auter jointenaunt n'ad en l'auter moitie fors que estate pur terme de sa vie per force de le lease, pur ceo que son entre fuit tolle, Ec.*

full age, the other within age, bee disseised, &c. and the disseisor die seised, and his issue enter, the one of the joyntenants being then within age, and after that he cometh to full age, the heire of the disseisor letteth the tenements to the same joyntenants for terme of their two lives, this is a remitter (as to the moitie) to him that was within age, because hee is seised of the moitie which belongeth to him in fee, for that his entrie was congeable. But the other joyntenant hath in the other moity but an estate for terme of his life by force of the lease, because his entrie was taken away, &c.

Vide 35. Aff. pl. ultim.

CHAP. 13.

Of Warrantie.

Sect. 697.

IL est communement dit. Here by the opinion of *Littleton*, *communis opinio* is of authoritie, and stands with the rule of law, *A communi observantia non est reco-*

IL est communement dit, que trois garranties y sont, scilicet, garrantie lineal, gar-

IT is commonly said, that there bee three warranties, scilicet, warrantie lineall, warrantie collateral

Vide Sect. 288. 321.
(Vaughan 375.)

* Ec. not in L. and M. nor Rob.

† deux not in L. and M. nor Rob.

rantie collateral, et garrantie que commence per disseisin. Et est ascavoir, que devant l'estatute de Gloucester tous garranties queux descendent a eux queux sont heires a eux queux fesoient les garranties, fueront barres a mesmes les heires a demander ascuns terres ou tenements encounter les garranties, foreprise les garranties queux commencerent per disseisin; car tiel garrantie ne fuit unque barre al heire, pur ceo que le garrantie commence per tort, scilicet, per disseisin.

defender son tenant en sa seisin, et en auter sence signifie que si il ne defende que le garrant luy, soit tenue a esbanges, et de faire son gree a la vassallance. [d] Bracton saith, Warrantizare nihil aliud est, quam defendere et acquiescere tenentem qui warrantum vocavit in seisinam suam. [e] Fleta saith, Warrantizare nihil aliud est quam possidentem vocantem defendere et acquiescere in sua seisinam vel possessione erga petentem, &c. et tenens de re warranti excambium habebit ad valentiam.

It is to be observed, that there be two kinde of warranties; that is to say, *warrantia expressa et tacita*, vulgarly said warrantie in deed, because they be expressed; and warranties in law, because the law doth tacitely imply them. And this division of warranties that Littleton here speaketh of, he intendeth of warranties in deed. And of warranties in law, more shall be said hereafter in this Chapter. As for promises or contracts annexed to chattels reall or personall, they are not intended by our author in his said division, but only warranties concerning freeholds and inheritances.

Devant le statute de Gloucester. This statute was made at a parliament holden at Gloucester in the sixth year of the reign of king E. 1. and therefore it is called the statute of Gloucester.

Sont barres a mesmes les heires a demander ascuns terres, &c. For the statute, as hath beene said, being made in 6. E. 1. (was before the statute of *donis conditionalibus*, which was enacted 13. Edward 1.) when all states of inheritance were fee simple. But after the statute of 13. Edward 1. the heire in tayle is not barred by the warrantie of his ancestor, unless there be assents; as shall be said hereafter more largely in this Chapter.

By the statute of Gloucester foure things are enacted.

First, that if a tenant by the courtie alien with warrantie and dieth, that this shall be no barre to the heire in a writ of *mordancester*, without assents in fee simple; and if lands or tenements descend to the heire from the father, he shall be barred, having regard to the value thereof.

Secondly,

(1) The doctrine of *warranty* was formerly one of the most interesting and useful articles of legal learning; but the effect and operation of warranties having, by repeated acts of the legislature, been reduced to a very narrow compass, it is become in most respects a matter of speculation rather than of use. In some instances, however, warranties have still a powerful influence on our landed property; and there is no part of our jurisprudence to which the ancient writers have more frequently recourse to explain and illustrate their legal doctrines. Hence abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our laws, which are more immediately connected with the doctrines that respect the alienation of landed property. In the *civil law* warranty is defined, the obligation of the seller to put a stop to the eviction and other troubles which the buyer suffers, in the property purchased. Eviction is defined to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, by reason of the right which a third person has to it. The other troubles are those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the usufruct of the lands sold, to a rent issuing out of them, to a service, or any other thing of the like nature. The buyer being thus evicted or troubled in his possession, has his recourse to the seller to warrant him. This warranty is either *in law*, being that security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold, although the sale makes no mention of it; or *in deed*, being that kind of particular or conventional warranty, which the seller and buyer regulate among themselves. See *Domat*, l. 1. tit. 2. § 10. By the practice of the *Roman law*, the buyer might, immediately after the eviction or trouble, give notice of it to the seller, who then, if he thought proper, might make himself a party to the action, and defend it; but till the sentence was pronounced, the buyer could not bring his action of warranty against the seller: and the action was brought before the judge of the place in which the seller was domiciliated. But the practice is different in the courts of law in *France*. There, the buyer, when he gives notice of the action to the seller, may bring his action of warranty against him before the judge, before whom the original action is brought; and if he cannot defend the action, the judge condemns him to indemnify the seller, by the same sentence by which he pronounces in favour of the plaintiff in the original cause. See *Pothier Traité des Contrats de Vente*, partie 2. c. 1. sect. 2. art. 5. § 2. The first warrantor may call upon another to warranty; he in the same manner may call upon a third. But to prevent the delays which must unavoidably ensue from multiplying warranties, a fourth warrantor is not permitted to intervene, except in particular circumstances. The degrees also must be observed. Each person must vouch his own immediate warrantor, as it is not lawful for him to vouch any of the ulterior warrantors. After the warrantor has entered into the warranty, the warrantee may either proceed in his defence jointly with the warrantor, or leave the cause to him solely. The sentence binds them both equally. If the person against whom the action is brought be evicted or troubled in his possession by the sentence of the judge, he has a claim upon the warrantor for a complete indemnification. Sometimes the precise sum to be paid by way of indemnity is fixed and agreed to by the parties upon the making of the contract; but penal obligations of this nature are greatly discountenanced by the laws of *France*. It is always in the breast of the judge to moderate or encrease them; but they cannot be encreased either by the express contract of the parties, or the equity of the judge, to more than double of the property evicted. See *Traité des Evictions et de la Garantie Formelle*, par Mous. Berthelot, 2 vol. oct. Paris, 1781.—The warranty treated of by Littleton in this Chapter, is evidently of *feudal extraction*, being derived from the obligation which the lord was under,

dendum: and againe, Minime (1. Rep. 1.) mutanda sunt quæ certam habuerunt interpretationem.

Here our authour beginneth this Chapter with an exact division of warranties. A warrantie is a covenant reall annexed to lands or tenements, whereby a man and his heires are bound to warrant the same; and either upon voucher, or by judgement in a writ of *warrantia carta*, to yeeld other lands and tenements (which in old bookes is called *in excambio*) to the value of those that shall bee evicted by a former title, or else may bee used by way of *rebutter*. (1)

Rebutter is a French word, and is in Latine *repellere*, to repell or barre; that is, in the understanding of the common law, the action of the heire by the warrantie of his ancestor; and this is called to rebut or repell. [c] Britton saith, *Gar-*

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Bract. lib. 2. fol. 37. Lib. 5. fol. 380, 381, &c. Glanvill. lib. 3. cap. 1. 2. 3. Lib. 7. cap. 2. 3. Lib. 9. ca. 4. Britton ca. 105. fol. 249, 250, &c. & fol. 88. 106. b. 196, 197. Fleta lib. 5. cap. 15. Lib. 6. cap. 23. Min. cap. 2. §. 17.

38. E. 3. 21. 45. E. 3. 18.

(Ant. 303. b. 2. Roll. Abr. 775, 776. Cro. Jac. 4.)

[c] Britton fol. 197. b.

[d] Bract. lib. 5. fol. 380.

[e] Fleta lib. 5. cap. 15.

Lib. 4. fol. 81. Noke's case, (F. N. B. 134. h.)

Vid. Sect. 733.

(2. Roll. Abr. 738. Sid. 178.

Cro. Ja. 4. Ant. 101. b.

Pol. 384. a. 1. Roll. Rep. 316.

Cro. Jac. 386. 3. Bull. 95.

Poph. 143. Bridg. 128. Owen 60.

3. Mod. 261. S. C. Shower 68.)

Gloc. cap. 3.

Vid. Sect. 724, 725. & 727, &c.

(2. Inst. 293.)

Bracton lib. 4. fol. 321. b.

Fleta lib. 5. cap. 34. 7. E. 3.

Garr. 47.

(8. Rep. 52, 53.)

Secondly, that if the heire, for want of assents at that time descended, doth recover the lands of his mother by force of this act, and afterwards assents descend to the heire from the father, then the tenant shall recover against the heire the inheritance of the mother by a writ of false judgement, which shall issue out of the record, to resummon him that ought to warrant, as it hath beene done in other cases, where the heire being vouched commeth into the court, and pleadeth that he hath nothing by descent.

Thirdly, that the issue of the sonne shall recover by a writ of *cofinage*, *aiel*, and *besaiel*.

And lastly, that the heire of the wife, after the death of the father and mother, shall not bee barred of his action to demand the heritage of the mother by writ of entrie, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Concerning the first, there be two points in law to be observed.

First, albeit the statute in this article name a writ of *mordancester*, and after writs of *cofinage*, *aiel*, and *besaiel* [e]; yet a writ of right, a *formedon*, a writ of entry *ad communem legem*, and all other like actions, are within the purview of this statute; for those actions are put but for examples.

Secondly, where it is said in the said act (if the tenant by the courtesie alien), yet this release with warrantie to a disseisor, &c. is within the purview of the statute, for that it is in equall mischief; and if that evasion might take place, the statute should have beene made in vaine.

If tenant by the courtesie be of a feignorie, and the tenancie escheate unto him, and after he alieneth with warrantie, this shall not binde the issue, unless assents descend; for it is in equall mischief. But notwithstanding this statute, if feme tenant in dower had aliened in fee with warranty and died, the warranty had bound the heire untill the statute [e] of 11. H. 7. since our author wrote: by which statute the heire may enter, notwithstanding such warrantie.

But note, there is a diversitie betweene a warranty on the part of the mother, and an estoppel; for an estoppel of the part of the mother shall not binde the heire, when hee claimeth from the father: as if lands bee given to the husband and wife, and to the heires of the husband, the husband make a gift in taile, and dieth, the wife recovereth in a *cui in vita* against the donee, supposing that she had fee simple, and make a feoffment and dyeth, the donee dyeth without issue, the issue of the husband and wife bring a *formedon* in the reverter against the feoffee; and notwithstanding that he was heire to the estoppel, and the mother was estopped, yet for that he claimed the land as heire to his father, hee was not estopped. Note, that warranties are favoured in law, being part of a man's assurance; but estoppels are odious.

If a feme heire of a disseisor infeoffeth me with warrantie, and marrieth with the disseisee, if after the disseisee bring a *præcipe* against me, I shall rebut him, in respect of the warrantie of his wife, and yet he demandeth the land in another's right. And so if the husband and wife demand the right of the wife, a warrantie of the collateral ancestor of the husband shall barre.

If a woman had beene tenant for life, the remainder or reversion to her next heire, and the woman had aliened in fee and died, this warrantie had barred her heire in remainder or reversion; but this is partly holpen by the said act of 11. H. 7. viz. where the woman hath any estate for life of the inheritance or purchase of her husband, or given to her by any of the ancestors of the husband, or by any other person seised to the use of her husband, or of any of his ancestors, there her alienation, release, or confirmation with warrantie, shall not binde the heire.

To the authorities quoted in the margent, which may serve as commentaries upon the said statute, I will only adde two cases. The one was, [f] A man seised of lands in fee levied a fine to the use of himselfe for life, and after to the use of his wife, and of the heires males of her body by him begotten for her jointure, and had issue male, and after he and his wife levied a fine, and suffered a common recovery, the husband and wife died, and the issue male entred by force of the said statute of 11. H. 7. And it was holden by the justices of assise, (the case coming downe to be tried by *nisi prius*), that the entry of the issue male was lawful: and yet this case is out of the letter of the statute; for she neither levied the fine, &c. being sole, or with any other after-taken husband, but is by herselfe with her husband that made the jointure. *Sed qui barret in literâ barret in cortice*; and this case being in the same mischief, is therefore within the remedy of the statute, by the intendment of the makers of the same, to avoid the disherison of heires who were provided for by the said jointure, and especially by the husband himselfe that made the jointure, which (as it was said) is a stronger case than the example set downe in the statute. The other was, [g] A man is seised of lands

(Ant. 54. b.)

[e] 11. E. 2. tit. Garr. 83.
4. E. 3. Garr. 63. 18. E. 3. 51.
Pl. Com. 110. 7. E. 3. 53.
Temps E. 1. Garr. 87.

27. E. 3. 8. 9. 14. E. 4. Gar. 5.
Dier quarto Mar. 148. a.

22. Aff. 9. & 37. Temps E. 1.
Gar. 86.

[e] 11. H. 7. cap. 20.
(Post 380. a. 381. a.)

18. E. 3. 9.

(Hob. 31. 8. Rep. 54. a.)

21. R. 2. Judgement. 263.
(2. Roll. Abr. 776. 8. Rep. 53. b.
Ant. 326. a. Doct. & Stud. 44. b.
1. Leo. 261.)

11. H. 7. cap. 20. Vid. Sect. 595.
See this statute of 11. H. 7. ca. 20.
well expounded, Lib. 1. fol. 176.
in Sir Anthony Mildmay's case,
3. & 4. Ph. & Mar. Dier 146.
Lib. 3. fol. 59, 60, 61, 62. Lin-
colne Coll. case. Pl. Com. fol. 56.
20. Eliz. Dier 362. Doct. & Stu-
dent 55. 8. Eliz. Dier 248.
19. Eliz. Dier 354. 21. Eliz.
ibid. 362. Lib. 3. fol. 50, 51.
for George Browne's case. Lib. 5.
fol. 79. Fitzh. case. 27. H. 8. 23.
[f] Mich. 13. Jac. inter Harley
& West in ejectione firmæ in
Communi Banco. Lincoln.
[g] Pasch. 17. Eliz.
(4. Rep. 10. Ant. 360. a. 115. a.
Post. 369. a. 381. a. Sid. 24.
Pl. 105. a. Dyer 64. b.
Jo. 31. Hob. 332. Cro. Eliz. 2.
2. Cro. 475. Ben. 40. 2. Inst. 681.
W. Jones 13. & 254. Palm. 21.
32. 216. Cro. Car. 244. pl. 464.)

under, by that system of polity, to defend his tenant's title to the land against all claimants. If the tenant was evicted, the lord was bound to make him a recompence, by giving him lands of equal value to those evicted from him. The doctrine and practice of warranty, in the early ages of the feudal law, is thus set forth in the book of the Fiefs, tit. 25. It is there stated, that a vassal held a fief from the lord, and being disturbed in his possession of it, called upon the lord to defend him. The lord refused to appear before the judge, by which the vassal lost his cause. The vassal thereupon demanded a recompence from the lord. The lord said in answer, that the vassal never held the fief, nor received the investiture of it from him. The vassal replied, that he held the fief from the lord, and had been invested with it by him; that he had called upon the lord to defend the possession on the trial, and that the lord did not then deny the lands being held of him. All this the vassal proved by proper witnesses. Upon this case it was held, that when a vassal is disturbed in the possession of his fief, if he calls on the lord to defend him, and it appears on the trial that the lord invested him with a fief that did not belong to him, the lord is bound either to give him another fief of equal value, or the price of it in money; and that he is bound to do this as soon as it clearly appears that the vassal will be evicted of the fief. But that if the lord denies that the fief is held of him, and that the vassal, or any of his ancestors, were invested with it by him, and the vassal proves those facts, either by an instrument, properly authenticated, or by the peers of the court, the lord must give him another fief; or may be put to his oath, that neither the vassal nor any of his ancestors held the fief from, or were invested with it by him, or any of his ancestors. If the lord does this, he is to be acquitted.—Sir Martin Wright seems to question whether the lord's obligation to protect or defend the feudatory, made him anciently liable upon eviction (without any fraud or defect in him) to compensate the loss of the fief. He observes, that it can hardly be imagined that while feuds were precarious, and held at the will of the lord, or indeed, that while they were generously given, without price or stipulated render, the lord should be subject to such a loss; especially since it is likely that the lord's obligation upon eviction rather prevailed upon the reason of contracted and improper feuds, than from the nature of a pure original feud. He observes, that none of the ancient feudists make any such distinction, but that all of them suppose the lord's obligation upon eviction to have been general; yet he asserts, they must be understood to speak of the times in which they wrote, when improper feuds chiefly prevailed. See Introd. to the Law of Tenures, p. 38, 39, 40.—Upon a principle similar to that upon which this distinction is grounded, it seems to have been formerly made a question by the writers on the feudal laws of the German and Italian states, whether investiture alone, without any express promise or undertaking on the part of the lord, entitled the tenant to claim an equivalent from the lord, in case of eviction. Rosenthal, a German feudist of great authority, has stated this question, and the authorities upon which the two opposite opinions respecting it are founded. He mentions it to be his own opinion, that investiture alone, without any promise, entitled the tenant to an equivalent; and he says, that the greatest part of those who maintain the opposite opinion, admit that the lord, though he has made no promise, is bound to give an equivalent, if the fief were originally granted for

lands in the right of his wife, and they two levie a fine, and the conusee grant and rendereth the land to the husband and wife in speciall tayle, the remainder to the right heires of the wife, they have issue, the husband dyeth, the wife taketh another husband, and they two levie a fine in fee, and the issue entereth, this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warrantie shall binde the heire at this day. So if a man bee tenant for life (otherwise than as tenant by the courtesie) and alien in fee with warrantie, and dieth, this shall at this day binde the heire, that hath the reversion or remainder by the common law not holpen by any statute. But all this is to be understood, unlesse the heire that hath the reversion or remainder doth avoid the estate so aliened in the life of the ancestour; for then the estate being avoided, the warrantie being annexed unto the estate, is avoided also; whereof more shall be said in this Chapter in his proper place. And therefore it is necessary for the heire in such cases to make an entry as soone as he hath notice or probable suspicion of such an alienation.

As to the second clause of the statute of *Glocester*, there are two points of law to be observed.

First, that by the expresse purview of the statute, if assets doe after descend from the father, then the tenant shall have recovery or restitution of the lands of the mother. But in a *formden*, if at the time of the warrantie pleaded no assets be descended, whereby the demandant recovereth, if after assets descend, there the tenant shall have a *scire facias* for the assets, and not for the land intailed. And the reason hereof is, that if in this case the tenant should be restored to the land intailed, then if the issue in taile aliened the assets, his issue should recover in a *formden*; and therefore the fages of the law, to prevent future occasions of suits, resolved the said diversitie in the cases abovesaid, upon consideration and construction of the statute of *Glocester*, and of the statute *de donis conditionalibus*.

Secondly, it is to be observed, that after assets descended, the recoverie shall bee by writ of judgement, which shall issue out of the rolle of the justices, &c. And here two things are to be declared and explained. First, by what writ, &c. and that is cleere, viz. by *scire facias*. But the second is more difficult; and that is, upon what manner of judgement the *scire facias* is to be grounded: for explanation whereof it is to be understood, that if the tenant will have benefit of the statute, he must plead the warrantie, and acknowledge the title of the demandant, and pray that the advantage of the statute may bee saved unto him, and then if after assets descend, the tenant upon this record shall have a *scire facias*; and if assets descend but for part, he shall have a *scire facias* for so much. But if the tenant plead the warrantie, and plead further that assets descended, &c. and the demandant taketh issue that assets descended not, &c. which issue is found for the demandant, whereupon he recovereth, the tenant, albeit assets doe after descend, shall never have a *scire facias* upon the said judgement; for that by his false plea he hath lost the benefit of the said statute.

Touching the third, sufficient hath beene spoken before. For the last, it is to be observed, that if the husband be seised of lands in the right of his wife, and maketh a feoffment in fee with warrantie, the wife dieth, and the husband dieth, this warrantie shall not binde the heire of the wife without assets, albeit the husband be not tenant by the curtesie. But of this you shall reade more hereafter.

In the meane time know this, that the learning of warranties is one of the most curious and cunning learnings of the law, and of great use and consequence. (1)

A demander ascuns terres ou tenements. A warrantie may not only be annexed to freeholds, or inheritances corporeall, which passe by livery, as houses and lands, but also to freeholds or inheritances incorporeall, which lye in grant, as advowsons; and to rents, commons, estovers, and the like, which issue out of lands or tenements. And not onely to inheritances *in esse*, but also to rents, commons, estovers, &c. newly created. As a man (some say) may grant a rent, &c. out of land for life, in tayle, or in fee with warrantie; for although there can be no title precedent to the rent, yet there may be a title precedent to the land, out of which it issueth before the grant of the rent, which rent may bee avoided by the recovery of the land; in which case the grantee may helpe himselfe by a *warrantia carte*, upon the especiall matter. And so a warrantie in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implyeth a warrantie in law. And so a rent newly created may be granted for oweltie of partition.

A man

(1) Upon the alterations made by the statute law in the doctrine of warranty, see note 1. 373. b.

services done; or otherwise, in the way of remuneration. See *Rosentall Tractatus et Synopsis totius Juris feudalis*, Coll. Allob. 1610. vol. 1. 469, 470.—In a more recent publication, expressly on the subject of gratuitous fiefs, it is held, that the lord is bound to defend the fief, and to give the tenant an equivalent, if it is evicted from him. The author states the objection made by sir Martin Wright; and in answer to it observes, that the feudal contract and connection between the lord and tenant is such, as distinguishes it from a voluntary donation, and necessarily includes this obligation upon the lord. See *Petri Schultzei Dissertatio de Feudo Gratia in Jenichen Thesaurus Juris feudalis*, Francofurti ad Menum, tom. 2. 556, 567, 568. It should seem that with us anciently, every kind of homage, when received, but not before, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lords paramount, and to defend his title to the lands against all others; but that in subsequent times, the implied acquittal and warranty were peculiar to that species of homage which is known by the appellation of homage ancestrel. See ant. 67. b. note 1. 105. a. note 1. In another material quality, the warranty annexed to homage ancestrel differed from expresse warranty. In the case of expresse warranty, the heir was chargeable only for those lands which he had by descent from the ancestor who created the warranty. But in the case of homage ancestrel, the tenant was not driven to recover in value only those lands which the lord had from that ancestor who created the feignory; that would be impossible, as it was essential to homage ancestrel, that the feignory should have been created before time of memory. It being therefore impossible to ascertain which lands descended from the ancestor who made the grant, the law charged all the lands. See ant. 102. b. But defence and recompence were not the only benefits which the tenant derived from the lord's warranty; it rebutted or repelled the lord from claiming the land itself, or any profit or right from it, but those which under the feudal contract were due to him as lord, according to the fundamental maxim of the doctrine of fiefs, *Homagium repellit perquisitum*. Such appear to be the outlines of the system of warranty in the early ages of the feudal law. The practice of subinfeudation necessarily occasioned a considerable extension of it. That practice arose, in a great measure, from the attempts, which, in every kingdom where the feudal polity has prevailed, the higher tenants or vassals have made to render themselves independent of the crown. In France, towards the end of the Carolingian race of their monarchs, the dukes or governors of provinces, the counts or governors of towns, and even the subordinate officers of state, taking advantage of the weakness of the royal authority, made hereditary in their families the lands, titles, and offices, which till then they had enjoyed for life only. They usurped the sovereign propriety of the land, with civil and military authority over the inhabitants: they granted out the lands to their immediate tenants, and these granted them over to others. By this means, though they always professed to hold their fiefs from the crown, they were in fact absolutely independent of it. They exercised in their territories every royal prerogative; they promulgated laws; they had the power of life and death; they coined money; fixed the standard of weights and measures; granted safeguards; entertained a military force; and imposed taxes, with every

Com. Banco. Latton's case, which I myselfe heard and observed.
(2. Roll. Abr. 141. Moor. 93.)

Sect. 725.
(1. Rep. 66. Post. 367. b. 388. b.
10. Rep. 95.)

Pl. Com. Fulmerstone's case,
110. a. Lib. 8. fol. 53. Sym's case.

Lib. 8. fol. 53, 54. Sym's case.
Ibid. 134. Mary Shipley's case.
(Doct. Pla. 180. 2. Cro. 15.
Ant. 33. a. 326. a.)

8. E. 2. tit. Car. 81. 18. E. 3. 51.

Vide Sect. 725.

(2. Roll. Abr. 774.
Hob. 14. 28. 2. Saund. 183.)

2. H. 4. 13. 30. H. 8. Dier. 41.
Temps E. 1. Admesurement 16.
32. E. 1. Voucher. 294. 30. E. 1.
Exchange 16. 9. E. 4.
15. E. 4. 9. 29. Aff. 13.
(F. N. B. 134.
Ante 50. b. 101. b. 308 nota.
Post. 389. a.)

Vide Sect. 741. 45. E. 3.
 Voucher 72. 9. E. 3. 78.
 18. E. 3. 55. 30. E. 3. 30.
 21. H. 7. 9. 3. H. 7. 4.
 7. H. 4. 17. 10. E. 4. 9. b.
 21. E. 4. 26. 14. H. 8
 30. H. 8. Dier. 42.
 (2. Roll. Abr. 744.)

A man seised of a rent secke issuing out of the mannor of *Dalt*, taketh a wife, the husband releaseth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, the wife bringeth a writ of dower of the rent, the terre-tenant shall vouch, for that albeit the release enured by way of extinguishment, yet the warrantie extended to it; and by warranting of the land, all rents, &c. issuing out of the land, that are suspended or discharged at the time of the warrantie created, are warranted also.

Sect. 698.

(Doct. & Stud. 155. a. b.)

GARRANTY que commence per disseisin, &c. (1) It is called a warranty that commenceth by disseisin, because regularly the conveyance whereunto the warranty is annexed doth worke a disseisin.

In this Section Littleton putteth five examples of a warrantie commencing by disseisin, viz. of a feoffment made with warranty by tenant for yeares, by tenant at will, by tenant by *elegit*, by tenant by statute merchant, and by tenant by statute staple: all these and the other examples that Littleton putteth of this kinde of warranties in the succeeding Sections, have foure qualities.

First, that the disseisin is done immediatly to the heire that is to be bound; and yet if the father bee tenant for life, the remainder to the sonne in fee, the father by covine and consent maketh a lease for yeares, to the end that the lessee shall make a feoffment in fee, to whom the father shall release with warrantie, and all is executed accordingly, the father dyeth, this warrantie shall not binde, albeit the disseisin was not done immediatly to the sonne; for the feoffment of the lessee is a disseisin to the father, who is *particeps criminis*. So it is if one brother make a gift in taylor to another, and the uncle disseise the donee, and infeoffeth another with warrantie, the uncle dieth, and the warrantie descendeth upon the donor, and then the donee dyeth without

GARRANTY que commence per disseisin est en tiel forme: sicome lou il est pier et fits, et le fits purchase terre, &c. et lessa mesme la terre a son pier pur terme d'ans, et pier per son fait ent enseoffa un auter en fee, et oblige luy et ses heires a garrantie, et le pier devy, per que le garrantie descendist al fits, ceo garrantie ne barrera my le fits; car nient obstant cel garrantie le fits poit bien enter en la terre, ou aver un assise envers l'alienee s'il voit, pur ceo que le garrantie commence per disseisin; car quant le pier que n'avoit estate forsque pur terme des ans, fist un feoffement en fee, ceo fuit un disseisin al fits del franktenement que adonques fust en le fits. En mesme le maner est, si le fits lessa a le pier la terre a tener a volunt, et puis le pier fait un feoffment ove

WARRANTIE that commences by disseisin is in this manner: as where there is father and son, and the sonne purchaseth land, &c. and letteth the same land to his father for terme of yeares, and the father by his deed thereof infeoffeth another in fee, and bindes him and his heires to warrantie, and the father dies, whereby the warrantie descendeth to the son, this warrantie shall not barre the sonne; for notwithstanding this warrantie the sonne may well enter into the land, or have an assise against the alienee if he will, because the warrantie commenced by disseisin; for when the father which had but an estate for terme of yeares, made a feoffment in fee, this was a disseisin to the sonne of the freehold which then was in the sonne. In the same manner it is, if the sonne letteth to the father

garrantie,

Lib. 5. fol. 79. b. Fitzherbert's case.
 (Cro. Car. 483. 2. Roll. Abr. 741.)

31. E. 3. tit. Garrantie. 28.
 (5. Rep. 50. a.)

(2. Roll. Abr. 772, 773.
 Ant. 32. a. 56. a. 171. a. 179. a.
 F. N. B. 149. c.)

(1) As to warranties commencing by disseisin:—Lord chief baron Gilbert divides warranties into two sorts; first, those commencing by disseisin or wrong; and secondly, binding warranties. The first are where the ancestor that makes the warranty is partner to the wrong; and such warranties are not obliging, because it cannot be presumed that one who is so unjust as to do wrong, will be so just as to leave a recompence to his heir; wherefore such contracts are wholly rejected as collusive, and founded on no consideration. In the *Ancien Coutumier de Normandie*, ch. 96, it is said, that in a writ of *nouvelle disseisine* there is no vouching to warranty; because it is not to be suffered that any one should retain the possession of another, either by himself, or by the means of another, or that he should disturb it by his foolish hardihood; and whoever does so, ought to restore it.

every other right supposed to be annexed to royalty. It was even admitted, that if the king refused the lord justice, the lord might make war against him. In the ordonnances of St. Lewis, ch. 50, is this remarkable passage: "If the lord says to his liege tenant, 'Come with me, I am going to make war against my sovereign, who has refused me the justice of his court: upon this the liege-man should answer in this manner to the lord: I would willingly go to the king to know the truth of what you say, that he has denied you his court. And then he shall go to the king, saying to him in this manner: Sir, the lord in whose liegeance and fealty I am, has told me that you have refused him the justice of your court; and upon this account I am come expressly to your majesty to know if it is so; for my lord has summoned me to go to war with you. And thereupon, if the king answers that he will do no judgment in his court, the man shall return immediately to his lord, and his lord must equip him, and fit him out at his own expence; and if he will not go with him, he shall lose his fief by right. But if the king answers that he will hear him, and do justice to the lord, the man shall return to him, and shall say: Sir, the king has said to me, that he will willingly do you justice in his court. Upon which, if the lord says, I never will enter into the king's court, come therefore with me, according to the summons I have sent you; then the man should say, I will not go with you; and he shall not lose his fief for his not going." This shews how powerful and absolute the great vassals were. The same motive which induced the vassals of the crown to attempt to make themselves independent of the crown, induced their tenants to make themselves independent of them. This introduced an ulterior state of vassalage. The king was still called the *sovereign lord*; his immediate vassal was called the *lord suzerain*; and the tenants holding of him were called the *arrière vassals*. Hugh Capet owed the crown of France to the extreme weakness to which this system of subinfeudation had reduced the crown of France; but after he had acquired the throne, he used his utmost efforts to restore it to its antient splendour and strength. His successors pursued the same plan with undeviating attention and consummate policy. It was completed by the union of the provinces of Lorraine and Bar to the crown of France in 1735. See *Abregé Chronologique des Grands Fiefs de la Couronne de France*, Paris 1759. But as to the common incidents of feudality, subinfeudation still prevails in France. In some parts of France, certain portions of the fief descend on the younger children: they are said to hold them of the eldest son by *parage*. The eldest son, however, represents the whole fee, and does homage for it; and is therefore bound to warranty

*garrantie, &c. Et si come est dit de pier, issint poit estre dit de cheescun auter auncester, &c. En mesme le maner est, si tenaunt per elegit, tenaunt per statute merchant, ou tenant per statute de le staple, fait feoffment en fee ovesque garrantie, * ceo ne barrera my l'heire que doit aver la terre, pur ceo que tiels garranties commencerent per disseisin.*

ther the land to hold at will, and after the father make a feoffment with warrantie, &c. And as it is said of the father, so it may be said of every other ancestor, &c. In the same manner is it, if tenant by *elegit*, tenant by statute merchant, or tenant by statute staple, make a feoffment in fee with warranty, this shall not bar the heire which ought to have the land, because such warranties commence by disseisin.

issue, albeit the disseisin was done to the donee and not to the donor, yet the warranty shall not binde him. The father, the sonne, and a third person are joyntenants in fee, the father maketh a feoffment in fee of the whole with warrantie, and dieth, the sonne dieth, the third person shall not only avoyd the feoffment for his owne part, but also for the part of the sonne; and he shall take advantage that the warranty commenced by disseisin, though the disseisin was done to another.

The second qualitie appearing in *Littleton's* examples is, that the warranty and disseisin are *simul et semel*, both at one and the same time. [y] And yet if a man commit a disseisin of intent to make a feoffment in fee with warranty, albeit he make the

(Cro. Car. 483.)

[y] 19. H. 8. 12. Lib. 5. fol. 79. b. Fitzh. case.

(Plowd. 51. a. 3. Rep. 78. Post. 369. a. 371. a. 9. Rep. 81. a. Ant. 314. b. 5. Rep. 78.)

feoffment many yeares after the disseisin, notwithstanding because the warranty was done to that intent and purpose, the law shall adjudge upon the whole matter, and by the intent couple the disseisin and the warranty together.

The third qualitie is, that the warranty that commenceth by disseisin by all these examples (if it should binde) should binde as a collaterall warranty, and therefore commencing by disseisin shall not binde at all.

Ne barrera my le heire, &c. For by the authoritie of our author himselfe, a lessee for yeares may make a feoffment, and by his feoffment a fee simple shall passe; so as albeit as to the lessor it worketh by disseisin, yet betweene the parties the warranty annexed to such estate standeth good; upon which the feoffee may vouch the feoffor or his heires, as by force of a lineall warranty. And therefore if a lessee for yeares, or tenant by *elegit*, &c. or a disseisor incontinent make a feoffment in fee with warranty, if the feoffee be impleaded, hee shall vouch the feoffor, and after him his heire also; because this is a covenant reall, which binde him and his heires to recompence in value, if they have assents by descent to recompence; for there is a feoffment *de facto*, and a feoffment *de jure*: [*] and a feoffment *de facto* made by them that have such interest or possession as is aforesaid, is good betweene the parties, and against all men but only against him that hath right. And therefore if the lord be gardeine of the land, or if the tenant maketh a lease to the lord for yeares, or if the lord be tenant by statute merchant or staple, or by *elegit* of the tenancie, and make a feoffment in fee, hee hereby doth extinguish his seignorie, although having regard to the lessor it is a disseisin.

(1. Leon. 304. 305. Cro. Car. 388) Vide Sect. 611. 699.

Bract fol. 216. 223. 224.

Fleta lib. 4. cap. 17. 1. 2. Britton, cap. Disseisin,

50. E. 3. 12. b. 8. H. 7. 5.

7. E. 3. 11. 14. E. 3. Feoffments en faits 67. 18. E. 3.

Issue 36. 4. E. 2. Briefe 790.

19. E. 2. Aff. 400. 43. E. 3. 7.

17. E. 3. 41. 43. E. 3. Diff. 5.

3. E. 4. 17. 12. E. 4. 12.

10. E. 4. 18. F. N. B. 201.

Lib. 3. fol. 78. in Fermor's case.

[*] Temps E. 1. Counteplea

de Voucher 126. 50. E. 3. ibi-

dem 124. Vide W. 1. ca. 48.

in the second part of the institutes.

(10. Rep. 95. 2. Roll. Abr. 740.)

The fourth qualitie is a disseisin; but that is put for an example; and the rather, for that it is most usuall and frequent: but a warranty that commenceth by abatement or intrusion (that is, when the abatement or intrusion is made of intent to make a feoffment in fee with warranty), shall not binde the right heire, no more than a warranty that commenceth by disseisin, because all doe commence by wrong. And so it is if the tenant dieth without heire, and an ancestor of the lord enter before the entrie of the lord, and make a feoffment in fee with warranty, and dieth, this warranty shall not binde the lord, because it commenceth by wrong, being in nature of an abatement. *Et sic de similibus.* (1)

Sect. 699.

IT E M, si gardein en chivalrie, ou gardein en socage,

ALSO, if a gardeine in chivalrie, or gardeine in socage, make fait

† &c. added L. and M. and Roh.

(1) The editor, in note 1. to page 330. a. has (he fears too prolixly) attempted to explain the difference between actual disseisin and disseisin by election, and to prove that the disseisin produced by a feoffment, however slender or tortious the estate of the feoffor may be, is an actual disseisin. It is submitted to the reader, that what he has said on that subject is confirmed by what *Littleton* says in this Section, and lord *Coke's* commentary upon it. The discussion, in the note above referred to, of the operation of a feoffment, and the discussion in note 1. p. 271. of the operation of conveyances deriving their effect from the statute of uses, will, perhaps, assist the reader in forming accurate notions of the difference in the operations and effect of feoffments, fines, common recoveries, bargains and sales, releases and wills.

ranty the younger children, from the claims of the lord for his rents and services. Subinfeudation prevails also in Germany. But it must be attended with three circumstances. 1st, It must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation. 2d, The sub-vassal must be, if not of equal, at least of suitable rank and circumstances. 3d, The conditions, so far as the lord is interested in them, must be the same as those upon which the original investiture is granted. See *Dissertatio de Subfeudis Imperii*, Mich. Hen. Gribnerii in *Jenichen Thes. Feud.* t. 1. p. 882. *Dissertatio Wenceslai Xaverii Neumann de Pucholtz, quid transeat in vassallum per concessionem feudi, vel subfeudi*, ibid. t. 3. 512. *Rosentall Tract. & Synopsis totius Juris Feud.* tom. 1. 549.—In England, the practice of subinfeudation was totally inhibited by the statute made in the 18th year of Edward I. commonly called the statute *quia emptoris terrarum*. In the preamble to that statute it is recited, that, by the practice of subinfeudation, the chief lords had lost their escheats, marriages, and wardships: it was therefore enacted, that it might be lawful for every free man to alien all or any part of his lands, to be held not of himself, but of the superior lord by the same services and customs by which the tenant himself held them. This statute, though evidently passed in compliance with the desires of the greater lords, and designed by them to encrease their power and extend their influence, had a very contrary effect; and was probably one of the chief causes

fait un feoffment en fee, ou en fee taile, ou pur terme de vie, ouefque garrantie, &c. tiels garranties ne sont pas barres a les heires as queux les terres serront descendus, pur ceo que ils commence per disseisin. a feoffment in fee, or in fee taile, or for life, with warrantie, &c. such warranties are not barres to the heyres to whom the lands shall bee descended, because they commence by disseisin.

16. E. 3. Gar. 20. 8. Aff. 2.
43. E. 3. 7. and the books above-
said. Vide Sect. 698.
(3. Rep. 37.)

HERE Littleton addeth the case of gardeine in chivalrie, and gardeine in socage, and gardeine because nurture is also in the same case.

Sect. 700.

A AVER et tener a eux jointment, &c.

This is to bee intended of a joynt purchase in fee; for if the purchase were to the father and the sonne, and the heires of the sonne, and the father maketh a feoffment in fee with warrantie, if the sonne entreth in the life of the father, and the feoffee re-enter, the father dieth, the sonne shall have an assise of the whole: and so is the booke of 22. H. 6. to be understood. But if the sonne had not entred in the life of the father, then for the father's moitie it had bene a bar to the sonne, for that therein he had an estate for life; and therefore the warrantie as to that moitie had bene collateral to the sonne, and by disseisin for the sonne's moitie; and so a warrantie defeated in part, and stand good in part. And this appeareth by the example that Littleton hath put. But if the purchase had

bee to the father and sonne, and to the heires of the father, then the entrie of the sonne in the life of the father, as to the avoydance of the warrantie, had not availed him, because his father lawfully conveyed away his moitie. (1)

If a man of full age and an infant make a feoffment in fee with warrantie, this warrantie is not void in part, and good in part; but it is good for the whole against the man of full age, and voyd against the infant: for albeit the feoffment of an infant passing by livery of seisin be voydable, yet his warrantie, which taketh effect only by deed, is merely voyd.

*ITEM, si le pier et le fits purchase certaine terres ou tenements, a aver et tener a eux jointment, &c. et puis le pier alien * l'entier a un autre, et oblige luy et ses heires a garrantie, &c. et puis le pier devie, cel garrantie ne barrera my le fits de le moitie que a luy affiert de les dits terres ou tenements, pur ceo que quaunt a cel moitie que affiert a le fits, le garrantie commence per disseisin, &c.*

ALSO, if father and sonne purchase certaine lands or tenements, to have and to hold to them joyntly, &c. and after the father alien the whole to another, and binde him and his heires to warrantie, &c. and after the father dieth, this warrantie shall not barre the sonne of the moitie that belongs to him of the said lands or tenements, because as to that moitie which belongs to the sonne, the warrantie commences by disseisin, &c.

13. Aff. 8. 13. E. 3.
Gar. 24. 25. 37. 22. H. 6. 51.
8. H. 7. 6.

(5. Rep. 79.)

(Post. 393. 2.)

(1. Rep. 66.)

(F. N. B. 192. 2.)

Temps E. 1. Vouch. 207.
39. E. 3. 26. Joan London's
case. 14. H. 6.
(8. Rep. 42. Plowd. 66. b.
5. Rep. 119.)

Sect.

* *l'entier*—*l'entier*, L. and M. and Roh.

(1) It is greatly to be regretted, that sir Edward Coke has not expressed himself more fully on the subject hinted at by him in this note, the defeating of the warranty by the heir's entry or claim in the ancestor's life-time. It is thus mentioned by lord chief-baron Gilbert, Ten. 135. The heir was presumed to receive a recompence, and therefore was barred if he did not claim during the life of his ancestor; and this was the more reasonable, because such recompences were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of his ancestor, otherwise he could never claim it, inasmuch as this was the whole time of limitation for the heir to challenge his own in this case; and if he slipped that time, he was barred for ever, inasmuch as there might be secret conveyances to alien the recompence for the benefit of the heir, which might turn to the prejudice of the purchaser.

causes which prevented their acquiring that independent and almost sovereign power, which was obtained during the feudal polity by the princes of Italy, Germany, and France. Hence, though the power and influence of the nobles of England were very great, and sometimes such as overshadowed royalty itself, yet they were inferior in every respect to that of the higher nobility of foreign countries. It is evident, that Nevil, the great earl of Warwick, and the nobles of the house of Percy (the greatest subjects ever known in this country) were, neither in strength, dignity, power, or influence, or in any other point of view, equal to the dukes of Brittany or Burgundy, or the counts of Flanders. Besides the general influence of the statute *quia emptores terrarum*, it had a particular influence both on the practice and the doctrine of warranty. The free alienation of property which it authorized, necessarily put an end to the homage ancestral, and consequently to the implied warranty annexed to it. To remedy this, if the lord aliened, the tenants, before they attorned to the new lord, required a new warranty from him; if the tenant aliened, it was with an express clause of warranty. This gave the new tenant the benefit of the lord's obligation to warranty the old tenant; as the new tenant might vouch the old tenant, and he in his turn might deraign the lord. This subject will be pursued, and an attempt will be made to investigate and explain the grounds of the distinction between lineal and collateral warranty, in note 1, 373. b.

Sect. 701.

ITEM, si A. de B. soit seise d'un mefe, et F. de G. que nul droit ad d'entrer en mesme le meafe, clamaunt mesme le meafe, a tener a luy et a ses heires, entra en mesme le meafe, mes le dit A. de B. adonque est continualment demurrant en mesme le meafe: en cest cas le possession de franktenement serra tout temps adjudge en A. de B. et nemy en F. de G. pur ceo que en tiel case lou deux sont en un meafe, ou auters tenements, et l'un clama per l'un title, et l'auter per l'auter title, la ley adjudgera celuy en possession que ad droit d'aver le possession de mesmes les tenements. Mes si en le case avantdit, le dit F. de G. fait un feoffment a certaine barrettors et extortioners en le pais, pur maintenance de eux aver de mesme le meafe, per un fait de feoffment ove garantie, per force de quel le dit A. de B.

ALSO, if A. of B. bee seised of a mefe, and F. of G. that no right hath to enter into the same mefe, claiming the sayd mefe, to hold to him and to his heires, entreth into the sayd mefe, but the same A. of B. is then continually abiding in the same meafe: in this case the possession of the freehold shall bee alwayes adjudged in A. of B. and not in F. of G. because in such case where two bee in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shal adjudge him in possession that hath right to have the possession of the same tenements. But if in the case aforelayd, the sayd F. of G. make a feoffment to certaine barrettors and extortioners in the countrie, to have maintenance from them of the sayd house, by a deed of feoffment with warrantie, by force whereof the said

L'OU deux sont en un mefe, &c. et l'un clama per l'un title, et l'auter per auter title, &c.

For the rule is, *Duo non possunt in solido unam rem possidere.*

These words of our author be significant and materiall: [b] for if a man hath issue two daughters, bastard eigne and mulier puisne, and die seised, and they both enter generally, the sole possession shall not bee adjudged only in the mulier, because they both claime by one and the same title; and not one by one title, and the other by another title, as our author here saith.

[i] If the tenaunt in an assise of an house desire the plaintiffe to dine with him in the house, which the plaintiffe doth accordingly, and so they bee both in the house; and in truth one pretendeth one title, and the other another title; yet the law in this case shall not adjudge the possession in him that right hath; because our author here saith, hee claimed not his right, and it should be to his prejudice if the law should adjudge him possession; and a trespasser hee cannot bee, because hee was invited by the tenant in the assise.

Barrettors. A barrettor is a common moover and exciter, or maintainer of suits, quarrels, or parts; either in courts or elsewhere in the countrey. In courts, as in courts of record, or not of record; as in the countie, hundred, or other inferiour courts. In the countrie in three manners: first, in disturbance of the peace: secondly, in taking or keeping of possessions of lands in controverfie, not only by force, but also by subtiltie

(Ant. 191. a. 244. a. 1. Roll. Abr. 661, 662, Plowd. 233. b.)

19. H. 6. fol. 28. b. per Newton.

(Siderf. 385. a. Ant. 180. b. 181. a.)

[b] 17. E. 3. 59. 11. Aff. p. 234 (Perk. 84. 8. Rep. 101. b. Hob. 120. Ant. 189. 244. 10. Rep. Lampet's Case.)

[i] Pl. Com. 91. the Parson of Honey Lane's case. (Ant. 245. b. Plowd. 93. a. b.)

See the Inditement of a common Barrettor. W. 1. cap 18 & 32. 40. E. 3. 33. Lib. 8. fol. 36. b. Case de Barrettrie. (3. Inst. 175. Siderf. 282. 2. Roll. Abr. 351.)

(1. Roll. Abr. 353.)

33. E. 1. Stat. de Conspiracie.
Lib. 8. ubi supra.
(3. Rep. 36.)

P. Com. fol. 64.
Lib. 10. fol. 101, 102.
Beaufage's Case.
(3. Inst. 149.)

[1] W. 1. c. 26, & c. W. 1. c. 10.
42. E. 3. 5. 27. Aff. 14.
Pl. Com. 68.
(2. Roll. Abr. 32.)

(P'owd. 465. Noy. 111.
2. Roll. Abr. 32.)
23. H. 6. c. 10. 33. H. 6. 22.
21. H. 7. 17. Stanf. 49.
3. E. 3. Cor. 372.

[7] Hil. 13. Jac. Reg.

Pl. Com. in Dine and Manning-
ham's case. Mir. cap. 5. § 1.

7. E. 4. 21.

(3. Inst. 175. 2. Inst. 212.
Dyer, 555, 556. Sid. 212, 213.
Noy. 52.)

[8] 1. E. 3. cap. 14.
20. E. 3. cap. 4. 5.

[7] Mich. 7. Ja. in the Starre-
Chamber.
(Doc. Plac. 240.)

33. E. 1. Stat. 2. in fine.
Regist. 183. 6. E. 3. 33.
22. H. 6. 7. 9. H. 7. 22.
(2. Roll. Abr. 114.)

tiltie and a deceit, and most commonly in suppression of truth and right: thirdly, by false inventions, and sowing of calumniation, rumors, and reports, whereby discord and disquiet may grow betweene neighbours.

Barretor is derived of this word (*barret*) which signifieth not only a wrangling suit, but also such brawles and quarrels in the countrey, as are aforesaid.

Extortioners. Extortion, in his proper sense, is a great misprison, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it be due; *quod non est debitum, vel quod est ultra debitum, vel ante tempus quod est debitum*: for this is to be knowne, that it is provided by the [1] statute of W. 1. that no sheriffe, nor any other minister of the king, shall take any reward for doing of his office, but only that which the king alloweth him, upon paine that hee shall render double to the partie, and be punished at the king's pleasure. And this was the antient common law, and was punishable by fine and imprisonment; but the statute added the aforesaid penaltie. But some latter statutes having permitted them to take in some cases; by colour thereof, the king's officers and ministers, as sheriffes, coroners, escheators, feodaries, gaolers, and the like, doe offend in most cases; and seeing this act yet standeth in force, they cannot take any thing but where and so farre as latter statutes have allowed unto them. But yet such reasonable fees as have beene allowed by the courts of justice of antient time to inferiour ministers and attendants of courts for their labour and attendance, if it be asked and taken of the subject, is no extortion.

And all this was resolved [2] by the whole court of king's bench, betweene *Shurley* plaintiffe, and *Packer* deposite of one of the sheriffes of London, in an action upon the case in the king's bench.

See the statute of 21. H. 8. cap. 5. setting downe the fees of ordinaries, registers, and other officers, in certaine cases, and many other statutes; as for example, the statute of 19. H. 7. cap. 8. against taking of shewage (that is, taking of any thing for shewing of wares and merchandises that be truly customed to the king before) and the like.

Of this crime it is said, that it is no other than robbrie: and another saith, that it is more odious than robbrie; for robbrie is apparant, and hath the face of a crime; but extortion puts on the visage of vertue, for expedition of justice, and the like; and it is ever accompanied with the grievous sinne of perjurie.

But largely extortion is taken for any oppression by extort power, or by colour or pretence of right; and so *Littleton* taketh it in this place. *Extortio* is derived from the verbe *extorqueo*; and it is called *crimen expilationis*, or *concussionis*: and here barretors and extortioners are put but for examples; for if the feoffment be made to any other person or persons, the law is all one.

Pur maintenance de eux aver. Maintenance, *manutentia*, is derived of the verbe *manutene*, and signifieth in law, a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right; *Culpa est rei se immiscere ad se non pertinenti*; and it is twofold, one in the countrey, and another in the court. For quarrels and sides in the court, [4] the statutes have inflicted grievous punishments. But this kinde of maintenance of quarrels and sides in the countrey, is punishable only at the suit of the king; [5] as it hath beene resolved. And this maintenance is called *manutentia*, or *manutentio ruralis*, for example, as to take possessions, or keepe possessions, whereof *Littleton* here speaketh, or the like.

The other is called *curialis*, because it is done *pendente p'acito*, in the courts of justice; and this was an offence at the common law, and is threefold.

First, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or other thing in plea or suit; and this is called *cambipartia*, champertie.

The second is, when one maintaineth the one side, without having any part of the thing in plea

* *Je en* added L. and M. and Roh.† *Ec.* added L. and M. and Roh.

(1) Whether an attorney's laying out money for his client be maintenance, see *Pierfon v. Hughes*, Freeman 71. 81.—By the ancient Roman law, there were few cases in which a person was admitted to plead by an attorney, according to the rule, *Nemo alieno nomine lege agere potest*. Recourse was therefore had to a fiction at law, by which it was supposed that the property of the thing in contest was made over to the attorney. The consequence was, that the proceedings were carried on in the name of the attorney, and even the sentence passed upon him. Hence he was called the *dominus litis*. See *Bohmer de dominio litis*, l. 12. *Pothier Pandectarum Institutionum*, lib. 3. tit. 3. § 2.

plea, or suit; and this maintenance is two-fold, generall maintenance, and speciall maintenance; whereof you shall reade at large in our bookes, which were too long here to be inserted.

The third is when [a] one laboureth the jury, if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embracour, and an action of maintenance lyeth against him; and if he take money, a *decies tantum* may be brought against him. And whether the jury passe for his side or no, or whether the jurie give any verdict at all, yet shall he be punished as a maintainer or embracour either at the suit of the king or partie.

Here in this case that *Littleton* putteth, the feoffment is void by the statute [a] of 1. R. 2.; for thereby it is enacted, that feoffments made for maintenance shall be holden for none, and of no value, so as *Littleton* putteth his case at the common law; for he seemeth to allow the feoffment, where he saith, *siel feoffment fuit le cause, &c.*; but some have said that the feoffment is not void betwene the feoffor and feoffee, but to him that right hath.

Now, since *Littleton* wrote, there is a notable statute [b] made in suppression of the causes of unlawfull maintenance (which is the most dangerous enemy that justice hath), the effect of which statute is,

First, that no person shall bargain, buy, or sell, or obtaine any pretended rights or titles. (2. Roll. Abr. 113. 114. Hob. 115.)

Secondly, or take, promise, grant, or covenant to have any right or title of any person in or to any lands, tenements, or hereditaments; but if such person which so shall bargain, &c. their ancestors, or they by whom he or they claime the same, have beene in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole yeare, &c. upon paine to forfeit the whole value of the lands, &c. and the buyer or taker, &c. knowing the same, to forfeit also the value. (1. Leon. 167. 208. Plowd. 89. a.)

Thirdly, provided that it shall be lawfull for any person, being in lawfull possession, by taking of the yearly farme, rents or profits, to obtaine and get the pretended right or title, &c. of any lands whereof he or they shall be in lawfull possession.

For the better understanding of which statute, you must observe, that title or right may be pretended two manner of wayes:

First, when it is meere in pretence or supposition, and nothing in verity.

Secondly, when it is a good right or title in verity, and made pretended by the act of the partie; and both these are within the said statute: for example, If *A.* be lawfull owner of land, and is in possession, *B.* that hath no right thereunto granteth to, or contracteth for the land with another, the grantor and the grantee (albeit the grant be meere void) are within the danger of the statute; for *B.* hath no right at all, but only in pretence. If *A.* be disseised in this case, *A.* hath a good lawfull right; yet if *A.* being out of possession, granteth to, or contracteth for the land with another, he hath now made his good right of entrie pretended within the statute, and both the grantor and grantee within the danger thereof. *A fortiori* of a right in action. *Quod nota.*

It is further to be knowne, that a right or title may be considered three manner of wayes.

First, as it is naked and without possession. Secondly, when the absolute right cometh by release or otherwise to a wrongfull possession; and no third person hath either *jus proprietatis*, or *jus possessionis*. The third, when he hath a good right, and a wrongfull possession. As to the first, somewhat hath beene said, and more shall be said hereafter. As to the second, taking the former example, if *A.* be disseised, and the disseisee release unto him, he may presently sell, grant, or contract for the land, and need not tarry a yeare; for it is a rule upon this statute, that whosoever hath the absolute ownership of any land, tenements, or hereditaments (as in this case the disseisor hath), there such owner may at his pleasure bargain, grant, or contract for the land, for no person can thereby be prejudiced or grieved. And so if a man mortgage his land, and after redeeme the same; or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargain, grant, or contract for the land, for the reason aforesaid. As to the third, if in the case aforesaid the disseisor dieth seised, and *A.* the disseisee entreateth, and disseise the heire of the disseisor, albeit he hath an ancient right, yet seeing the possession is unlawfull, if he bargain or contract for the land before hee hath beene in possession by the space of a yeare, he is within the danger of the statute, because the heire of the disseisor hath right to the possession, and he is thereby grieved, *et sic de similibus*: and albeit he that hath a pretended right (and none in verity) getteth the possession wrongfully, yet the statute extendeth unto him, as well as where he is out of possession.

Note, the words of the statute be (any pretended right), therefore a lease for yeares is within the statute; for the statute saith not (the right), but (any right), and the offendour shall forfeit the whole value of the land. And where the statute speaketh of rights in the plural number, yet any one right is within the statute. [a] But yet if a man make a lease for yeares to another to the intent to trie the title in an *ejectione firma*, that is out of the statute,

9 C

because

30. Aff. 5. 19. E. 4. 3.
20. H. 6. 12. 34. H. 6. 2.
11. H. 6. 11. 8. H. 5. 8.
10. E. 4. 19. W. 1. ca. 25.
28. W. 2. cap. 49. Artic. super
Cart. cap. 11. F. N. B. 171, 172.
Mirror cap. 1. § 5.
(Mo. 6. Ant. 157. Hob. 294.)
[a] 12. H. 4. 16. b. F. N. B. 171.
11. H. 6. 10. 37. H. 6. 31.

[a] 1. R. 2. cap. 9.
Vid. 27. H. 2. fol. 23.

[b] 32. H. 8. cap. 9.
(Plowd. 79. a.)

(1. Cro. 232. 233.)

Pl. Com. fol. 80, &c. Partridge's case.

Pl. Com. Partridge's case ubi
sup. 6. E. 6. Brooke tit. Main-
tenance 38.

(Cro. Car. 388. Plowd. 89. a.)

23. Eliz. Dier 374. Pl. Com.
Partridge's case, l. 87.

[a] Mich 30. & 31. Eliz. 28112
inter Finch. & Cockham in Com.
Banc.
(Mo. 266.)

(2. Roll. Abr. 114.)

[d] Lib. 4. fol. 26. Copikold
cales.6. E. 6. tit. Maintenance
Brooke 38.

(5. Rep. 60.)

[c] 34. H. 8. Dier 52.

because it is in a kinde of course of law; but if it be made to a great man, or any other to
fway or countenance the cause, that is within this statute.

Also the statute speakes (of any right or title to any land, &c.) [b] A customary right, or
a pretence thereof to lands holden by copie, is within this statute.

The said proviso (which is rather added for explanation, than of any necessitie) extendeth
only to a pretended right or title, and to a good and cleare right; and therefore without ques-
tion, any that hath a just and lawfull estate may obtaine any pretended right by release or
otherwise; for that cannot be to the prejudice of any: nay, as hath beene said, a disseisor
that hath a wrongfull estate may obtaine a release of the disseisee, and that is not within the
body of the act, and consequently standeth not in need of any proviso to protect him.

And therefore [c] if there be tenant for life, the remainder in fee by lawfull and just title,
he in the remainder may obtaine and get the pretended right or title of any stranger, not only
for that the particular estate and the remainder are all one, but for that it is a meane to ex-
tinguish the seeds of troubles and suits, and cannot be to the prejudice of any, as hath beene
said. And where the statute saith, (being in lawfull possession by taking the yearly rent,
&c.) those words are but explanatory, and put for example; for howsoever he be lawfully
seised in possession, reversion, or remainder, it sufficeth though he never tooke profit. But
the matter observable upon this proviso, which is worthy of observation, is, that if a disseisor
make a lease for life, lives, or yeares, the remainder for life, in taylor, or in fee, he in remainder
cannot take a promise or covenant, that when the disseisee hath entred upon the land, or
recovered the same, that then he should convey the land to any of them in remainder, there-
by to avoid the particular estate, or the interest or estate of any other; for the words of the
proviso be (buy, obtaine, get, or have by any reasonable way or meane) and that is not by
promise or covenant to convey the land after entry or recovery; for that is neither lawfull,
being against the expresse purview of the body of the act, and not reasonable, because it is to
the prejudice of a third person. But the reasonable way or meane intended by the statute,
is by release or confirmation, or such conveyances as amount to as much: and this agreeth
with the letter of the law, viz. the pretended right or title of any other person; and rights
and titles are by release or confirmation, as by reasonable wayes and meanes lawfully trans-
ferred and extinct: and the words of promise or covenant, &c. which are prohibited by the
body of the act, are omitted in the proviso.

(2. Rep. 31. Ant. 43. b.)

Relinquit le possession, &c. This must be understood, that before livery of seisin
upon the feoffment, *A. de B.* departed out of the house; for otherwise the livery and seisin
should be void, because *A. de B.* was in possession. And *Littleton* here saith, *per un fait de*
feoffment, so as albeit the deed were made before the departure it is not materiall; but the de-
parture must be before the livery of seisin, for that doth worke the disseisin. And yet that
which *Littleton* saith is true, that the feoffment was the cause that he relinquished his pos-
session; for otherwise he would not have done it.

But admit that *A. de B.* had departed for any other cause, yet if *F. de G.* enter and en-
feoffe certaine barretors or extortioners, or any other with warrantie, this is a warrantie that
commenceth by disseisin, for that the feoffment worketh a disseisin.

Sect. 702.

See before in the Chapter of
Releases.
(5. Rep. 79.)

46. E. 3. 6.

THIS doth explaine that
which hath beene said
before. And albeit *Littleton*
useth the words (and in-
continently thereof make
a feoffment); and that in
this case of *Littleton* the dis-
seisin and feoffment were
made (*quasi uno tempore*);
yet if the disseisin were
made to the intent to make
a feoffment with warrant-
tie, albeit the feoffment be
long after, this (as hath
beene said) is a warrantie

ITEM, si home que
nul droit ad d'en-
trer en auters tene-
ments, entra en mes-
mes les tenements, et
incontinent ent fait un
feoffment as auters
per son fait ove gar-
rantie, et deliver a eux
seisin, cel garrantie
commence per dissei-

A L S O, if a man
which hath no right
to enter into other te-
nements, enter into the
same tenements, and
incontinently make a
feoffment therof to
others by his deed
with warranty, and de-
liver to them seisin, this
warranty commence by
seisin,

fin, pur ceo que le disseisin et le feoffement furent faits quasi uno tempore. Et que ceo est ley, poiez veier en un plee *M. 11. Ed. 3. *en un brieve de forme-don en le reverter.*

by disseisin, because the disseisin and feoffment were made as it were at one time. And that this is law, you may see in a plee M. 11. E. 3. in a writ of *formedon* in the reverter.

that commenceth by disseisin.

Mich. 11. E. 3.

This is mistaken, and should be [d] 31. E. 3. and so is the original, which case you shall see in Master Fitzherbert's Abridgement, for there is no booke at large of that year. Hereby you may perceive that learned men looke not only to the cases reported, but unto records, as you may see *Littleton* did; for Fitzherbert put this case in print long after, as elsewhere hath beene shewed.

[d] 31. E. 3. tit. Garr. 28.

Sect. 703.

GARRANTY lineal est, lou home seisse de terres en fee, † fait feoffement per son fait a un autre, et oblige luy et ses heires a garranty, et ad issue et morust, et le garrantie descendist a son issue, ceo est lineal garranty. Et la cause pur ceo que ‡ est dit lineal garrantie, n'est pur ceo que le garrantie descendist de le pier a son heire; mes la cause est, pur ceo que si nul tiel fait ove garranty fuisse fait per le pier, donque le droit de les tenements descenderoit al heire, et l'heire conveyeroit le discent de son pier, &c.

WARRANTY lineal is, where a man seised of lands in fee, maketh a feoffment by his deed to another, and bindes himselfe and his heires to warrantie, and hath issue and die, and the warranty descend to his issue, that is a lineal warranty. And the cause why this is called lineal warrantie, is not because the warrantie descendeth from the father to his heire; but the cause is, for that if no such deed with warranty had beene made by the father, then the right of the tenements should descend to the heire, and the heire should convey the discent from his father, &c.

GARRANTY lineal, (1. Rep. 1.)

&c. A warrantie lineal is a covenant reall annexed to the land by him which either was owner, or might have inherited the land, and from whom his heire lineal or collateral might by possibilitie have claimed the land as heire from him that made the warranty; whereof *Littleton* himselfe putteth divers cases, which shall be explained in their proper places. And in this case put in this Section, *Littleton* (once for all) sheweth, that the reason of the example here put, is because if no such alienation with warranty (for so is *Littleton* to be intended) had beene made, the very lands had descended to the heire, so as the case being put of lands in fee simple, the alienation without the warranty had barred the heire. And note, that it is called a lineal warrantie (1), not because it must descend upon the lineal heire; for be the heire lineal or collateral, if by possibility he might claime the land from him that made the warrantie, it is lineal; having regard to the war-

(Post. 371. a. 375. a.)

(3. Rep. 59.)
35. E. 3. Garr. 73.

tie, and title of the land. And also it is called lineal, in respect that the warranty made by him that had no right or possibility of right to the land, is called collateral, in regard that it is collateral to the title of the land. And it is also to be observed, that in all the cases that *Littleton* hath put, or shall put, the lineal or collateral warranty doth binde the heire; and therefore the successor claiming in another right, shall not be bound by the warrantie of any naturall ancestor. For which cause [c] in a *juris utrum* brought by a parson of a church, the collateral warrantie of his ancestor is no barre, for that he demandeth the land in the right of his church in his politike capacite, and the warrantie descendeth on him in his naturall capacite. [d] But some have holden, that if a parson bring an assise, that a collateral warranty of his ancestor shall binde him; and their reason is, for that

[c] 27. H. 6. Garr. 48.

[d] 34. E. 3. Garr. 71.

* M. 11.—anno xxxi. L. and M. and Roh.
|| son—L. and M. and Roh.

† et added L. and M. and Roh.

‡ ceo added L. and M. and Roh.

(1) As to the distinction between lineal and collateral warranty:—By the definitions given in this place of lineal warranty, it appears to be distinguished from collateral warranty chiefly by this circumstance, that he on whom it descends might possibly have claimed the land as heir to him that made the warranty, and whether he claims as heir lineal or as heir collateral, the warranty is equally lineal. But he must claim as heir; for if an estate is limited to the sons of any person successively in tail, and the eldest son aliens with warranty, and dies without issue, the second son is heir at law to the eldest son: he does not however claim as heir, but as purchaser, and therefore the warranty is collateral to him. So if an estate is limited to the father for life, and after his decease to his sons successively in tail, and the father aliens with warranty and dies, the warranty descends on his eldest son and heir; but as he claims as purchaser, not as heir, the warranty is collateral to him. But though he must claim as heir, it is not necessary he should make his title immediately as heir to him, (see Sect. 706.) neither is it necessary he should derive from him alone. See Sect. 714.—An attempt will be made, note 2, page 372, b. to explain the real distinction between lineal and collateral warranty.

Lib. 3. Cap. 13. Of Warrantie. Sect. 704, 705.

that the assise is brought of his possession and seisin, and he shall recover the meane profits to his owne use: but seeing he is seised of the freehold, whereof the assise is brought *in jure ecclesie*, which is in another right than the warrantie, it seemeth that it should not be any barre in the assise. The like law is of a bishop, archdeacon, deane, master of an hospitall, and the like, of their sole possessions, and of the prebend, vicar, and the like.

[2] 45. Aff. 6. 6. B. 3. 56.
Pl. Com. 234. & 553, 554.
18. Rep. 1. Ant. 19. b.)

Vide 27. H. 6. Carr. 48.
34. E. 3. Carr. 71.

Vide Sect. 711. 712.
(Hob. 339. 9. Rep. 132. b.
Vaug. 379.)

Et oblige luy et ses beires. * King H. 3. gave a mannor to Edmund earle of Cornwall, and to the heires of his body, saving the possibilitie of reverter, and died: the earle, before the statute of W. 2. cap. 1. *de donis conditionalibus*, by deed gave the said mannor to another in fee with warrantie in exchange for another mannor, and after the said statute in the 28. yeare of E. 1. dieth without issue, leaving assets in fee simple; which warrantie and assets descended upon king E. 1. as cosin germaine and heire of the said earle, viz. son and heire of king Henry the third, brother of Richard earle of Cornwall, father of the said earle Edmund. And it was adjudged, that the king, as heire to the said earle Edmund, was by the said warrantie and assets barred of the possibilitie of reverter, which he had expectant upon the said gift, albeit the warrantie and assets descended upon the naturall body of king E. 1. as heire to a subject; and king E. 1. claimed the said mannor, as in his reverter *in jure corone* in the capacity of his body politike, in which right he was seised before the gift. In this case, how by the death of the said earle Edmund without issue, the king's title by reverter, and the warrantie and assets came together, and that the warrantie was collaterall, yet the king shall not be barred without assets, as a subject shall be; and many other things are to be observed in this case, which the learned reader will observe. (1)

Sect. 704, 705.

(8. Rep. 64.)

*CAR si soit pier et fits, et le fits purchase * terres en fee, et le pier de ceo disseisist son fits, et † aliena a un auter en fee per son fait, et per mesme le fait oblige luy et ses beires a garranter mesmes les tenements, &c. et le pier morust; ore est le fits barre d'aver les dits tenements; car il ne poit per ascun suit, ne per auter meane de la ley, aver mesmes les terres per cause del dit garrantie. Et ceo est un collateral garranty; et uncore le garranty descendist lyncalment de le pier a le fits.* FOR if there be father and sonne, and the sonne purchase lands in fee, and the father of this disseiseth his sonne, and alieneth to another in fee by his deed, and by the same deed binde him and his heires to warrant the same tenements, &c. and the father dieth; now is the son barred to have the said tenements; for he cannot by any suit, nor by other meane of law, have the same lands by cause of the said warrantie. And this is a collateral warrantie; and yet the warrantie descendeth lineally from the father to the sonne.

Sect. 705.

MES pur ceo que si nul tiel fait ove garrantie ust estre fait, le fits en nul maner puissoit conveyer le tittle que il ad a les tenements de son pier a luy, entant que son pier n'avoit ascun BUT because if no such deed with warrantie had beene made, the sonne in no manner could convey the title which hee hath to the tenements from his father unto him, inasmuch as his father *estate*

* terres—tenements, L. and M. and Roh.

† ceo added L. and M. and Roh.

(1) The king was in this case barred of the possibility of reverter descending to him *in jure corone*, by warranty and assets from a subject descending on his body natural; for in all likelihood those lands will descend to the same person to whom the crown will descend, and consequently will be a good recompence for the loss of the crown lands; but in the case of the parson, his successor can have no benefit of what the predecessor has in his natural capacity. Hawk. Abr. 474.

estate en droit en les tenements ; ther had no estate in right in the pur ceo tiel garrantie est appel lands ; wherefore such warrantie collateral garrantie, entant que is called collateral warrantie, in celuy que fist le garrantie est col- asmuch as he that maketh the war- lateral a le title de les tenements : rantie is collateral to the title of et ceo est a tant a dire, que cestuy the tenements : and this is asmuch a que le garrantie descendist, ne to say, as hee to whom the warran- pouvoit a luy conveyer le title que tie descendeth, could not convey il ad de les tenements per my to him the title which hee hath in cestuy que fist le garrantie, en the tenements by him that made cas que nul tiel garrantie fuit the warrantie, in case that no such fait. warrantie were made.

HERE Littleton putteth an example, proving that it is not called lineall, because it descendeth lineally from the father to the son ; for in this case the warrantie descendeth lineally, and yet is a collateral warrantie. In this example you must intend that the disseisin was not of intent to alien with warrantie to barre the sonne ; but here the disseisin being done to the sonne, without any such intent, the alienation afterwards with warrantie doth barre the sonne ; because that albeit the warrantie doth lineally descend, yet seeing the title is collateral, that is, that the sonne claimeth not the land as heire to his father, therefore in respect of the title it is a collateral warrantie. And thus doth Littleton agree [e] with the authoritie of our bookes. So as the diversities do stand thus. First, where the disseisin and feoffment are *uno tempore*, and where at severall times. Secondly, where the disseisin is with intent to alien with warrantie, and where the disseisin is made without such intent, and the alienation with warrantie afterwards made.

5. E. 3. 14. 46. E. 3. 6.
19. H. 8. 12. 8. R. 2. Gar. 100.
Vid. Sect. 716.

[e] 46. E. 3. 6. 5. E. 3. 14.
19. H. 8. 12.

Sect. 706.

ITEM, si soit aiel, pier, et fits, et le aiel soit disseisne, en que possession le pier releas per son fait ove garrantie, &c. et mourust, et puis l'ail mourust ; ore le fits est barre d'aver les tenements per le garrantie del pier. Et ceo est appel lineal garrantie, pur ceo que si nul tiel garrantie fuit, le fits ne pouvoit conveyer le droit de les tenements a luy, ne monstre coment il est heire al aiel for-

ALSO, if there bee grandfather, father, and son, and the grandfather is disseised, in whose possession the father releaseth by his deed with warrantie, &c. and dieth, and after the grandfather dieth ; now the son is barred to have the tenements by the warranty of the father. And this is called a lineal warrantie, because if no such warrantie were, the son could not convey the right of the tenements to him, nor

HERE Littleton putteth an example where the son must claime the land as heire to his grandfather ; and yet because hee cannot make himselfe heire to his grandfather but by his father, it is lineall.

And it is to bee observed, that the warrantie in this case descended upon the son, before the discent of the right, which happened by the death of the grandfather, in whom the right was. *Vide Littleton Cap. de Releases*, and after in this Chapter, Sect. 707. and 741.

Pier release per son fait ove garrantie.

[f] It is to be knownen, that upon everie conveyance of lands, tenements, or hereditaments, as upon fines, feoffments, gifts, &c. releases and confirmations made to the tenant

1. H. 4. 33. 35. E. 3. Gar. 73.

(3. Rep. 59. Ant. 265. a. Post. 386.)

[f] 14. E. 3. Voucher 108.
16. E. 3. ibid. 87.
18. E. 3. ibid. 6. 10. E. 3. 52.
21. E. 3. 27. 11. H. 4. 22.
44. E. 3. Cont. de Vouch. 22.
12. H. 7. 1.
Vide Sect. 733. 738. 745.

(Post. 385. a.)

tenant of the land, a warrantie may bee made, albeit hee that makes the release or confirmation, hath no right to the land, &c.; but some doe hold, that by release or confirmation, where there is no estate created, or transmutation of possession, a warrantie cannot be made to the assignee.

que per meane del shew how hee is heire to the grandfather but by means of the father.

Sect. 707.

*ITEM, si home ad issue deux fits et est disseise, et l'eigne fits releffa al disseisor per son fait ove garranty, &c. et morust sans issue, et apres ceo le pier morust, ceo est un lineall garranty al puisne fits, pur ceo que coment que l'eigne fits morust en la vie le pier, uncore pur ceo que per possibilitie il puissoit estre, que il puissoit conveyer a luy le title del terre per son eigne frere, si nul tiel garranty fuisset. Car il puissoit estre, que apres la mort le pier l'eigne frere entroit en les tenements et morust sans issue, et donque le puisne fits conveyera a luy le title per l'eigne * fits. Mes en tiel cas, si le puisne fits releffe ove garranty a le disseisor, et morust sans issue, ceo est un collateral garranty al eigne † fits, pur ceo que de tiel terre que fuit al pier, l'eigne per nul possibilitie poit conveyer a luy le title per meane de le puisne ‡ fits.*

ALSO, if a man hath issue two sonnes and is disseised, and the eldest sonne release to the disseisor by his deed with warrantie, &c. and dies without issue, and afterwards the father dieth, this is a lineall warrantie to the younger sonne, because albeit the eldest sonne died in the life of the father, yet by possibilitie it might have beene, that hee might convey to him the title of the land by his elder brother, if no such warrantie had beene. For it might bee, that after the death of the father the elder brother entred into the tenements and died without issue, and then the yonger sonne shall convey to him the title by the elder son. But in this case, if the younger sonne releaseth with warrantie to the disseisor, and dieth without issue, this is a collateral warrantie to the elder son, because that of such land as was the father's, the elder by no possibilitie can convey to him the title by meanes of the younger son.

35. E. 3. Gar. 73. 11. II. 4. 31.
(1. Rep. 66.)

HERE Littleton putteth an example, where the heire that is to be barred by the warrantie, is not to make his descent by him that made the warrantie, as in the case before; and yet because by possibilitie he might have claimed by the eldest sonne, if he had survived the father, and died without issue, and so the younger brother might by possibilitie have beene heire to him, the warrantie is lineall.

And here it is to be noted, that the warrantie of the eldest sonne descended before the right descended; whereof more shall be said hereafter, Sect. 741.; and the opinion of Littleton in this case is holden for law, against the opinions in 35. E. 3. Gar. 73.

9. E. 3. 16. 38. E. 3. 21.
46. E. 3. 26. 8. R. 2. Gar. 101.
(2. Roll. Abr. 773.)

Mes en tiel case le puisne fits releffe ove garranty, &c. This warrantie in this case is collateral to the eldest sonne, and to the issues of his bodie; but if the eldest sonne dieth without issue of his bodie, then the warrantie is lineall to the issues of the bodie of the youngest; and so the warrantie that was collateral to some person, may become lineall to others.

Sect.

* fits not in L. and M. nor Rob.

† fits not in L. and M. nor Rob.

‡ fits not in L. and M. nor Rob.

Sect. 708.

ITEM, si tenant en le taile ad issue trois firs, et discontinue le taile en fee, et le mulnes firs releffa per son fait al discontinuee, et oblige luy et ses beires a garrantie, &c. et puis le tenant en le taile morust, et le mulnes firs morust sans issue, ore l'eigne firs est barre d'averascun recoverie per brieſe de formedon, pur ceo que le garrantie del mulnes frere est collateral a luy, entant que il ne poit per nul manner conveyer a luy per force del taile ascun discent per le mulnes, et pur ceo c'est un collateral garrantie. Mes en cest cas si l'eigne firs devie sans issue, ore le puisne frere poit bien aver un brieſe de formedon en le discenter, et recouvrera mesme le terre, pur ceo que le garrantie del mulnes est lineal al firs puisne, pur ceo que il puissoit estre que per possibilitie le mulnes puissoit estre seise per force del taile apres la mort son eigne frere, et

ALSO, if tenaunt in taile hath issue three sonnes, and discontinue the taile in fee, and the middle son release by his deed to the discontinuee, and binde him and his heires to warrantie, &c. and after the tenant in taile dieth, and the middle son dieth without issue, now the eldest sonne is barred to have any recoverie by writ of *formedon*, because the warrantie of the middle brother is collateral to him, inasmuch as hee can by no meanes convey to him by force of the taile any discent by the middle, and therefore this is a collateral warrantie. But in this case if the eldest sonne die without issue, now the youngest brother may well have a writ of *formedon* in the discenter; and shall recover the same land, because the warrantie of the middle is lineal to the youngest son, for that it might bee that by possibilitie the middle might bee seised by force of the taile after the death of his eldest

HEREBY it also appeareth, that a warrantie that is collateral in respect of some persons, may afterwards become lineal in respect of others. Whereupon it followeth, * that a collateral warrantie doth not give a right, but bindeth only a right so long as the same continueth: but if the collateral warrantie be determined, removed, or defeated, the right is revived. [f] And yet in an assise the plaintiff hath made his title by a collateral warrantie.

Barre is a word common aswell to the English as to the French, of which commeth the nowne, a bar, *barra*. It signifieth legally a destruction for ever, or taking away for a time of the action of him that right hath. And *barra* is an Italian word, and signifieth barre, as we use it; and it is called a plea in barre, when such a barre is pleaded. Here *Littleton* putteth an example of a barre of an estate taile by a collateral warranty. It is to be observed, that in some cases an estate taile may be barred by some acts of parliament made since *Littleton* wrote; and in some cases an estate taile cannot be barred, which might when *Littleton* wrote have been barred. For example, if tenant in taile levie a fine with proclamations according to the statute, this is a barre to the estate taile, but not to him in reversion or remainder, if hee maketh his claim, or pursue his action within five yeares after the state taile spent.

[b] If a gift be made to the eldest sonne, and to the heires of his bodie, the remainder to the father and to the heires of his bodie, the father dieth, the eldest sonne levie a fine with proclamations, and dieth without issue; this shall barre

(Dr. and Stud. 153. b.)

8. R. 2. Garr. 101.

[*] 43. Aff. 44. 24. H. 3. tit. Taile Br. 7. H. 5. 6. tit. Aff. 359. 34. E. 3. Droit. 29. 19. H. 6. 59. 21. H. 7. 40. 5. H. 7. 29. 3. H. 7. 9. b.

[f] 16. Aff. p. 16. 27. Aff. 74. 29. Aff. 50. 43. Aff. 8. 14. H. 4. 13. 19. H. 6. 60.

(Doc. Plac. 54.)

(Dr. and Stud. 56. a.)

4. H. 7. c. 24. & 31. H. 8. c. 36.

(10. Rep. 43.)

[b] Dalison a. El. & 7. El. Vide lib. 3. fol. 84. le case de Fines.

(3. Leon. 19.)

(Ant. 120. b. 9. Rep. 104.
Plowd. 374. a. 375. a.
Cro. Eliz. 898. Noy 46.
Dyer, 3. b. 133. a.)

[1] 26. H. 8. cap. 13.
33. H. 8. cap. 20. 5. E. 6. c. 11.
Stant. Pl. Coron. 18.

[c] 12. E. 4. 19. Taltarum's case.
[d] Vide devant Sect. 620.
Vid. Lib. 3. fol. 5. Cuppledick's
case, & fol. 94. 97. 106.
Lib. 1. fol. 62. Capet's case.
Lib. 2. fol. 16. 52. 74. 77.
Lib. 6. fol. 41. 42.
Lib. 10. fol. 37. Marie Porting-
ton's case.
(Ante 335. a.)
[e] 38. H. 8. tale Br. 41.
Pl. Com. fol. 553. 29. H. 8.
Dier 52.
[f] 34. H. 8. cap. 20.

[g] Trin. 23. Eliz. inter Dively
& Alston resolved in the Court
of Wards.
Lib. 2. fol. 15. & 16. in Wise-
man's case.

Lib. 8. fol. 77. 78. the Lord
Stafford's case.
(2. Roll. 394.)

Lib. 2. fol. 15. 16. Wiseman's
case. Lib. 2. fol. 52. Cholmley's
case.

(Mo. 115. 195. 2. Rep. 15. b.
1. Cro. 430.)

Lib. 2. fol. 16. Wiseman's case.

the second sonne, for the
remainder descended to the
eldest.

If tenant in taile be dis-
seised, or have a right of ac-
tion, and the tenant of the
land levie a fine with pro-

clamations, and five yeares passe, the right of the estate taile is barred.

[4] If tenant in taile in possession, or that hath a right of entrie, bee attainted of high-
treason, the estate taile is barred, and the land is forfeited to the king; and none of these
were barred when *Littleton* wrote. A lineall warrantie and affets was a barre to the estate
taile when *Littleton* wrote; whereof more shall be said hereafter.

[c] A common recoverie with a voucher over, and a judgement to recover in value, was
a barre of the estate taile when *Littleton* wrote. [d] And of common recoveries there bee two
sorts, viz. one with a single voucher, and another with a double voucher, and that is more
common and more safe: there may be more vouchers over.

[e] If the king had made a gift in taile, and the donee had suffered a common recoverie,
this should have barred the estate taile in *Littleton's* time, but not the reversion or remainder
in the king. And so if such a donee had levied a fine with proclamations after the statute of
4. H. 7. this had barred the estate taile, although the reversion was in the king. (1) [f] But
since *Littleton* wrote, a common recoverie had against tenant in taile of the king's gift, or
such a fine levied by him, the reversion continuing in the crowne, is no barre to the estate
taile by the statute of 34. H. 8. (2) And where the words of the statute be (whereof the re-
version or remainder at the time of such recoverie had, shall be in the king) these ten things
are to be observed upon the construction of that act. (3)

First, that the estate taile must bee created by a king, and not by any subject, albeit the
king be his heire to the reversion; for the preamble speakes of gifts made to subjects, and
none can have subjects but the king. And also in the preamble it is said (for service done to
the kings of the realme) and the body of the act referreth to the preamble. [g] And there-
fore if the duke of *Lancaster* had made a gift in taile, and the reversion descended to the
king, yet was not that estate taile restrained by that statute; and so of the like.

Secondly, if the king grant over the reversion, then a recoverie suffered will barre the
fe taile, because the king had no reversion at the time of the recoverie.

Thirdly, if the king make a gift in taile, the remainder in taile, or grant the reversion in
taile, keeping the reversion in the crowne, a recoverie against tenant in taile in possession
shall neither barre the estate taile in possession by the expresse purview of the statute, nor by
consequence the state in remainder or reversion; for that the reversion or remainder cannot
be barred, but where the estate taile in possession is barred.

Fourthly, if a subject make a gift in taile, the remainder to the king in fee, albeit the
words of the statute be, (whereof the reversion or remainder of the same, &c.) yet seeing
the estate in taile was not created by a king, as hath beene said, the estate taile may bee
barred by a common recoverie.

Fifthly, if Prince *Henrie*, sonne of *Henrie* the Seventh, had made a gift in taile, the re-
mainder to *Henrie* the Seventh in fee, which remainder by the death of *Henrie* the Seventh
had descended to *Henrie* the Eighth, so as he had the remainder by descent; yet might tenant
in taile, for the cause aforesaid, barre the estate taile by a common recoverie.

Sixthly, the word (remainder) in the statute is no vaine word; for the words of the
preamble be, the king hath given or granted, or otherwise provided to his servants and
subjects. The word (reversion) in the body of the act hath reference to these words (given
or granted); and (remainder) hath reference to these words (otherwise provided.) As if the
king in consideration of money, or of assurance of land, or for other consideration by way
of provision, procure a subject by deed indented and inrolled, to make a gift in taile to one of
his servants and subjects for recompence of service, or other consideration, the remainder
to the king in fee, and all this appeare of record; this is a good provision within the sta-
tute, and the tenant in taile cannot by a common rec verie barre the estate taile. So it is,
if the remainder be limited to the king in taile; but if the remainder bee limited to the king
for yeares, or for life, that is no such remainder as it is intended by the statute, because it
is of no remainder of continuance, as it ought to be, as it appeareth by the preamble; and
it ought to have some affinity with a reversion, wherewith it is joyned.

Seventhly, where a common recoverie cannot barre the state taile by force of the said sta-
tute, there a fine levied in fee, in taile, for lives, or yeares, with proclamations according to
the statutes, shall not barre the state taile, or the issue in taile, where the reversion or re-
mainder

(1) 29. H. 8. Dy. 32. accord. tail barred, but not discontinued, because the reversion is in the king: so note the issue is barred by
4. H. 7. Hob. 382. for 32. H. 8. cap. 36. was not then made. Note also, that 32. H. 8. cap. 36. excepts tenant in tail by gift of the
king. Lord Nott. MSS.

(2) Upon this act see Mr. Cruise's Essay on Recoveries, 2d ed. 255.

(3) Nota, 34. H. 8. is not of force in Ireland, therefore the knowledge of the common law in these points is necessary there.—
B. being tenant in tail by gift of king H. 8. of the manor of T. an. 14. Eliz. contracted with A. to convey it to him and his heirs in
consideration of a sum of money, and the manner of assurance was this: queen Eliz. in May, 14. Eliz. grants her reversion to C. and
D. and their heirs; June 14. Eliz. B. suffers a recovery to the use of C. and D. and their heirs; and in the same term B. and A.
levy a fine of T. to C. and D. which they grant, and render to A.; and afterwards, in the same term, convey the reversion by fine,
&c. to queen Eliz. And now whether this estate to A. was a gift in tail ex provisione from the queen, within the statute of 34. H. 8.
c. 20. was the question between E. heir of the body of A. and F. who claimed by the fine levied by the father of the said E. whose
daughter he had married; and it was held by Berkeley that it was not, 1st, because the grant of the reversion to C. expresses no intent
of the queen to create an estate tail to A.: 2d, when the estate tail of B. was docted by the recovery, and upon the fine levied C.
rendered the tail to A. he might have rendered the fee simple if he had willed; and he was the donor of the estate tail, not the queen,
except of the reversion afterwards reconveyed: 3d, this reversion reconveyed was not in the queen her original reversion, but a new
reversion expectant upon the tail of A. (for the former tail was docted) wherefore A. cannot bar the reversion in the queen, but he may
bar his own issue notwithstanding 34. H. 8.: 4th, because altho' gift in tail by a subject may be a provision of the king within the sta-
tute, nevertheless the intent should appear, which is not the case here. Hales made two questions. 1. What shall be said a provision by
the king within this statute, and this is question of law. 2. Whether this shall be said to be such a provision, which is matter of fact.
To the first it seems, that if the queen be merely instrumental in procuring an estate tail to be settled, but that the estate itself does not
proceed either from the charge, or from the bounty of the crown as a reward for service, it is no provision within this statute; and there-
fore it is to be seen, if in this case the entail was upon contract between subject and subject, and if the queen were merely instrumental
to perfect the conveyance and serve her own reversion, which is the second question, and a question of fact. To the second, that this is not
such a provision there are these presumptions. 1st, Nothing appears of record that such provision was intended, which by Coke is here held
to be necessary (but Hales doubted hereof.) 2d, No land, money, or other consideration, moved the queen to procure B. to grant this estate
tail to A.: 3d, it does not appear that the queen took notice of any service done by A. or of any favour intended by her to him. 4th, If the
queen had intended a provision within the statute, she might have caused C. to convey the fee simple first to herself, and then have granted
to A. in tail. 5th, If it was intended that A. should have an entail, which should not be a provision within the statute, no one can contrive
any other way than this to effect it. 6th, It appears that A. was to purchase, and that the queen should not be prejudiced, nor any other person

mainder is in the king, as is aforesaid, by reason of these words in the said act (the said recovery, or any other thing or things hereafter to be had, done, or suffered by or against any such tenant in taile to the contrary notwithstanding), which words include a fine levied by such a donee, and restraineth the same.

Eighthly, but where a common recovery shall barre the estate taile, notwithstanding that statute, there a fine with proclamations shall barre the same also.

Ninthly, where the said latter words of the statute be (had, done, or suffered by or against any such tenant in taile), the sense and construction is, where tenant in taile is partie or privie to the act, be it by doing or suffering that which should worke the barre, and not by meere permission, he being a stranger to the act. (1)

As if tenant in taile of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levie a fine, and five yeares passe, this shall barre the estate taile (2): and so if a collateral ancestor of the donee release with warrantie, and the donee suffer the warrantie to descend without any entry made in the life of the ancestor, this shall binde the tenant in taile, because he is not party or privie to any act, either done or suffered by or against him.

Tenthly, albeit the preamble of the statute extend onely to gifts in taile made by the kings of England before the act (viz. hath given and granted, &c.), and the body of the act referreth to the preamble (viz. that no such feined recovery hereafter to be had against such tenant in taile), so as this word (such) may seeme to couple the body and the preamble together; yet in this case (such) shall be taken for such in equall mischief, or in like case; and by divers parts of the act it appeareth, that the makers of the act intended to extend it to future gifts; and so is the law taken at this day without question.

A recovery in a writ of right against tenant in taile without a voucher, is no barre of any gift in taile.

If tenant in taile the remainder over in fee cesse, and the lord recover in a *cessavit*, this shall not barre the estate taile, for the issue shall recover in a *firmesdon*; neither were either of these barres when *Littleton* wrote. But let us now heare *Littleton*.

So resolved Pasch. 31. Eliz. Rot. 1645. in Notley's case in Communi Banco.

(8. Rep. 77.)

(3. Cro. 430. Cro. Eliz. 595. Sid. 166. 4. Leon. 40. Moor 467.)

So holden Trin. 39. Eliz. Rot. 1914 inter Stratford & Dover in Communi Banco.

(Hob. 332. 2. Roll. Abr. 773.)

33. E. 3. Judgement. 252.

3. H. 6. 55. 10. H. 6. 5.

14. E. 4. 5. b. 15. E. 4. 8.

F. N. B. 124. b. Pl. Com. 237.

28. E. 3. 95. F. N. B. 28. l.

Sect. 709.

ITEM, si tenant en taile discontinue le taile, et ad issue et devy, et l'uncle del issue releffa al discontinuee ove garrantie, &c. et morust sans issue, ceo est collateral garrantie al issue en taile, pur ceo que le garrantie descendist sur l'issue, le quel ne poit joy conveyer a le taile per meane de son uncle.

ALSO, if tenant in taile discontinue the taile, and hath issue and dieth, and the uncle of the issue release to the discontinuee with warrantie, &c. and dieth without issue, this is a collateral warranty to the issue in taile, because the warranty descendeth upon the issue, that cannot convey himselfe to the entaile by meanes of his uncle.

THE reason wherefore the warrantie of the uncle having no right to the land entailed shall barre the issue in taile is, for that the law presumeth that the uncle would not unnaturally disherit his lawfull heire, being of his owne blood, of that right which the uncle never had, but came to the heire by another meane, unlesse hee would leave him greater advancement. *Nemo præsumitur alienam posteritatem suæ prætulisse.* And in this case the law will admit no prooffe against that which the law presumeth. And so it is of all other collateral warranties: for no man is presumed to doe any thing against nature.

P. Com. fol. 307. a. in Sharrington's case.

(2. Roll. Abr. 745.)

(Post. 371. b.)

(3. Rep. 59.)

(Ante 6. b.)

[k] And the like holdeth in some other cases: as if a rent be behinde for twentie yeares, and the lord make an acquittance for the last that is due, all the rest are presumed to be paid; and the law will admit no prooffe against this presumption (3). [l] So if a man be within the foure seas, and his wife hath a childe, the law presumeth that it is the childe of the husband; and against this presumption the law will admit no prooffe. (4)

[m] If a man that is innocent be accused of felony, and for feare flieth for the same, albeit

[k] 11. H. 4. 55. 10. Eliz.

Dier 271.

[l] 7. H. 4. 9.

[m] 3. E. 3. Corone Stanf.

(1) 11. Car. Cro. obiter in *Wyat's case*, tenant in tail, reversion in the king, is disseised, entry of the issue is barred; which perhaps is so here, because in both cases the tail is not barred.—Lord Nott. MSS.

(2) Cro. Car. 430. Jones cited the case according to the report in this place; but it seems he was misled by this book. See the note immediately following.—It seems to some that the case of *Stratford and Dover* above quoted is not law; for in 2. Rep. 11. Magd. Coll. case, it is adjudged, that the fine does not bar the college, not being parties, because the 13. Eliz. makes void all acts which it suffers, and such sufferance extends to the act in which they are not parties, by Sir Or. B.—And Sir F. Moore 467. reports the same case: and there by *Walmesley* it is said, that this issue is only bound in the time the fine is levied, but no other issue, and this by 34 H. 8.; hence it seems, that Sir F. Moore or Lord Coke have misreported the case, for they are contrary to each other. Note, Mr. Palmer told Hen. Finch, afterwards Lord Nottingham and Chancellor, that he attended *Walker* Chief Baron upon a reference, and that *Walker* denied the above case, and said, that the roll was contra, and the judgment there contra to this report, and that he and Palmer went to the house of Lord Coke, then living, and shewed him the roll contra to his report in this place, and that he acknowledged it, and said, that he trusted to Serjeant *Bridgman's* report: whence it appears, that Sir F. Moore's report is the better, and there he reports it to have been, 39. Eliz. Ro. 1914.—Lord Nott. MSS.

(3) This is to be understood of an acquittance under hand and seal, which is an estoppel; for if it be not under seal, the law will admit of proof to the contrary: but an avowry for the last day's rent is no discharge for the former; for by the avowry the avowant says so much is due, but discharges nothing, no other rent being mentioned in the avowry, but that for which he acknowledges the taking the goods. See 1. Sid. 44. 1. Lev. 43. 1. Saund. 285, 286. Latw. 1173. Note to the 11th edition.

(4) But see ant. 214. a. note 2.

which is effected.—Note, At the common law, if the king grant lands in fee simple conditional, it was doubted if donee post prolem fuscitatem might have aliened to bar his issue, *Riley* 438. supra 19. b. but clearly not to bar possibility of reverter in the king; no, not though the alienation were with warranty collateral, unless assents descended to the king. Ante 19. b. and 370. in margin. And unde alienation without warranty or assents bars subject donor, 4 H. 6. Rot. Parl. n. 51. Common: petition that feoffees who buy lands of the king, tenant in tail may enjoy them against the king. Resp. de roy s'aviser. — Note also, after *Westm.* 2. and before 34 H. 8. recovery or fine barred the tail of gift by the king, not the reversion to the king; so that by the wisdom of the common law, where the king raised the family, a kind of perpetuity was intended; for every man was discouraged to purchase from the donee, for no act of his could bar the king's reversion or possibility of reverter, which was a good way to preserve the memory of the king's bounty. When this would not do, upon the dissolution of monasteries, the crown having much land to bestow, began now to provide by 34 Hen. 8. that no alienation should bar the entail; for there needed no law for the reversion, and no other way could preserve the memory, &c.: and yet this is often eluded by a temporary grant of the reversion by the king, and a reconveyance, &c.—Lord Nott. MSS.

Bracton lib. 1. cap. 9.

[x] Rot. Parliament 50. E. 3. num. 77.

beit he judicially acquitteth himselfe of the felonie, yet if it be found that he fled for the felonie, he shall, notwithstanding his innocencie, forfeit all his goods and chattels, debts and duties; for as to the forfeiture of them, the law will admit no prooffe against the presumption in law grounded upon his flight: and so in many other cases. But yet the generall rule is, *Quod statuitur presumptioni donec probetur in contrarium*; but, as you see, it hath many exceptions.

[y] It hath beene attempted in parliament, that a statute might be made, that no man should be barred by a warrantie collaterall, but where assents descend from the same ancestor (1); but it never tooke effect, for that it should weaken common assurances. (2)

Sect. 710.

5. F. 2. Carr. 78. Lib. 8. fol. 41. Sym's case.

(10. Rep. 95.)

(Ante 367. b.)
(2. Cro. 217, 218.)

(Ant. 189. a. 243. b.)
See before in the Chapter of
Discent, Sect. 398.

AD issue deux files.

If husband and wife, tenants in especiall tayle, have issue a daughter, and the wife die, the husband by a second wife hath issue another daughter, and discontinueth in fee and dieth, a collaterall ancestor of the daughters releaseth to the discontinuee with warranty and dieth, the warrantie descendeth upon both daughters, yet the issue in taile shall bee barred of the whole; for in judgement of law the entire warrantie descendeth upon both of them.

Et l'eigne enter en l'entiertie, et ent fait un feoffement,

Ec. Here it is to bee understood, that when one coparcener doth generally enter into the whole, this doth not devert the estate which descendeth by the law to the other, unless shee that doth enter claimeth the whole, and taketh the profits of the whole; for that shall devert the freehold in law of the other parcener.

Otherwise it is after the parceners be actually seised, the taking of the whole profits, or any caine made by the one, cannot put the other out of possession without an

ITEM, si le tenant en tayle ad issue deux files et morust, et l'eigne entra en le entiertie, et ent fait un feoffement en fee ove garrantie, Ec. et puis l'eigne file morust sans issue;

en cest cas le puisne file est barre quant al un moitie, et quant al autre moitie el n'est pas barre. Car quant a la moitie que affiert a le puisne file, el est barre, par ceo que quant a cel part el ne poit conveyer le discent per my le maine de son eigne soer, et pur ceo quant a cel moitie, ceo est un collateral garrantie. Mes quant al autre moitie, que affiert a son eigne soer, le garrantie n'est pas barre a le puisne soer, pur ceo que el poit conveyer son discent quant a cel moitie que affiert a son eigne soer per mesme le eigne soer, issint quant a cest moitie que affiert al eigne soer, le garrantie*

ALSO, if the tenant in tayle hath issue two daughters and dieth, and the elder entreth into the whole, and thereof maketh a feoffement in fee with warrantie, &c. and after the elder daughter dieth without issue; in this case the younger daughter is barred as to the one moitie, and as to the other moitie shee is not barred. For as to the moiety which belongeth to the younger daughter, shee is barred, because as to this part shee cannot convey the discent by meanes of her elder sister, and therefore as to this moitie, this is a collaterall warrantie. But as to the other moitie, which belongeth to her elder sister, the warrantie is no bar to the younger sister, because she may convey her discent as to that moitie which belongeth to her elder sister by the same elder sister, so as to this moitie which be-

* part—moitie que affiert a luy, L. and M. and Roh.

(1) However, it hath been effected in our days; for by 4 Ann. cap. 16. sect. 21. all warranties since the first day of Trinity Term, anno dom. 1705, by any tenants for life, of any lands, tenements, or hereditaments, coming or descending to any person in reversion or remainder, are void and of no effect; and all collateral warranties made since then of any lands, tenements or hereditaments, by any ancestor who had no estate of inheritance in possession, the same is void against the heir. *Note to the 11th edition.*

(2) The reader will recollect, that, previously to the statute *de donis*, all estates were held either in fee simple, in fee simple conditional, for life, or for years; and that estates tail, in the light in which we now consider them, had not then an existence. If a person seised in fee simple aliened his estate, the alienation was certainly binding both upon his lineal and his collateral heirs; his warranty therefore had effect so far as it entitled the alienee to vouch the heir of the warrantor, and, in case of eviction, to claim a recompence from him, if any real assents descended upon him from the ancestor; but with respect to the repelling or rebutting of the claim of the heir to the estate itself, as the alienations of tenant in fee simple bound the heirs as effectually without the warranty as with it, the warranty, in that respect, could have no operation.—As to the warranties of persons seised of estates held in fee simple conditional, it has been observed before, p. 326. b. note 1, that the condition from which that estate took its appellation did not suspend the fee from vesting in the donee immediately by the gift; and therefore if he aliened before he had issue, it not only was no forfeiture, but if afterwards he had issue, it was a bar to them. Hence the warranty of a tenant in fee simple conditional had the same effect with respect to his issue, as the warranty of tenant in tail in fee simple had upon those who claimed from him; that is, with assents, it entitled the warrantee to vouch the issue as heirs at law of the ancestor; but in other respects it had no operation, as the issue was bound by the alienation of the ancestor, as effectually without warranty, as with it. With respect to the donor or reversioner, the alienations of tenant in fee simple conditional could not be binding on him without assents, because he claimed to be in by title paramount.—As to the alienations of tenant for life or for years: in most cases they must have been void, as commencing by disseisin. In those cases where they were not void upon that account, it is to be observed, that before the statute of uses an estate of freehold could not be created without livery of seisin; and that as the livery of seisin of tenant for life or for years was a forfeiture of the estate, the reversioner or remainder-man might enter immediately for the forfeiture; but if he did not enter during the life of the person aliening, the warranty stopped him from entering afterwards. The reader will recollect, that if a disseisor, abator, or intruder, died in the possession of the estate, his heirs so far acquired a presumptive title to the estate, that the disseisee could no longer restore his possession by entry, but was reduced to his action. By analogy to this reasoning, and a rational extension of the principles on which it was founded, the law supposed that the remainder-man or reversioner would have entered for the forfeiture of the tenant for life or years, if an equivalent were not given him: it was therefore presumed, that if he did not enter during the life of such particular tenant, he had received from him an equivalent; and this presumption being admitted, he could not afterwards, with any colour of justice, be allowed to claim the estate itself. Such were the effects and operation of warranty at the common law. The first material alteration in it was by the statute of Gloucester, 6. E. 1. ch. 3. by which it was enacted, that the warranty of the father, tenant by the courtesy, either in the life of his wife or afterwards, should not be a bar to the heir without assents. The next statute which made any material alteration upon the

tie est lineal al puisne longeth to the elder sister, the warrantie is lineal to the younger sister.

Sect. 711.

ET nota, que quant a celuy que demanda fee simple per ascun de ses auncesters, il serra barre per warrantie lineal que descendist sur luy, sinon que soit restraine per ascun estatute.

AND note, that as to him that demandeth fee simple by any of his ancestors, he shall be barred by warrantie lineall which descendeth upon him, unless he be restrained by some statute.

Sect. 712.

MES ilque demande fee taile per brieve de formedon en descender, ne serra my barre per lineal garrantie, sinon que il ad assets per discent en fee simple per mesme l'auncester que fist le garrantie. Mes collateral garrantie est barre a celuy que demanda fee, et auxy a celuy que demanda fee taile sans ascun auter discent de fee simple, sinon en cases queux sont restraines per les estatutes, et auters cases pur certaine causes, come serra dit en apres.

BUT hee that demandeth fee taile by writ of *formedon* in descender, shall not be barred by lineall warrantie, unless hee hath assets by discent in fee simple by the same ancestor that made the warrantie. But collateral warrantie is a barre to him that demandeth fee, and also to him that demandeth fee taile without any other discent of fee simple, except in cases which are restrained by the statutes, and in other cases for certaine causes, as shall be said hereafter. (1)

her. And thus is the booke in the 21. Assise [n] to be intended, the case being no other in effect; but *A.* disseiseth one to the use of himselfe and *B.* *B.* agreeth; by this he is joyntenant with *A.* [n] 21. Ass. p. 19. (Aut. 180.)

Et

(1) The observations of Lord Vaughan on this Section and the comment upon it, deserve attentive perusal. See Vaugh. 375.

effect and operation of warranty, was the statute *de donis*. An attempt has been made in note 1, page 326. b. and notes 1 and 2 to page 327. a. to explain in what manner, and by what construction of law, estates tail derived their origin from that statute. It is obvious, that if the warranty of tenant in tail, without assets, had been permitted to be a bar of the estate tail, it would have been in the power of every tenant in tail to have evaded that statute, and barred his issue. By a kind of analogy, therefore, to what the legislature had done in passing the stat. of Gloucester, the judges, in their construction of the statute *de donis*, held, that the warranty of tenant in tail, without assets, should not bind his issue; but by the same analogy, and to prevent the circuitry which would arise if the issue had been permitted to recover the estate from the alienee, and the alienee to recover the assets from the issue, they held, the issue bound by warranty with assets. — With respect to those in remainder or reversion — it is to be observed, that the statute *de donis* extends only to the alienations of tenants in tail; the alienations, therefore, of tenants for life with warranty, remained as they did at the common law, and therefore bound all upon whom the warranty descended, either with or without assets. Neither did the statute *de donis* restrain the alienations of tenant in tail, except so far as they prevented the land descending upon the issue at his death, or reverting to the donor for want of issue in tail. There is nothing in it which, either directly or indirectly, restrains the tenant in tail from barring a remainder-man in tail, by his warranty descending on him. As to a remainder-man in tail, therefore, the operation of warranty in rebutting the heir, remained as it was before the statute: it barred him both with and without assets. This is laid down and explained with great learning and force of argument by lord chief justice Vaughan, in his argument in *Bole v. Horton*. See his Reports, p. 360. The case there was, that William Vesey devised to John Vesey, his eldest son, and the heirs male of his body; and for want of such issue, to Wm. Vesey, another of his sons, and the heirs male of his body; and for want of such issue, to his own right heirs. John, upon his father's death, entered and died, leaving issue only two daughters: Wm. then entered and aliened with warranty, and died without issue. The question was, whether the warranty rebutted the daughters. Lord chief justice Vaughan was of opinion, that the warranty, not being accompanied with assets, would not have barred his own issues in tail, if there had been any, or the two daughters, who claimed the reversion, both issues in tail and the reversioners being protected by the statute *de donis*; but he admitted, that if there had been any intermediate remainder in tail, the warranty would have rebutted all who claimed under that remainder, a remainder in tail not being under the protection of the statute. The only point before the court in this case was, upon the operation of the warranty to rebut the reversioners. Upon this the court was divided: the chief justice and justice Archer were for the demandant; and justice Wyld and justice Atkins, for the tenant. — The next statute which restrained the operation of warranty, was 11 Henry 7. ch. 20. by which the warranty of the wife of her husband's lands, either with or without her succeeding husband, was held to be void. The last statute which has been enacted for the purpose of restraining the operation of warranty, is the 4 and 5 Ann. ch. 16. by which all warranties of tenant of life are declared void; and all collateral warranties of any ancestor who has not an estate of inheritance in possession, are declared void against the heir. But this statute does not extend to the alienation of tenant in tail in possession. The consequence is, that even at this day, if a tenant in tail in possession discontinues his estate with warranty, it is a bar with assets to his issue, and without assets to those in remainder. Supposing, therefore, the common case of a limitation to the first and other sons successively in tail male; if the first

actually putting out or disseisin. And in this case of *Littleton*, when one coparcener entred into the whole, and maketh a feoffment of the whole, this devesteth the freehold in law out of the other coparcener.

Now seeing the entrie in this case of *Littleton* devesteth not the estate of the other parcener, if no further proceeding had beene, then it is to be demanded, that seeing the feoffment doth worke the wrong, and bee the wrong either a disseisin, or in nature of an abatement, how can the warrantie annexed to that feoffment that wrought the wrong be collateral, or binde the youngest sister for her part? To this it is answered, that when the one sister entred into the whole, the possession being void, and maketh a feoffment in fee, this act subsequent doth so explaine the entry precedent into the whole, that now by construction of law, she was only seised of the whole, and this feoffment can bee no disseisin, because the other sister was never seised; nor any abatement, because they both made but one heire to the ancestor, and one freehold and inheritance descended to them. So as in judgement of law the warrantie doth not commence by disseisin or by abatement, and without question her entrie was no intrusion.

Tenant in taile hath issue two daughters, and discontinueth in fee, the youngest disseiseth the discontinuee to the use of herselfe and her sister, the discontinuee ousteth her, against whom she recovereth in an assise, the eldest agreeth to the disseisin, as she may, against her sister, and become joyntenant with

Fl. Com. 543.
(5. Rep. 51. Post. 377. a.)

(Sect. 398. Post. 393. b.)

3. E. 3. 22. 4. E. 3. 28. 50.
6. E. 3. 56. 7. E. 3. 51. 57.
9. E. 3. 16. 10. E. 3. 14.
15. E. 3. Gar. 27. 20. E. 3.
Ibid. 39. 25. E. 3. 5.
27. E. 3. 83. 41. E. 3. Garr. 16.
Mich. 38. E. 3. Coram Rege
Abbot de Colchester's case.
45. Aff. 6. Pl. Com. 554.
19. E. 4. 10. Vid. Sect. 703. 747.

(Moore, 96. accord. Vaugh. 382.
contra. See Vaug. 365.)

Fleta lib. 2. ca. 63. Britton 185.
4. E. 3. Garr. 63. 16. E. 3.
Aff. 4. 43. E. 3. 9. 7. H. 6. 3.
11. H. 4. 20.
(2. Roll. Abr. 774, 775.)

24. E. 3. 47.

(6. Rep. 56.)

[a] 31. E. 3. Aff. 5. 13. E. 3.
Recoverie in value 17. Lib. 3.
fol. 31. Butler & Baker's case.

[b] 14. E. 3. Mefne 7.
Registrem 293.

[c] Fleta, lib. 2. cap. 65.
Britton fol. 185. Extent. manerii.
5. H. 7. 37. 32. H. 6. 21.
33. E. 3. Garr. 102.

Et nota, que quant a celui que demanda fee simple, &c. In these two Sections there are expressed foure legall conclutions :

First, that a lineall warrantie doth binde the right of a fee simple.
Secondly, that a lineall warrantie doth not binde the right of an estate taile, for that it is restrained by the statute of *donis conditionalibus*.

Thirdly, that a lineall warranty and assents is a barre of the right in taile, and is not restrained (as hath beene said) by the said act.

Fourthly, that a collateral warrantie made by a collateral ancestor of the donee, doth binde the right of an estate taile, albeit there be no assents ; and the reason thereof is upon the statute of *donis conditionalibus*, for that it is not made by the tenant in taile, &c. as the lineall warrantie is.

To this may be added, that the warranty of the donee in taile, which is collateral to the donor, or to him in remainder, being heire to him, doth binde them without any assents. For though the alienation of the donee after issue doth not barre the donor, which was the mischief provided for by the act, yet the warranty being collateral doth barre both of them ; for the act restraineth not that warranty, but it remaineth at the common law, as *Littleton* after faith : and in like manner the warranty of the donee doth barre him in the remainder.

Assents, (id est) quod tantundem valet, sufficient by descent.

Note, assents requisite to make a lineall warranty a barre must have six qualities. First, it must be assents (that is) of equall value or more at the time of the descent. Secondly, it must be of descent, and not by purchase or gift. Thirdly, as *Littleton* here faith, it must be assents in fee simple, and not in taile, or for another man's life. Fourthly, it must descend to him as heire to the same ancestor that made the warranty, as *Littleton* also here faith. Fifthly, it must be of lands or tenements, or rents, or services valuable, or other profits issuing out of lands or tenements, and not personall inheritances, as annuities, and the like. Sixthly, it must be in state or interest, and not in use or right of actions or rights of entry, for they are no assents until they be brought into possession. [a] But if a rent in fee simple issuing out of the land of the heire descend unto him whereby it is extinct, yet this is assents, and to this purpose hath in judgement of law a continuance.

[b] A feignory in fee almoigne is no assents, because it is not valuable, and therefore not to be extended ; and so it seemeth of a feignory of homage and fealty. But an advowson is assents, whereof [c] *Fleta* faith ; *Item de ecclesiis que ad donationem domini pertinent quot sunt, et que, et ubi, et quantum valeat que liber ecclesia per annum secundum veram ipsius estimationem, et pro marca solent extendatur, ut si ecclesia centum marcas valeat per annum, ad centum solidos extendatur, advocatio per annum.* (1) And herewith agreeth *Britton*, and others have reckoned a shilling in the pound ; and *Pritton* addeth further, *mes si la advowson duiest estre vendue, adonques seroit le reasonable price selonque le value en un an a cel extent.* Wherein it is to be observed, that antiquitie did ever reckon by markes.

Sect. 713.

ITEM, si terre soit done a un home et a les heires de son corps engendres, le quel prent feme, et ont issue firs enter eux, et le baron discontinua le taile en fee et devy, et puis la feme releffa al discontinuee en fee ove garrantie, &c. et morust, et le garrantie descendist a le firs, ceo est un collateral garrantie.

ALSO, if land be given to a man, and to the heires of his bodie begotten, who taketh wife, and have issue a son betweenethem, and the husband discontinues the taile in fee and dieth, and after the wife releaseth to the discontinuee in fee with warrantie, &c. and dieth, and the warranty descends to the son, this is a collateral warrantie.

THIS case standeth upon the same reason that divers other formerly put by our author doe, viz. that because the heire claimeth only from the father *per formam doni*, and nothing from the wife, that therefore the warrantie of the wife is collateral, and the warrantie made by any ancestor male or female of the wife bindeth ; and here the warrantie descendeth after the descent of the right.

Sect.

(1) Bro. Assents per Descent 21. contra.

son, when in possession, levies a fine, that is a discontinuance of the remainders to the other sons ; and by reason of the warranty contained in the concord, it is a bar to them, even without assents. It is the same if he executes a feoffment, and accompanies it with a warranty. It remains to observe, that no warranty extends to bar any estate, either in possession, reversion, or remainder, unless before, or, at least, at the time that the warranty is made, it is divided or displaced. See *Seymour's case*, 10. Rep. 96. These, it is presumed, are the general outlines of the doctrine of warranty. The reader will observe, by what has been said on that subject, that at common law, the operation of a warranty to rebut the heir could hold in no case where the heir claimed the estate warranted from the ancestor by descent ; for, at the common law, wherever the ancestor had the inheritance, he could alien it from the issue ; therefore the warranty, as to the purpose of rebutter, was perfectly inoperative. The statutes have made no alteration in these respects. Had it been held that the statute *de donis* did not restrain the effect of the warranty to rebut the issue, this principle would have been broken into, as the heir in that case would have been rebutted by his ancestor's warranty from an estate which he claimed to take from him by descent ; but as the contrary construction was received, the principle remains as it did at the common law. The consequence is, that without assents the ancestor's warranty never did, and does not now bind the heir in any case, except where he takes by purchase ; and that when he does take by purchase, it binds him, either with or without assents, in every case where the contrary has not been enacted by statute. Upon enquiry it will be found, that the cases where the operation of warranty still prevails are reduced to two ; the first, that by the construction of the statute *de donis*, the ancestor's warranty binds the issues in tail with assents ; the other, that, at common law, the warranty of the ancestor, tenant in tail in possession, still continues to bar those in remainder without assents. It is observable, that all warranties are collateral, so far as they are extraneous to the estate, and by way of contradistinction to those rights, incidents, or qualities, which by their nature are inherent in, annexed to, or issuing out of the estate which they accompany. In this sense the word collateral frequently occurs in our law books. Thus, 1. Rep. 121. b. an use at common law is said to be a trust or confidence, not issuing out of land, but a thing collateral, annexed in privity to the estate. In the same sense it is used in the well-known distinction between those powers which are said to be relating to the land, and collateral powers. Thus, whether the warranty descends lineally or collaterally, whether the estate and the warranty descend from the same person or from different persons, and whether the warranty is considered as to its operation of rebutting the heir, or of entitling the alliance to vouch the warrantor, it is, in its nature, collateral to the estate which it accompanies. If in some cases it bars the heir from claiming, and in others it does not, it is only because the statute law has said, that in some cases where by the common law it would have operated as a bar, it shall no longer have that operation ; and if, by the statute *de donis*, the warranty of tenant

Sect. 714.

*MES si tenements soyent donnees a le baron et a sa feme, et a les beires de leur deux corps engendres, queux ont issue fits, et le baron discontinua le taile et morust, et puis la feme releffa ove garrantie et morust, cest garrantie n'est forsque un lineal garrantie a le fits; car le fits ne serra barre en ceo cas de fuer son breve de formedon, sinon que il ad assets per discent en fee simple per sa mere, pur ceo que leur issue en brieve de formedon covient conveyer a luy le droit come heire a son pere et a sa mere de leur * deux corps engendres per forme del done; et issint en tiel case, le garrantie de le pere et le garrantie de la mere ne sont forsque lineal garrantie al heire, &c.*

BUT if lands be given to the husband and wife, and to the heires of their two bodies begotten, who have issue a son, and the husband discontinue the taile and dieth, and after the wife release with warrantie and dieth, this warrantie is but a lineall warrantie to the son; for the sonne shall not be barred in this case to sue his writ of *formedon*, unlesse that hee hath assets by discent in fee simple by his mother, because their issue in the writ of *formedon* ought to convey to him the right as heire to his father and mother of their two bodies begotten *per formam doni*; and so in this case the warrantie of the father and the warrantie of the mother are but lineall warrantie to the heire, &c.

(9. Rep. 143. a. Ant. 187. a.)

HERE is a point worthy of observation, that albeit in this case the issue in taile must claime as heire of both their bodies, yet the warrantie of either of them is lineall to the issue; and yet the issue cannot claime as heire to either of them alone, but of both.

(2. Roll. Abr. 741.

If lands be given to a man and to a woman unmarried, and the heires of their two bodies, and they entermarrie, and are disseised, and the husband release with warrantie, the wife dieth, the husband dieth, albeit the donees did take by moities, yet the warrantie is lineall for the whole, because, as our author here saith, the issue must in a *formedon* convey to him the right as heire to his father and his mother of their two bodies engendred; and therefore it is collateral for no part.

Ant. 187. a. Sect. 25.)

Sect. 715.

ET nota, que en chescun cas ou home demanda tenements en fee taile per brieve de formedon, si ascun del issue en le taile que avoit possession, ou que n'avoit ascun possession, fait un garrantie, &c. si celui que suist le brieve de formedon pouvoit per ascun possibilitie, per matter que pouvoit estre en fait, conveyer a luy, per my celui que fist le gar-

AND note, that in everie case where a man demandeth lands in fee taile by writ of *formedon*, if any of the issue in taile that hath possession, or that hath not possession, make a warrantie, &c. if hee which sueth the writ of *formedon* might by any possibilitie, by matter which might be *en fait*, convey to him, by him that made the warrantie *per formam doni*, this is a *li-rantie*

* deux not in L. and M. nor Roh.

nant in tail did not bar the issue without assets, but barred it with assets, this is not from any pre-established distinction between lineal and collateral warranty, but because the judges, upon the construction of the statute *de donis*, held the issues in tail and the reversioner should not be deprived of the estate by the indirect and circuitous operation of warranty, when that statute had declared they should not be deprived of it by the direct alienation of common-law conveyances.—The chief part of the observations offered to the reader in this note, are grounded on what was said by lord Vaughan in the argument above referred to: he concludes it by saying, "The doctrine of the binding of lineal and collateral warranties, or their not binding, is an extraction out of men's brains and speculations many scores of years after the statute *de donis*.—And if Littleton (whose memory I much honour) had taken that plain way in resolving his many excellent cases in his Chapter of Warranty, of saying the warranty of the ancestor doth not bind in this case, because it is restrained by the statute of Gloucester, or the statute *de donis*; and it doth bind in this case, as at the common law, because not restrained by either statute (for when he wrote there were no other statutes restraining warranties, there is now a third, 11 H. 7.) his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of lineal and collateral; for that in truth is the genuine resolution of most, if not of all his cases; for no man's warranty doth bind, or not, directly, and *a priori*, because it is lineal or collateral; for no statute restrains any warranty under those terms from binding, nor no law institutes any warranty in those terms; but those are restraints by consequent only from the restraints of warranties made by statutes." Vaugh. 375.—Lord Holt is also reported to have said, "The true reason of collateral warranty was the security of purchasers, and for their encouragement; as also, for the establishing and settling the estates of such as were in by title, or descent cast; and this was the only security such persons could have at common law. And because the estate of such persons as are in by title are much favoured in law, these covenants that were for strengthening of them were favoured likewise. And in those days there was no need of lineal warranty; but, however, the force of that is taken away by the statute of *donis*, and common recovery is not upon the supposition of recompence in value, and never was within the statute, but always as much out of it as if it were so mentioned by express words." And this, he said, was my lord Hale's opinion. 12. Mod. 512.

rantie performe del done, ceo estun neall warrantie, and not collate-
lineal garrantie, et nemy collateral. rall.*

35. E. 3. Gar. 73.

OF this sufficient hath beene said before, *sed nunquam nimis dicitur quod nunquam satis dicitur*; for it is a point of great use and consequence.

Sect. 716.

(Vaugh. 377.)

(8. Rep. 51.)

ITEM, *si home ad issue trois fits, et il dona terre al eigne fits, a aver et tener a luy et a les heires de son corps engendres, et pur default de tiel issue, le remainder al mulnes fits, a luy et a les heires de son corps engendres, et pur default de tiel issue † del mulnes, le remainder al puisne fits, et les heires de son corps engendres; en cest cas, si l'eigne ‡ discontinua le taile en fee, et oblige luy et ses heires a garrantie, et morust sans issue, ceo est un collateral garrantie al mulnes fits, et serra barre a demaunders mesme la terre per force del remainder; pur ceo que le remainder est son title, et son eigne frere est collateral a cel title, que commence per force del remainder. En mesme le maner est, si le mulnes fits avoit mesme la terre per force del remainder, pur ceo que son eigne frere ne fist aucun discontinuance, mes morust sans issue de son corps, et puis le mulnes fait un discontinuance ove garrantie, &c. et morust sans issue, ceo est un collateral garrantie a le puisne fits. Et auxy en cest case, si aucun de les dits fits soit disseisie, et le pere que fist le done, &c. releffa a le disseisor tout son droit § ove garrantie, ¶ ceo est un collateral garrantie a celui fits sur que le garrantie descendist, causâ quâ supra.*

(Vaugh. 367. 377.)

ALSO, if a man hath issue three sonnes, and giveth land to the eldest sonne, to have and to hold to him and to the heires of his bodie begotten, and for default of such issue, the remainder to the middle sonne, to him and to the heires of his bodie begotten, and for default of such issue of the middle sonne, the remainder to the youngest son, and to the heires of his bodie begotten; in this case, if the eldest discontinua the taile in fee, and binde him and his heires to warrantie, and dieth without issue, this is a collateral warrantie to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collateral to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder, because his eldest brother made no discontinuance, but died without issue of his bodie, and after the middle make a discontinuance with warrantie, &c. and dieth without issue, this is a collateral warrantie to the youngest son. And also in this case, if any of the said sonnes be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warrantie, this is a collateral warrantie to that son upon whom the warrantie descendeth, *causâ quâ supra.*

Sect.

* &c. added L. and M. and Roh.
‡ &c. added L. and M. and Roh.

† del mulnes not in L. and M. not Roh.
¶ &c. added L. and M. and Roh.

‡ fits added in L. and M. and Roh.

Sect. 717.

ET sic nota, *que lou home* **AND** so note, that where a
que est collateral a le title, man that is collateral to the
** et ceo release ove garrantie,* title, and releaseth this with war-
&c. ceo est un collateral gar- rantie, &c. this is a collateral
rantie. warrantie.

HERE it appeareth, that it is not adjudged in law a collateral warrantie, in respect of
 the blood, for the warrantie may be collateral, albeit the blood be lineall; and the
 warrantie may be lineall, albeit the blood be collateral, as hath beene said. But it is in law
 deemed a collateral warrantie, in respect that he that maketh the warrantie is collateral to
 the title of him upon whom the warrantie doth fall; as by the example which *Littleton* here
 putteth, and by that which hath beene formerly said, is manifest.

8. R. 2. Car. 101. Vi. Sect. 704.

Sect. 718.

ITEM, *si pier do-* **ALSO**, if a father
na terre a son giveth land to his
eigne fits, a aver et eldest son, to have and
tener a luy et a les to hold to him and to
beires males de son the heires males of his
corps engendres, le re- body begotten, the re-
mainder a le second mainder to the second
fits, &c. si l'eigne fits sonne, &c. if the eldest
alienast en fee oveſque sonne alieneth in fee
garrantie, &c. et ad with warranty, &c.
issue female, et mo- and hath issue female,
rust sans issue male, and dieth without issue
ceo n'est pas collate- male, this is no collate-
rall garrantie al se- rall warranty to the se-
cond fits, † car il ne cond son, for he shall
serra barre de son ac- not bee barred of his
tion de formedon en action of *formedon* in
le remainder, pur ceo the remainder, because
que le garrantie dis- the warranty descend-
cendist al file del eigne ed to the daughter of
fits, et nemy al se- the elder son, and not
cond fits: car ches- to the second sonne:
cun garrantie que for every warrantie
discendist, discendist which descends, de-
a celuy que est beire scendeth to him that is
a luy que fist le gar- heire to him who made
rantie, per le common the warrantie, by the
ley. common law.

HERE is rehearsed a
 maxime of the common
 law, that every warrantie
 doth descend upon him that
 is heire to him that made the
 warrantie, by the common
 law, as by this example it ap-
 peareth.

Vid. Sect. 3. 603. 735. 736. 737.
(Ant. 329. a. Cro. Eliz. 72.)

*A celuy que est beire
 a luy que fist le garrantie
 per le common ley, &c.*

Hereupon many things wor-
 thy to be knowne are to be
 understood.

[a] First, that if a man in-
 feoffeth another of an acre of
 ground with warrantie, and
 hath issue two sons, and dieth
 seised of another acre of land,
 of the nature of burrough
 English, the feoffee is implead-
 ed, albeit the warrantie de-
 scendeth onely upon the eldest
 sonne, yet may he vouch them
 both; the one as heire to the
 warrantie, and the other as
 heire to the land: for if he
 should vouch the eldest son
 only, then should he not have
 the fruit of his warranty, viz.
 a recoverie in value; the
 youngest son only he cannot
 vouch, because he is not heire
 at the common law, upon whom
 the warrantie descendeth. (1)

[a] 40. E. 3. 14.

(Mod. Rep. 96. 2. Cro. 218.)

[b] So it is of heires in
 gavelkind, the eldest may bee
 vouched as heire to the war-
 ranty,

[b] 22. E. 4. 10. 4. E. 3. 55.
27. H. 6. 1. 2. 11. E. 3. Dec. 7.
(8. Rep. 8. b.)

* &c. added L. and M. and Roh.

† car il ne serra barre—ne luy ledera, L. and M. and Roh.

(1) 38. E. 3. 22. 43. E. 3. 19. 48. Aff. 41. 4. E. 3. 55. 21. E. 3. 46. 21. E. 3. 36. 11. H. 7. 12. 6. H. 7. 2. Hale's MSS.

[c] 49. Aff. 4. 38. E. 3. 22.
(Hob. 25.)

[d] 32. E. 3. Vouch. 94.
35. H. 6. 33.

Pl. Com. 515.

(2. Cro. 218.)

[e] 17. E. 2. t. Recover in va-
lue 33. 1. E. 3. 12. 33. E. 3.
Judgm. 222. 14. E. 3. ib. 160.
10. E. 3. 52. 18. E. 3. 51.
Lib. 1. fol. 96. Sarileye's case.

[f] 32. E. 3. Vouch. 94.
per Greene.
(Plowd. 11. a. Manxel's Case.)

[g] Vide Pl. Com. fol. 514.
(3. Rep. 5. 10. Rep. 35.
Dr. and Stud. 41. b.
8. Rep. 101. b. See Cro. Eliz. 670.)

[h] 17. E. 3. 59. 20. E. 3.
Vouch. 129. 32. E. 3. Vouch. 94.
5. H. 7. 2.

[i] 11. H. 7. 12. 11. E. 3.
tit. Det. 7. Dy. 5. El. 238.
(Moor. 74.)

[k] 11. H. 7. 12.
(2. Cro. 25. b. 218.
1. Suderl. 238. 272. 420.
Hob. 25.)

ranty, and the other sonnes in respect of the inheritance descended unto them. [c] And in like sort, the heire at the common law, and the heire of the part of the mother, shall be vouched: but the heire at the common law may be vouched alone in both these cases, at the election of the tenant: *et sic de similibus*. [d] In the same manner if a man dieth seised of certaine lands in fee, having issue a sonne and a daughter by one venter, and a sonne by another, the eldest sonne entreth and dieth, the land descends to the sister; in this case the warrantie descendeth on the sonne, and he may be vouched as heire, and the sister, as heire of the land: in which and the other case of burrough English, the sonne and heire by the common law having nothing by descent, the whole losse of the recoverie in value lieth upon the heires of the land, albeit they be no heires to the warrantie. Then put the case that there is a warrantie paramount, Who shall deraigne that warrantie? and to whom shall the recompence in value goe? Some have said, that as they are vouched together, so shall they avouch over, and that the recompence in value shall enure according to the losse; and that the effect must pursue the cause, as a recoverie in value by a warrantie of the part of the mother shall goe to the heire of the part of the mother, &c.

Some others hold, that it is against the maxime of law, that they that are not heires to the warrantie should joyne in voucher, or to take benefit of the warrantie which descended not to them; but that the heire at the common law, to whom the warrantie descended, shall deraigne the warrantie, and recover in value; and that this doth stand with the rule of the common law.

Others hold the contrarie, and that this should be both against the rule of law, and against reason also; for by the rule of law [e] the vouchee shall never sue to have execution in value, untill execution be sued against him. But in this case execution can never be sued against the heire at the common law, therefore he cannot sue to have execution over in value. Secondly, it should be against reason, that the heire at the common law should have *totum lucrum*, and the speciall heires *totum damnum*. I finde in our bookes, [f] that this reason is veiled, that the speciall heire should not be vouched only; for (say they) if the speciall heires should be vouched only, then could not they deraigne the warrantie over; which should be mischievous, that they should lose the benefit of the warrantie, if they should be vouched only. But if the heire at the common law were vouched with them, (as by the law he ought) all might be saved; and therefore studie well this point how it may be done.

[g] If tenant in generall taile be, and a common recoverie is had against him and his wife, where his wife hath nothing, and they vouch, and have judgement to recover in value, tenant in taile dieth, and the wife surviveth; for that the issue in taile had the whole losse, the recompence shall enure wholly to him; and the wife, albeit she was partie to the judgement, shall have nothing in the recompence, for that she loseth nothing.

[h] If the bastard eigne enter and take the profits, he shall be vouched only, and not the bastard and the mulier; because the bastard is in appearance heire, and shall not disable himselfe.

[i] If a man be seised of lands in gavelkinde, and hath issue three sonnes, and by obligation bindeth himselfe and his heires and dieth, an action of debt shall be maintainable against all the three sonnes, for the heire is not chargeable unlesse he hath lands by descent.

[k] So if a man be seised of land on the part of his mother, and binde himselfe and his heires by obligation, and dieth, an action of debt shall lie against the heire on the part of the mother, without naming of the heire at the common law. And so note a diversitie betwene a personall lien of a bond, and a reall lien of a warrantie.

Sect. 719.

[l] 24. E. 3. 36. 27. E. 3. age 108.
34. E. 3. 26. 40. E. 3. 9.
37. H. 8. Br. Notare. 1. & 40.
& m. Done & Rem. 61.

(Ant. 17. b. 22. b.
2. Roll. Abr. 417.
1. Roll. Abr. 627, 628.)

HERE it appeareth, that [l] whenever the ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heires, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder; (1) and therefore here the remainder, to the heires females, vesteth in the tenant in taile himselfe.

* *NOTA, si terre soit done a un home, et a les heires males de son corps engendres, et par default de tiel issue, le remainder ent a ses heires females de son corps engendres, et puis le*

NOTE, if land bee given to a man, and to the heirs males of his bodie begotten, and for default of such issue, the remainder thereof to his heirs females of his body begotten, and after the donee

* Nota—Item, L. and M. and Roh.

(1) In a late very distinguished publication it is observed, that "where there is a gift to A. and his heirs for ever, or to A. and the heirs of his body begotten, the first words (to A.) create an estate for life; the latter (to his heirs, or the heirs of his body) create a remainder in fee, or in tail, which the law, to prevent an abeyance, refers to and vests in the ancestor himself, who is thus tenant for life, with an immediate remainder in fee or in tail; and then by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee, or tenant in tail in possession." See *for Wm. Blackstone's* argument in the case of *Perrin v. Blake*, published by Mr. Hargrave among his *Tracts*, fol. 500. This exposition of the expression in question he afterwards applies, with great ability, in his investigation of the rule in *Shelley's case*. He lays it down as the great fundamental maxim upon which the construction of every devise must depend, that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rules of law, and no farther. He makes a distinction between those rules of law which are to be considered as the fundamental rules of the property of this kingdom, and are therefore of that essential, permanent and substantial kind, which cannot be exceeded or transgressed by any intention of a testator, however clearly or manifestly expressed; and those rules of a more arbitrary, technical, and artificial kind, which the intention of a testator may controul. He then supposes that there is a third class of rules, of a still more flexible nature. Among the rules of the first class he reckons these: that every tenant in fee simple, or fee tail, shall have the power of alienating his estates, by the several modes adapted to their respective interests; that no disposition shall be allowed, which in its consequence tends to a perpetuity; that lands shall descend to the eldest son or brother alone, or to all the daughters or sisters in partnership. Among the rules of the second class he reckons those rules of interpretation by which the courts invariably construe particular modes of expression to denote a particular intention in the testator. Thus, says he, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the courts consider it as evidence that he intended the devise should be only tenant for life; but if he devises, in like manner, a chattel interest, the courts consider it to be evidence of his intention that the devisee should have the total property. Among the rules of the third class he reckons the rule in *Shelley's case*. Having admitted that the second and third class of rules allow of exceptions, when it appears to be the testator's intention that the operation of his devise should be different from that which the legal operation of the words in which it is penned would be, he adds, that this intention shall not have this effect, unless it is manifest and certain; so that if his intention that his words should operate contrary to their technical and legal import, does not appear by express words, or by necessary implication, the legal operation of the words must take effect. He applies this rule to the case of *Perrin v. Blake*. He argues, that it does not appear by any evidence that the testator intended his words should not have their legal operation: he

donee en le taile fait
feoffment en fee oves-
que garrantie accor-
dant, et ad issue fits
et file et morust,
cel garrantie n'est
forsque lineal gar-
rantie a le fits a de-
maunder per brieve
de formedon en le
discender; et auxy il
n'est forsque lineall a
le file, a demaunder
mesme la terre per
brieve de formedon
en le remainder, si-
non * frere deviaist
sans issue male, pur
ceo que el claime come
beire female de la
corps son pere engen-
dres. Mes en cest
cas, si son frere en sa
vie releasast al discon-
tinuee, &c. ove gar-
rantie, &c. et puis
morust sauns issue, ceo
est un collateral gar-
rantie a le file, pur
ceo que el ne poit con-
veyer a luy le droit
que el ad per force
de le remaynder per
ascun meane de dis-
cent per son frere,
† pur ceo ‡ que le frere
est collateral a le title
sa soer, et pur ceo
son garrantie est col-
lateral, &c.

donee in tayle maketh
a feoffment in fee
with warrantie accor-
dingly, and hath issue
a son and a daughter
and dieth, this warran-
tie is but a lineall war-
rantie to the sonne to
demand by a writ of
formedon in the dis-
cender; and also it
is but lineall to the
daughter, to demand
the same land by writ
of formedon in the re-
maynder, unlessse the
brother dieth without
issue male, because shee
claimeth as heire fe-
male of the bodie of
her father ingendred.
But in this case, if
her brother in his life
release to the discon-
tinuee, &c. with war-
rantie, &c. and after
dieth without issue, this
is a collateral warran-
ty to the daughter,
because shee cannot
convey to her the right
which shee hath by
force of the remainder
by any meanes of dis-
cent by her brother,
for that the brother is
collateral to the title
of his sister, and there-
fore his warranty is
collateral, &c.

knowne, that for learning
fake, and to find out the rea-
son of the law, these limita-
tions to the heires males of
the bodie, and after to the
heires females of the bodie
may be put: but it is dan-
gerous to use them in con-
veyances, for great incon-
veniencies may arise ther-
upon; for if such a tenant
in tayle hath issue divers
sons, and they have issue di-
vers daughters, and likewise
if tenant in tayle hath issue
divers daughters, and each
of them hath issue sonnes,
none of the daughters of
the sons, nor the sonnes of
the daughters, shall ever in-
herite to either of the said
estates tayle: and so it is of
the issues of the issues, for
that (as hath beene said) the
issues inheritable must make
their claime eyther onely by
males, or onely by females,
so as the females of the
males, or males of the fe-
males, are wholly excluded
to bee inheritable to eyther
of the said estates tayle: but
where the first limitation
is to the heires males, let
the limitation be, for de-
fault of such issue, to the
heires of the bodie of the
donee, and then all the is-
sues, be they females of
males, or males of females,
are inheritable.

If a man give lands to a
man, to have and to hold
to him and the heires males
of his bodie, and to him and
to the heires females of his
bodie, the estate to the heires
females is in remaynder,
and the daughters shall not
inherit any part, so long as
there is issue male; for the
estate to the heires males is
first limited, and shall be first
served; and it is as much
to say, and after to the heires
females, and males in con-
struction of law are to be pre-
ferred.

1. H. 6. 4. 11. H. 6. 13. 14.
28. H. 6. Devif. 18. Statham.
Devife. Pl. Com. 414.
20. H. 6. 43. Vid. Litt. ca. Taile,
Sect. 24. 37. H. 8. Br. done &
rem. 61. & tit. nofme 1. & 40.

(Ant. 25. a. b.)

(Vaugh. 358. g. 376. Ant. 374. a.)

Sect.

* *finon—fi son*, L. and M. Roh. Pinson, Redman, and MSS. This reading, which materially alters the sense of the above passage of Littleton, was much relied on by lord Vaughan as above cited, and is also accordingly confirmed by edit. 1577, by R. Tottel; 1594, by C. Yettsweirt; and by that of 1639. It is however observable, that the text stood as above in the first edition of Coke upon Littleton 1628, and in all the editions to the 9th inclusive. † *et* added L. and M. and Roh. ‡ *que* not in L. and M. nor Roh.

he says, the question is not whether the testator intended the ancestor should or should not have a power of alienating the lands devised to him, or should have only an estate for his life. He admits it to be clear, that he intended the ancestor should not have a power of alienating the lands, and that he should take only an estate for his life: but the real question, he says, is, how the heirs were intended to take, whether as descendants or purchasers. If the testator intended they should take as purchasers, the ancestor remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, says he, by operation and consequence of law the inheritance is vested in the ancestor. He says, that in the case of Perrin and Blake, it is neither clearly expressed nor manifestly to be implied from any part of the testator's will, that he intended the heirs should take as purchasers: he therefore concludes, that the words in question should be construed according to their legal operation; and consequently, that in conformity to the rule laid down in Shelley's case, they should operate not as words of purchase, but as words of descent, and the ancestor therefore take an estate in tail.—Mr. Hargrave, in his observations concerning the rule in Shelley's case, remarks, that those who wish to avoid the rule avow, that they consider it as subordinate to the intention of the testator, as a rule of interpretation, as merely a technical construction of words, which yields to the intention whenever they are opposed to each other; that as soon as they discover that it is not the testator's intention that the first taker should have a power of barring the entail to his heirs, they think the victory over the rule is complete. On the other hand, those who wish to support the rule insist, that it is a rule of interpretation, established on decrees of the most authoritative decisions, which cannot be departed from without levelling the great land marks, by which the titles to real property are ascertained, and establishing in their room a monstrous latitude of uncertain and arbitrary construction. He says, he finds something to approve, and something to condemn on both sides of these discordant comments upon the rule; and that in both there is one common error. To the opponents of the rule he admits, that where the rule would disappoint a lawful intention sufficiently expressed, it ought not to be effected. But he asks, whether the intention is lawful. The rule, as he considers it, is a conclusion of law upon certain principles—so absolute, as not to have any thing to say to the intention, if these premises really belong to the case; and these premises, he insists, are an intention by heirs of the body, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and so to build a succession upon his preceding estate of freehold. This being so, if in such cases the word *heirs* is used in that its large and proper sense, it is a contradiction to the rule, to intend that the remainder to the heirs shall operate by purchase, and such intent is not lawful; so that it is incumbent on those who oppose this application of the rule, to shew, that the word *heirs* is used in a qualified sense, and intended merely to describe certain persons, who, at the death of the tenant for life, may answer that description, and to give a succession of heirs to them: this being shewn, the rule, he says, no longer applies. But nothing less than

Sect. 720.

(9. Rep. 127.)

(Plowd. 403. a.)

ITEM, jeo ay oye dire, que en temps le roy Richard le second, il y fuit un justice del common banke, demurrant en Kent, appel Richel, que avoit issue divers fits, et son entent fuit, que son eigne fits averoit certaine terres et tenements a luy, et a les heires de son corps engendres; et pur default d'issue, le remainder a le second fits, &c. et issint a le tierce fits, &c. et pur ceo que il voile que nul de ses fits alieneroit, ou ferroit garrantie pur barrer ou leder les auters queux serront en le remainder, &c. il fist faire tiel indenture a tiel effect, c'estasca-voir, que les terres et tenements fueront dones a son eigne fits sur tiel condition, que si l'eigne fits aliena en fee, ou en fee taile, &c. ou si ascun de ses fits alienast, &c. que adonque lour estate cessera et ferroit void, et que adonque mesmes les terres et tenements immediate remaindront a le second fits, et a les heires de son corps engendres, * et sic ultra, le remainder as auters de ses fits, et livery de seisin fuit fait accordant.

ALSO, I have heard say, that in the time of king Richard the second, there was a justice of the common place, dwelling in Kent, called Richel, who had issue divers sonnes, and his intent was, that his eldest sonne should have certaine lands and tenements to him, and to the heires of his bodie begotten; and for default of issue, the remainder to the second sonne, &c. and so to the third sonne, &c. and because he would that none of his sons should alien, or make warrantie to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee taile, &c. or if any of his sons alien, &c. that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son, and to the heires of his body begotten, et sic ultra, the remainder to his other sonnes, and livery of seisin was made accordingly.

21. H. 6. f. 33. L. 6. f. 42. b.
fir Anthony Mildmaye's case.

(1. Rep. 84.)

[m] 2. H. 4. f. 21. in Action
sur le case.

JEO ay oye dire, &c. Those things that one hath by credible hearefay, by the example of our author, are worthy of observation. This invention, devised by justice Richel in the reigne of king Richard the second, who was an Irishman borne, and the like by Thirning, chiefe-justice in the reigne of Henry the fourth, were both full of imperfections; for *Nihil simul inventum est et perfectum*, and *Saepe viatorem nova non vetus orbita fallit*; and therefore new inventions in assurances are dangerous. And hereby it may appeare, that it is not safe for any man (be he never so learned) to be of counsell with himselfe in his owne case, but to take advice of other great and learned men.

Non profunt dominis quae profunt omnibus, artes.

And the reason hereof is, *in suo quisque negotio hebetior est, quam in alieno.*

[m] And the same judge, in his owne name, &c. brought an action upon his case against others, and obtained a verdict. so as the right of the cause was tried on his side; yet for that upon his owne shewing in his count the action did not lye, *ex assensu omnium iudiciorum praeter querentem Richel*, judgement was given against him: but let us now leave this judge for example to others, and let us return to our author.

Sect.

* ceo sur mesme condition, scilicet, que si le second fits alienast, &c. que adonques son estat cessera, et que adonques mesmes les terres et tenements remaindront al tierce fits, et a les heires de son corps engendres, added L. and M. and Roh.

than its appearing, that by the heirs of the body or heirs general, the whole line and succession of heirs to the tenant for life, or, in other words, the whole of his inheritable blood was not meant, can deliver the case from the rule. He says, that the genuine rule in Shelley's case, is part of an ancient policy of the law to guard against the creation of estates of inheritance, with qualities, incidents, or restrictions, foreign to their nature. Thus it is one of the properties of an estate in fee simple, that it may be alienated by the party seised, so that a condition not to alien is void at law. Thus curtesy and dower are incidents to estates of inheritance, and inseparably annexed to them; that these known examples of incidents, inseparable from inheritance, lead to a discovery of a foundation for the rule, which in a moment renders it paramount to, and independent of private intention. It is one branch of a policy of law, adopted to prevent annexing to a real descent the qualities and properties of a purchase, and so is calculated to render impossible the creation of an amphibious species of inheritance; that is, an estate of freehold, with a perpetual succession to heirs, without the other properties of inheritance; in other words, an inheritance in the first ancestor, with the privilege of vesting in the heirs by purchase the succession of one to another, without the legal effects of a descent, a compound of descent, and purchase.—Such a commixture would, he says, have put an end to all those lines of distinction by which we so easily and certainly discriminate inheritances from mere estates of freehold. It would have been a continual source of fraud upon feudal tenure. When the heir came into the tenure by descent, the lord was entitled to those grand fruits of military tenure, wardship and marriage; but if he took by purchase, only the trifling acknowledgment of relief was due to the lord. If the heir were allowed to succeed by purchase, it would defeat the specialty creditors of the ancestor; it would have suspended all actions for the inheritance of land. If private intention had been permitted to annex to real heirship the contradiction of taking by purchase, what principle of our law would have remained to resist stripping the title by succession of all the other effects and consequences legally appropriated to it? Why might it not have given to purchase the qualities of descent? It is a positive rule of our law, that a man cannot raise a fee simple to his own right heirs as purchasers, either by legal conveyance, or by conveyance to uses. By this it is meant, that where the ancestor wills that at his death his heirs shall, by gift from him, come to that very inheritance which the law of descent and succession throws upon them, it is construed as a vain and fruitless attempt to give that to the heirs which the law vests in them. It amounts to a prohibition upon the ancestor against making his heirs purchasers, by giving at his death what the law confers without his aid. But this rule applies only to the acts of the ancestor; it was there-

Sect. 721.

MES il semble per
reason, que tous
tielx remainders en
la forme avantdit
sont voides et de nul
value, et ceo pur
trois causes. Un cause
est, pur ceo que ches-
cun remainder que
commence per un fait,
il covient que le re-
mainder soit en luy a
que le remainder est
tayle per force de
mesme le fait, avant
liverie de seisin est
fait a luy que ave-
ra le franktenement;
car en tiel case le nes-
sance et le estre de le
remainder est per le
livery de seisin a celuy
que avera le frank-
tenement, et tiel re-
mainder ne fuit al se-
cond fts al temps
de livery de seisin
en le cas avantdit,
&c.

BUT it seemeth by
reason, that all
such remainders in the
forme aforefaid are
void and of no value,
and that for three
causes. One cause is,
for that every remain-
der which beginneth
by a deed, it behooveth
that the remainder
be in him to whom
the remainder is en-
tailed by force of the
same deed, before the
livery of seisin is made
to him which shal
have the freehold; for
in such case the grow-
ing and the being
of the remainder is by
the livery of seisin to
him that shall have
the freehold, and such
remainder was not to
the second sonne at the
time of the livery of
seisin in the case afore-
faid, &c.

HERE our authour is
of opinion, that these
remainders in the forme afore-
faid, are void and of no va-
lue for three causes.

Un cause est, &c.

Here hee setteth downe a rule
concerning remainders, viz.
every remainder which com-
menceth by a deed ought to
vest in him to whom it is li-
mitted, when livery of seisin
is made to him that hath the
particular estate.

First, *Littleton* saith by
deed, [n] because if lands
bee granted and rendred by
fine for life, the remainder
in taile, the remainder in fee,
none of these remainders are
in them in the remainder, un-
till the particular estate be
executed.

Secondly, that the remain-
der bee in him, &c. at the
time of the livery. This is re-
gularly true; but yet it hath
divers exceptions. First, un-
lesse the person that is to take
the remainder be not *in rerum*
natura; [o] as if a lease for
life be made, the remainder
to the right heires of *I. S.*
I. S. being then alive, it suf-
ficeth that the inheritance
passeth presently out of the
lessour, but cannot vest in the
heire of *I. S.* for that living
his father he is not *in rerum*
natura, for *non est hæres vi-*
ventis; so as the remainder

(Plowd. 25. a. 29. a.
a. Cro. 360.)

[n] 7. R. a. Scire facias,
(Ant. 354. b.)

(Cro. Eliz. 360.)

(a. Roll. Abr. 419.)
[o] 32. H. 6. tit. Feoffments &
Falls, 99. 27. E. 3. 87.
11. R. 2. Detinue, 46.
2. H. 7. 13. 12. H. 7. 27.
12. E. 4. 2. 21. H. 7. 11.
7. H. 4. 23. 11. H. 4. 74.
18. H. 8. 3. 27. H. 8. 42.
38. E. 3. 26. 30. Aff. 47.
6. R. 2. qu. Jur. clam. 20.
(1. Rep. 94.)

is good upon this contingent, viz. if *I. S.* die during the life of the lessee.

[p] And so it is if a man make a lease for life to *A. B.* and *C.* and if *B.* survive *C.* then the remainder to *B.* and his heires. Here is another exception out of the said rule; for albeit the person be certaine, yet inasmuch as it depends upon the dying of *B.* before *C.* the remainder cannot vest in *C.* presently. And the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibilitie of the death of one man before another, which is a common possibilitie.

A man letteth lands for life upon condition to have fee, and warranteth the land *in forma prædictâ*, afterward the lessee performeth the condition whereby the lessee hath fee, the warranty shall extend and increase according to the state. And so it is in that case if the lessor had died before the performance of the condition, the warrantie shall rise and increase according to the estate, and yet the lessor himselfe was never bound to the warrantie, but it hath relation from the first livery. And by this it appeareth that a warranty being a covenant reall executory, may extend to an estate *in futuro*, having an estate, whereupon it may worke in the beginning. But if a man grant a feignorie for yeares upon condition to have fee with

[p] Pl. Com. Colthirst's case,
fol. 25. 29.
(3. Rep. 20. 2. Rep. 57. a. b.)

(8. Rep. 73.)

(Hob. 130. 131.)

therefore requisite to have a like barrier as to acts between persons not standing in that relation towards each other. This is effected by the rule in *Shelley's case*. Thus explained, says he, the rule in *Shelley's case* can no longer be treated as a medium for discovering the testator's intention. The ordinary rules for the interpretation of deeds should be first resorted to. When it is once settled that the donor or testator has used words of inheritance, according to their legal import; has applied them intentionally to comprize the whole line of heirs to the tenant for life; has made him the terminus, by reference to whom the succession is to be regulated; then the rule in *Shelley's case* applies, and the heir shall not take by purchase. But if it shall be decided that the testator or donor did not mean to involve the whole line of heirs to the tenant for life; did not mean to ingraft a succession on his estate, and to make him the ancestor or terminus; but instead of this, intended to use the word heirs in a limited, restrictive, and qualified sense; intended to point at that individual person who should be the heir at the moment of the ancestor's decease; intended to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the ground-work of a succession of heirs; to construe him or her the ancestor, terminus, or stock, for the succession to take its course from:—in every one of these cases, the premises are wanting upon which the rule in *Shelley's case* interposes its authority, and the rule therefore becomes extraneous matter.—Previously to Mr. Hargrave's publication, the rule in question had been discussed, with infinite learning and ability, by Mr. *Fearne*, in his *Essay on Contingent Remainders*. In this justly celebrated work, Mr. *Fearne* observes, that the rule in *Shelley's case* is supposed to have been originally introduced to prevent frauds upon the tenure; and that if such a limitation had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit: if not, he might have let it remain to his heirs in as beneficial manner as if it had descended to him, at the same time that the lord would have been deprived of those fruits of the tenure, which would have accrued to him upon a descent. He then minutely and accurately examines all the cases upon the subject, which had come before the courts of law and equity, and investigates very fully the principles upon which they were determined. He says, "that in the case of *Perrin and Blake*, the question is not whether the words, *heirs of the body*, may not, under certain circumstances, be taken as words of purchase; but whether those words, standing perfect, independent, and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed as words of purchase." To this he replies, "that not one of the cases, till that of *Perrin and Blake*, can fairly be urged in support of an affirmative answer to that question." The three very masterly performances referred to in this note, will make the reader fully acquainted with the general merits of the case in question, and of the several points of legal learning, upon the discussion of which it either immediately or incidentally depends. But as the subject is necessarily of a very abstruse and intricate nature, and the arguments used in support of the different opinions respecting it are necessarily complicated and interwoven with one another, the following discrimination of the leading points upon which the decision of the case must ultimately turn, will, perhaps, be useful to those who wish to obtain an accurate knowledge of the doctrine in dispute.—1. Let us first suppose, that after a devise to a man for life, and a subsequent devise to the heirs of his body, the testator

with a warranty *in formā prædictā*, and after the condition is performed, this shall not extend to the fee, because the first estate was but for yeares, which was not capable of a warranty. And so it is, if a man make a lease for yeares, the remainder in fee, and warrant the land *in formā prædictā*, he in the remainder cannot take benefit of the warranty, because he is not partie to the deed; and immediately he cannot take, if he were partie to the deed, because he is named after the *habendum*, and the estate for yeares is not capable of a warrantie. And so it is if land be given to *A.* and *B.* so long as they joyntly together live, the remainder to the right heires of him that dieth first, and warrant the land *in formā prædictā*; *A.* dieth, his heire shall have the warrantie; and yet the remainder vested not during the life of *A.* for the death of *A.* must precede the remainder, and yet shall the heire of *A.* have the land by descent.

1. Rep. 17.)

Sect. 722.

S *I le primer fits alienast, &c.* By the alienation of the donee two things are wrought:

First, the franktenement and fee is in the alienee.

Secondly, the reversion is devested out of the donor.

[7] 21. H. 7. 11. 27. H. 8. 24.

[7] 6. R. 2. quid juris clam. 20. (Perk. Sect. 729. fol. 275. 276. Dyer 209. a. Plowd. 487.)

Argumentum ex absurdo. (5. Rep. 8.2.)

[7] 20. H. 8. Presentments al. Equites. Br. 52. 33. H. 8. ib. 55. 29. H. 8. Dicr. 35. 11. Eliz. 282. 283. (5. Rep. 56.)

[7] 15. H. 7. 7. 19. E. 3. quar. imp. 154. (3. Cro. 790. 791.)

[7] And therefore by the alienation that transferreth the freehold and fee simple to the alienee, there can no remainder be raised and vested in the second sonne. [7] As if a man make a lease for life upon condition that if the lessor grant over the reversion, that then the lessee shall have fee; if the lessor grant the reversion by fine, the lessee shall not have fee; for when the fine transferreth the fee to the conusee, it should bee absurd, and repugnant to reason, that the same fine should worke an estate in the lessee; for one alienation cannot vest an estate of one and the same land to two severall persons at one time.

In a man's owne grant, which is ever taken most forcibly against himselfe, the reason of *Littleton* doth hold; for it hath beene resolved by the justices, [7] that if a man seised of an advowson in fee by his deed granteth the next presentation to *A.* and before the church becometh void, by another deed grant the next presentation of the same church to *B.* the second grant is void, for *A.* had the same granted to him before; and the grantee shall not have the second avoydance by construction, to have the next avoydance, which the grantor might lawfully grant, for the grant of the next avoydance doth not import the second presentation. [7] But if a man seised of an advowson

L *E* *second cause est, si le primer fits alienast les tenements en fee, adonques est le franktenement et le fee simple en l'alienee, et en nul autre; et si le donour avoit ascun reversion, per tiel alienation le reversion est discontinue: adonques coment per ascun reason poit* ceo estre que tiel remainder commencera son estre et son nessance immediate apres tiel alienation fait a un estrange, que ad per mesme l'alienation franktenement et fee simple, &c. Et auxy si tiel remainder serroit bone, adonques purroit il enter sur l'alienee, lou il n'avoit ascun maner de droit avant l'alienation, que serra inconvenient.*

T *HE* second cause is, if the first sonne alien the tenements in fee, then is the freehold and the fee simple in the alienee, and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued: then how by any reason may it be, that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee simple, &c.? And also if such remainder should bee good, then might hee enter upon the alienee, where he had no manner of right before the alienation, which should bee inconvenient.

* *ceo* not in L. and M. nor Roh.

in expresse words declares it to be his intention, that by the devises in question he means to give the ancestor the estate for his life only, and to give an estate in fee by purchase to his heirs: Is the rule in question of that very rigid and forcible nature, as to be unaffected and uncontroled by these expresse words?—II. If the answer to this question is, that the expresse declaration of the testator will, in this case, controul the legal operation of the words, heirs of the body, the next question is, Can any words short of an expresse declaration have this effect? or, in other language, Can that rule be controulled by words of implication?—III. If the answer is in the affirmative, the next enquiry is, Whether, to form such an implication as will controul the rule, it is sufficient that it appears to be the testator's intention that the ancestor should take an estate for his life only?—IV. Or, Must it also appear to be his intention that the heirs should take, not as descendants, but as purchasers?—V. Must it also appear how or what estates he intends the heirs to take?—VI. And how and what estates may the heir take by the law of England, his ancestor taking by the same instrument an estate for his life only?—Such, perhaps, will be the process of enquiry, if it is admitted, that there are cases where, in devises of this nature, the heirs will take by purchase; but if that is not admitted; if it is asserted, that where a testator has once devised to a man for life, and afterwards to the heirs of his body, no other words, however positive and expresse, shall controul the legal operation of the words, heirs of his body; it will then remain to inquire into the ground of the supposed inflexibility and rigidity of the rule.—1. Is it that it is against the law of the land, that lands should be conveyed to the ancestor for life with such estate or estates in remainder to the heirs of his body, as those heirs must be supposed to take, if they take as purchasers?—To resolve this question with accuracy, it should first be settled what estate or estates the heirs of the body would take under this construction; and then it should be supposed that such estate or estates are devised by the most accurate and scientific legal expressions: if devises so worded would be held contrary to law, the necessary conclusion is, that the object intended to be effected by the testator is against law.—II. If it appears that such estate or estates are not contrary to the law, but it still is contended that a devise to one for life, and after his decease to the heirs of his body, shall make the heirs take by descent, contrary to the testator's intention, the only remaining ground to support that conclusion is, that to make the heirs take by descent in devises of this nature, is a point of construction so fixedly and unalterably settled by judicial determination, that it is not now in the breast of any court to deviate from it. By investigating the rule in question under the above heads of enquiry, a regular and distinct view may, it is conceived, be obtained of the different points of law which relate to it, and of the different grounds upon which an opinion upon it may be framed.—It is greatly to be lamented that there should be so much uncertainty and difficulty in the application of a rule of law, to which resort must be so often had on the construction of wills. All parties agree that the rule has an existence; but from the liberality which is allowed in the construction of wills, it has been contended that it does not extend to those devises to which it cannot be applied, without

son in fee take wife; now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heire shall present twice, the wife shall have the third presentation, and the grantee the fourth; for in this case it shall be taken the third presentation, which he might lawfully grant: and so note a diversitie betweene a title by act in law, and by act of the partie; for the act in law shall worke no prejudice to the grantee.

(2. Cro. 691. contra Winch 94. a. c. Hob. 120. Ant. 189. a.)

Auxi si tiel remainder ferroit bone, &c. The force of this argument is, that seeing the estate of the alienee (albeit the words of the condition be, that the state should cease and be void) being an estate of inheritance in lands or tenements, cannot cease or be void before the state be defeated by entrie; then if this remainder should be good, then must it give an entrie upon the alienee to him that had no right before, which should be against the expresse rule of law, viz. that an entrie cannot be given to a stranger to avoid a voydable act, as before hath beene said in the Chapter of Conditions.

(Ant. 214. b. 218. a.)

Lequel serra inconvenient. Here note three things. First, that whatsoever is against the rule of law is inconvenient. Secondly, that an argument *ab inconvenienti* is strong to prove it is against law, as often hath beene observed. Thirdly, that new inventions (though of a learned judge in his owne profession) are full of inconvenience, *Periculosum est res novas et inusitatas inducere.*

Vide Sect. 87, &c.

Eventus varios res nova semper habet.

Sect. 723.

LA tierce cause est, quant la condition est tiel, que si l'aigne fits alienast, &c. que son estate cessera ou ferroit void, &c. donques apres tiel alienation, &c. poit le donor enter per force de tiel condition †, coment il semble; et issint le donor ou ses beires en tiel case doivent puis tost aver la terre que le second fits, que n'avoit ascun droit devant tiel alienation; et issint il semble que tielx remainders en le cas avantdit sont voides ‡.

THE third cause is, when the condition is such, that if the elder sonne alien, &c. that his estate shall cease or bee void, &c. then after such alienation, &c. may the donor enter by force of such condition, as it seemeth; and so the donor or his heires in such case ought sooner to have the land than the second sonne, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesayd are void.

HERE it is to bee observed, that part of the condition that prohibiteth the alienation made by tenant in taile is good in law, with such distinction as hath beene before said in the Chapter of Conditions. And the consequent of the condition, viz. that the lands should remaine to another, &c. is void in law, and by the opinion of *Littleton* the donor may re-enter for the condition broken; for *Utile per inutile non vitiatur*: which being in case of a condition for the defeating of an estate, is worthy of observation.

(1. Rep. 48. 62. 120. 10. Rep. 35. 9. Rep. 127. 6. Rep. 40. 2. Rep. 50. Ant. 224. a.)

And it is to bee noted, that after the death of the donor, the condition descendeth to the eldest sonne, and consequently his alienation doth extinguish the same forever; wherein the weaknesse of this invention appeareth: and therefore *Littleton* here saith, that it seemeth that the donor may re-enter, and speaketh nothing of his heire. A man hath issue two sonnes, and maketh a gift in

(1. Roll. Abr. 408.)

(10. Rep. 40. b.)

taile to the eldest, the remainder in fee to the puisne, upon condition, that the eldest shall not make any discontinuance with warrantie to barre him in the remainder; and if he doth, that then the puisne sonne and his heires shall re-enter, the eldest make a feoffment in fee with warrantie, the father dieth, the eldest sonne dieth without issue, the puisne may enter; but if the discontinuance had beene after the death of the father, the puisne could not have entred. In this case foure points are to be observed. First, as *Littleton* here saith the entrie for the breach of the condition is given to the father, and not to the puisne sonne. Secondly,

(10. Rep. 109.)

that

† &c. added L. and M. and Roh.

‡ &c. added L. and M. and Roh.

without defeating the intention of the testator. It is certain, that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either by not using technical and artificial terms, or by using them improperly, yet if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intention; and if the object of it is warranted by the established rules of law and equity, will admit its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that which the rules of law and equity do not admit, neither the courts of law nor the courts of equity can allow its operation. The first thing, therefore, to be ascertained, is, what the object of the testator is; the next, whether it is such as the rules of law and equity admit. To determine the last point, as soon as it is settled what the testator's intention is, let him be supposed to have expressed it, not in the words actually made use of by him, but in the most accurate and scientific language. If, when so expressed, its operation will be allowed, both at law and in equity, it must be admitted on all hands that it should have its operation and effect, notwithstanding any inaccuracy or impropriety used by the testator in his method of expressing it. But if, when expressed in artificial and scientific language, the law will not give it effect, it must equally be admitted, that it is no longer in the power of the courts to give it an operation; the fault of the testator's will being, not that he has expressed his intention inaccurately, but that the object of his intention is unlawful. To apply this reasoning to the case of *Perrin v. Blake*, what was the testator's intention? Supposing the heirs in that case to take by purchase, there are, it is conceived, but three constructions to be put upon such a devise. The first is, to suppose that the devise to the heirs of the body of the ancestor, to whom the life estate is limited, gives estates to his sons successively in tail, with remainders over in tail to his daughters as tenants in common. Devises of this nature are, unquestionably, conformable to law. They are the modifications of property most frequently introduced in the settlements of real estates. It follows, that if the words of the testator are construed in this sense, they are unobjectionable in point of law. But the courts of law have not thought themselves warranted to construe them in this sense; this construction, therefore, must be laid aside. The second construction is to suppose, that the testator's intention is to give the ancestor an estate of freehold, and to vest the inheritance in the person who, at the time of the ancestor's decease, should be the heir of his body, and to make that person the stock of the inheritance. It must be admitted, that this is perfectly lawful; and there is no doubt but a disposition of this nature, if framed in proper language, would be good, not only in a will, but in a deed. The question then will be, Whether that was the intention of the testator? It is obvious, that by the words heirs of the body, the testator means to comprehend all the heirs of the body of the devisee; but if the construction

41. E. 3. fol.

Vid. Sect. 446.

(10. Rep. 95.)

(Plowd. 413. Ant. 282. b.)

[*] 31. E. 3. Gager deliverance 5.
 22. Alf. 12. 38. E. 3. 1.
 2. H. 4. 18. &c.
 [a] 1. E. 3. cap. 15. stat. 3.
 18. E. 3. cap. 1. & 6.
 4. H. 4. ca. 2. 11. H. 6. c. 23.
 12. E. 4. cap. 8. &c.

that by the death of the father the condition descends to the elder sonne, and is but suspended, and is revived by the death of the eldest sonne without issue, and descendeth to the youngest sonne. Thirdly, that the feoffment made in the life of the father cannot give away a condition that is collateral, as it may doe a right. Fourthly, that a warrantie cannot binde a title of entrie for a condition broken (as hath beene said); but if the discontinuance had beene made after the death of the father, it had extinct the condition: which case is put to open the reason of our author's opinion. (1)

In these last three Sections our author hath taught us an excellent point of learning, that when any innovation or new invention starts up, to trie it with the rules of the common law (as our author here hath done); for these be true touchstones to sever the pure gold from the dross and sophistications of novelties and new inventions. And by this example you may perceive, that the rule of the old common law being soundly (as our author hath done) applied to such novelties, it doth utterly crush them and bring them to nothing; and commonly a new invention doth offend against many rules and reasons (as here it appeareth) of the common law; and the ancient judges and sages of the law have ever (as it appeareth [*] in our bookes) suppressed innovations and novelties in the beginning, as soone as they have offered to creepe up, lest the quiet of the common law might be disturbed: and so have [a] acts of parliament done the like, whereof by the authorities quoted in the margent, you may in stead of many others, upon this occasion take a little taste. But our excellent author, in all his three bookes, hath said nothing but *Ex veterum sapientium ore et more*.

Sect. 724.

(2. Inst. 293. cap. 3.)

ITEM, a le common ley, devant l'estatute de Gloucester, si tenant per le curtesie uft alien en fee ovesque garrantie, apres son decease ceo fuit un barre al heire†, sicome appiert per les parols de mesme l'estatute: mes il est remedy per mesme l'estatute, que le garrantie de le tenant per le curtesie ne ferroit my bar al heire, sinon que il y ad assets per discent per le tenant per le curtesie; car devant le dit estatute, ceo fuit un collateral garrantie al heire, pur ceo que il ne pouvoit conveyer ascun title de discent a les tenements per le tenant per le curtesie, mes tant seulement per sa mere, ou auters de ses ancestors‡; et ceo est le cause pur que il fuit collateral garrantie.*

ALSO, at the common law, before the statute of Gloucester, if tenant by the curtesie had aliened in fee with warrantie, after his decease this was a barre to the heire, as it appeareth by the words of the same statute: but it is remedied by the same statute, that the warrantie of tenant by the curtesie shall bee no barre to the heire, unlesse that hee hath assets by discent by the tenant by the curtesie; for before the sayd statute, this was a collateral warrantie to the heire, for that hee could not convey any title of discent to the tenements by the tenant by the curtesie, but only by his mother, or other of his ancestors; and this is the cause why it was a collateral warrantie.

Sect. 725.

MES si home enheritor prent feme, les queux ont § fits enter eux, et le pier devie, et le

BUT if a man inheritor taketh wife, who have issue a sonne betweene them, and the father di-

fits

* accord added L. and M. and Roh.
 § issue added L. and M. and Roh.

† &c. added L. and M. and Roh.

‡ &c. added L. and M. and Roh.

(1) In some of the former notes, there has been found occasion to anticipate many of the observations which otherwise would have occurred upon this and the three preceding Sections. See ante 203. b. n. 1. 216. a. n. 2. 223. b. n. 1. and particularly 327. a. n. 2.— Some further observations on the subject of these Sections will be found at the foot of page 381. a. ¶

here contended for be admitted, only a particular series or line of such heirs will be admitted. None will be admitted but the person who happens at the time of the ancestor's decease to be the heir of his body, and the heirs of the body of that person; all the other heirs of the body of the ancestor will be utterly excluded. Thus, supposing him to have several sons, the eldest son would, at the time of the testator's decease, answer to the description of heir of his body; he, therefore, would take an estate by purchase, he would be the stock of the inheritance, and from him the lands would descend upon all his issue. But the devise would reach no farther; it would not comprehend the other sons of the ancestor, or their issue. Thus, if this construction should be received, the intention of the testator will be, to a great degree, absolutely defeated. If there are no ulterior limitations or devises after the devise to the heirs of the body of the tenant for life, the reversion in fee will descend on the eldest son; and he may, consequently, dispose of it from his brothers and their issue. If there are any such ulterior limitations or devises, the persons claiming under them would take before, and to the total disinherison of the other brothers and their issue. Of the second construction, therefore, must be repeated what was said of the first, that it is unobjectionable in point of law, but that it is not conformable to the intention of the testator. The third construction is, to suppose that the inheritance will first vest in the person answering, at the time of the decease of the ancestor, to the description of heir of his body; and that, on failure of issue of that person, it will vest in him who answers that description at the time of such failure of issue, and so on, while there are any such heirs remaining. This construction is conformable in some respects to the case of John de Mandeville, mentioned by Sir Edward Coke, ante 26. b. and see note in p. 488. of Mr. Douglas's Reports. The question then is, Whether there is any thing unlawful in this intention? To ascertain this, let it be tried by the test above mentioned, that is, let us suppose it expressed in the most accurate and technical language, that after the decease of the tenant for life, the lands shall go to the heirs of his body severally and successively, and the heirs of their several and respective bodies. This will give the first son or his issue, at the time of the ancestor's decease, an estate tail; and upon failure of that line of issue, the lands will vest for an estate tail in the person who, at the time of the failure of the issue of the first taking heir, will answer the description of heir of the body

*fits entra en la terre, et endowa sa mere, et puis le mere alien ceo que el ad en sa dower, a un autre en fee ove garrantie accordant, et puis morust, et le garrantie descendist a le fits, ore le fits serra barre a demaunder mesme la terre per cause de la dit garrantie; pur ceo que tiel collateral garrantie de tenaunt en dower n'est pas remedie per aucun estatute. Mesme la ley est, lou tenaunt a terme de vie fait un alienation ovesque garrantie, &c. et morust, et le garrantie descendist a celui que avoit le reversion ou le remainder *, ils seront barres per tiel garrantie †.*

eth, and the sonne entreth into the land, and endow his mother, and after the mother alieneth that which shee hath in dower, to another in fee with warrantie accordant, and after dieth, and the warrantie descendeth to the sonne, now the son shall be barred to demand the same land by cause of the sayd warrantie; because that such collateral warrantie of tenaunt in dower is not remedied by any statute. The same law is it, where tenant for life maketh an alienation with warrantie, &c. and dieth, and the warranty descendeth to him which hath the reversion or the remainder, they shall be barred by such warrantie.

OF this and the subsequent Section sufficient hath beene sayd before in this Chapter, *Sect. 697.* (11. H. 7. cap. 20. Ant. 365. b.)

N'est pas remedie per aucun estatute. But by a statute made since, this case is remedied, as you see before, *Sect. 697.*

Sect. 726.

ITEM, en le dit case, si issint fuit que quant le tenant en dower alienast, ‡ &c. son heire fuit deins age, et auxy al temps que le garrantie descendist sur luy il fuit deins age; en cest cas l'heire poit apres enter sur l'aliennee, nient contristeant le garrantie descendist, &c. pur ceo que nul lacheffe serra adjudge en l'heire deins age, que il n'entra pas sur l'aliennee en la vie le tenant en dower. Mes

ALSO, in the case aforefaid, if it were so that when the tenant in dower aliened, &c. his heire was within age, and also at that time that the warrantie descended upon him hee was within age; in this case the heire may after enter upon the aliennee, notwithstanding the warrantie descended, &c. because no lacheffe shall be adjudged in the heire within age, that hee did not enter upon the aliennee in the life

HERE note this diversitie: if the heire bee within age at the time of the descent of the warrantie, he may enter and avoyd the estate either within age, or at any time after his full age: and *Littleton* saith well, that the infant in this case may enter upon the aliennee; for if he bring his action against him, he shall be barred by this warrantie, so long as the state whereunto the warrantie is annexed continue, and be not defeated by entrie of the heire: but if hee be within age at the time of the alienation with warrantie, and become of full age before the descent of the warranty, the warranty shall barre him for ever. Our author putteth his cases where the entrie of the infant is lawful; [a] for where the entrie of the infant is not lawful when the warrantie descendeth, *18. E. 4. 13. 35 H. 6. 63. 28. Aff. 28. 32. E. 3. Car. 30. (1. Rep. 120. 140.) (2. Roll. Abr. 773.) 35. H. 6. 63. [a] 3. H. 7. 9. 35. H. 6. 63. Br. tit. War. 54. 33. H. 8. tit. War. Br. 84. Lib. 1. fol. 67. a. in Archer's case, & 140. Chudley's case.*

* &c. added L. and M. and Roh.

† &c. added L. and M. and Roh.

‡ &c. added L. and M. and Roh.

body of the tenant for life, and soon till all the heirs of his body, and all their issue, are exhausted.—It is obvious, that a limitation of this nature differs materially from the limitations adopted in the first construction, viz. to the sons successively in tail male, with remainder to the daughters; for in that case the estate vests immediately in the first taker, and the other sons, and all the daughters, take vested remainders in tail. But according to the construction we are now speaking of, all after the first taker must be considered as taking *per formam doni*; supposing even that they take by purchase, all the estates after that of the first taker must be contingent. In fact, it is not very easy to ascertain how they would take. But certainly none of the other children, or their heirs, if this construction should be received, would take vested estates during the life of the first taker, or the continuance of issue of his body: for, till the events in question happened, it must be uncertain who, at the particular times in question, would answer to the description of heir of the body of the tenant for life; whereas, according to the first construction, all the children would answer the description under which they are designed, immediately upon their respective births. Such is the effect of this third construction.—Is there any thing in the devise, construing it in this manner, supposing it to be properly and accurately framed, that combats with any known rule of law? It is certain that such a limitation would be good, if the life estate, instead of being limited to the ancestor of the persons to whom the inheritance is afterwards limited, were limited to a stranger; as in the common case of a devise to A. for life, remainder to the right heirs, or the heirs of the body of I. S.—Why should its being a devise to the ancestor make a difference? It may even be contended, that a limitation and devise of this nature have been allowed in equity. In the case of *Tipping v. Coffin*, *Cluth. 272*, there was a limitation; and in *lady Jones v. lady Say and Sele*, *8. Vin. 262*, there was a devise of a trust estate to the ancestor for life, with a legal remainder after his decease to the heirs of his body. In both cases it was admitted, that on account of the different qualities of their estates, the freehold being equitable, and the inheritance legal, they did not coalesce so as to be within the rule in *Shelley's case*; but it was allowed to be a good remainder in tail, in the heirs of the body of the ancestor; and in the former of these cases the verdict was for the person claiming the remainder. It may be answered (and certainly with a great appearance of reason) that on account of the different nature and quality of the estates, the mischief intended to be obviated by the rule in *Shelley's case* could not follow from admitting the heirs to take in these cases by purchase. Considering it with respect to the feudal principles, which are supposed to have given occasion to the rule, the lord would not have lost the fruits of his tenure, nor would the fee have been put into abeyance. This case, therefore, proves nothing in favour of the legality of the estates to be raised by the construction here contended for. This point is exhausted by Mr. Hargrave's treatise upon it. If the reader is convinced by it that the estates to be raised by this third construction are not such as the law admits, it follows, that supposing the devise in question

(1. Rep. 66.)

[w] 18. E. 3. 3.
(F. N. B. 192. g. 2. Infl. 483.)[g] 20. E. 3. Audit. quer. 27.
F. N. B. 104. k. 6. E. 3. 39.
17. E. 3. 76. 17. Aff. 53. 17.
21. E. 2. 4. 13. E. 3. Audit. quer. 26.
18. E. 3. Infant. 61.
16. H. 7. 5. 15. E. 4. 5.
8. H. 6. 30. 1. H. 7. 15.
(10. Rep. 43. Siderf. 321. 322.
F. N. B. 104. k. Moor. 76. 460.
9. Rep. 3. b. 12. Rep. 122. 123.)
6. H. 8. Saver de default Br. 50.
3. H. 6. 10. 1. Mar. Dy. 104.
(Ant. 131. a. Noy. 16.)

(Cro. Jac. 59. Yelv. 88. contra.)

[*] Pasch. 13. Ja. R. in the
king's bench.(Ante 171. b. 246. a. 337. b.
35. b.)[y] Pl. Com. Stowel's case, 355.
etc.
(2. Rep. 44. Moor. 92.
4. Rep. 4. b. 9. Rep. 85.)

scendeth, the warrantie doth binde the infant, as well as a man of full age; and the reason thereof is, because the state whereunto the warrantie was annexed, continueth and cannot be avoided but by action, in which action the warrantie is a barre: and for the same reason likewise it is of a feme covert, if her entrie be not lawful, a warrantie descending on her during the coverture, doth bind her. [w] And albeit the husband be within age at the descent of the warrantie, yet if the entrie of the wife be taken away, the warrantie shall binde the wife.

[g] And herein a diversitie is to bee observed betweene matters of record done or suffered by an infant, and matters *in fait*; for matters *in fait* he shall avoid either within age, or at full age, as hath beene said: but matters of record, as statutes merchants and of the staple, recognizances knowledged by him, or a fine levied by him, recoverie against him by default in a reall action (saving in dower) must be avoyded by him, viz. statutes, &c. by *audita querela*, and the fine and recoverie (1) by writ of error during his minority, and the like. And the reason thereof is, because they are judiciall acts, and taken by a court or a judge, therefore the nonage of the partie, to avoyd the same, shall be tried by inspection of judges, and not by the countrey. And for that his nonage must be tried by inspection, this cannot be done after his full age: and so is the law clerely holden at this day, though there be some difference in our bookes. But if the age be inspected by the judges, and recorded that he is within age, albeit he come of full age before the reverfall, yet may it be reversed after his full age. * And so was it resolved by the whole court of king's bench in the case of *Kekewich*.

If lands had beene given to the husband and wife and their heires, and the husband had made a feoffment to another, to whom a collateral ancestor of the wife had releafed and died, and the husband died, (and this had beene before the statute of 32 H. 8.) this warrantie had so bound her waivable right, as she could not waive her estate, and claime dower. Otherwise it is of an estate determined: for if a disseisor make a lease to the husband and wife during the life of the husband, and the husband dieth, she may disagree to this estate determined, to save herselfe from dammages. And so note a diversitie betweene an estate determined, and an estate bound by warrantie.

Nul laches serra adjudge en le heire deins age. *Laches*, or *laches*, is an old French word for slacknesse, or negligence, or not doing. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in respect of a former right, as by a descent; or of his former right, (as *Littleton* doth here put an example) by a warrantie where his entrie is congeble. But otherwise it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence shall be adjudged in those cases aswell in the infant as in any other. [y] *Vide Pl. Com. Stowel's case per totum.* And see further there, where an infant being tenant for life or yeares, shall be punished for doing or suffering of waste; and where he claimeth by purchase, a *cessavit* shall lie against him, if he pay not his rent by two yeares. And some have said, if he have the tenancie by descent, and he himselfe cesse, a *cessavit* doth lie, and he shall not have his age because it is of his owne cesse, 31. E. 3. Age 54. But other bookes (as some conceive them) be against that: *Vide 9. Edw. 3. 50. 28. E. 3. 99. 14. E. 3. Age 88. 2. E.*

(1) Since our author wrote, the law seems to be otherwise understood; for 'tis now the common practice for infants, having obtained a privy seal for that purpose, to suffer common recoveries; and the law seems to have been so settled ever since Blunt's case, which is reported in Hobart's Reports, page 196; which recovery was afterwards held good on a writ of error brought, and infancy assigned for error; as may be seen in W. Jones 318. Cro. Car. 357, where the case is reported under the names of the earl of Newport v. Sir Henry Mildmay. See Salk. 567. Note to the 11th edition.

to operate so as to give the heirs an estate by purchase, it must be construed in one of the three modes above mentioned. Now the two first of these modes are not reconcileable with what is acknowledged to be the general scope and object of the testator's intention; and the third is not reconcileable with the laws of the land. The consequence is, that the devise must be left to its legal operation, and the heir must take by descent. But if the reader should be of opinion that the estates which, if the third construction is admitted, will be created by the testator's will, are such as the law allows, still there will remain a formidable objection to the admission of that construction. It will appear, that by a series of adjudications, from the 18 Ed. II. to the case of *Coulson v. Coulson*, 17 Geo. II. inclusively, devises of the nature in question have been construed to vest the inheritance in the ancestor. Admitting therefore that the reason or foundation of the construction in question is not now discoverable, there still is great reason to contend that it is binding on the courts. This is by no means peculiar to the rule in *Shelley's case*. There are many other rules of construction received by the courts, which are arbitrary, and some of them not reconcileable to plain reason. Still, being adopted as rules of construction, the courts (sometimes even with an avowed reluctance) consider themselves to be bound to submit to them. It remains to observe, that the observations here offered to the reader, are intended to apply only to the devises of legal estates, and to those devises only in which the argument to except them from the rule in *Shelley's case* depends at the most on the two following circumstances: 1st, that it evidently appears to be the testator's intention to give the ancestor an estate for his life only; and 2^d, that it also evidently appears to be his intention that the heirs of his body should take by purchase. If the testator's intention appears to be to give the ancestor an estate for life only, and to give an estate by purchase to the heirs of his body; and if, besides this, his intention is, that by the devise to the heirs the inheritance should vest in that individual heir who, at the time of the decease of the tenant for life, shall be the heir of his body, and the heirs of the body of that person, and that the devise should reach no farther; or his intention is that the inheritance should descend upon the sons of the tenant for life successively in tail, with or without remainders to the daughters; and this ulterior intention appears from any other part of the will, either by plain declaration, or clear implication; then, as there is nothing unlawful in this disposition of his property, there is no rule of law or equity stands in the way of such construction.—But this ulterior construction is not to be implied from the mere circumstances of an estate for life only being given to the ancestor, and its appearing either by express words or implication, that it was his intention to give an estate by purchase to the heirs.—It may be said this brings the matter to as much uncertainty as attended it before: but surely that is not the case. Numberless as the cases respecting the point in question are, there are few indeed in which this ulterior explanation of the words, heirs of the body, occurs. See those cited by Mr. Justice Blackstone in Mr. Hargrave's Tracts, 502, 506.

si l'heire fuit deins age of tenant in dower. al temps del alienation, &c. et puis il devient al pleine age en la vie de le tenant en dower, et issint esteant de pleine age il n'entra pas sur l'aliennee en la vie de le tenant en dower, et puis le tenaunt en dower morust, &c. la peradventure l'heire serra barre per tiel garrantie; pur ceo que il serra recte sa follie, que il esteant de pleine age ne entra pas en la vie de le tenaunt en dower, &c. But if the heire were within age at the time of the alienation, &c. and after he commeth to full age in the life of tenant in dower, and so being of full age he doth not enter upon the aliennee in the life of tenant in dower, and after the tenant in dower dieth, &c. there peradventure the heire shall bee barred by such warrantie; because it shall bee accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.

and others, which books doe not prove that the *cessavit* doth not lye in that case, but the contrary, that hee shall have his age to the end, hee may at his full age certainly know what to plead, or what arrerages to tender; for the land was originally charged with the feignorie and services.

* Sect. 727.

MES ore per l'estatute fait
11. H. 7. cap. 10. *il est*
ordeine, si ascun feme discontinue,
alien, release, ou confirme ove
garrantie ascun terres ou te-
nements que el tient en dower
pur terme de vie, ou en tayle
del done sa primer baron, ou de
ses ancesters, ou del done d'ascun
auter seisie al use le primer ba-
ron, ou de ses ancesters, que
touts tiels garranties, &c. ferront
voides; et que bien lirroit a cestuy
que avoit ceux terres ou tene-
ments, apres la mort de mesme la
feme d'entrer.

BUT now by the statute made (Ant. 52. b. 395.)
11. H. 7. cap. 10. it is ordain-
ed, if any woman discontinue,
alien, release, or confirme with
warrantie any lands or tenements
which she holdeth in dower for
terme of life, or in taile of the gift
of her first husband, or of his an-
cestors, or of the gift of any other
seised to the use of the first hus-
band, or of his ancestours, that all
such warranties, &c. shall be void;
and that it shall bee lawfull for
him which hath these lands or te-
nements, after the death of the
same woman to enter.

THIS is an addition to *Littleton*, and therefore to be passed over. And hereof sufficient hath beene said before, *Sect.* 697.

Sect. 728.

ITEM, il est parle
en le fine de le dit
estatute de Gloucester,
que parle del aliena-
tion ovesque garran-
tie fait per le tenant
per le curtesie en cest
forme. Ensement, en
mesme le manner, ne
soit l'heire le feme a-
pres la mort la pere et
le mere barre d'action,
s'il demanda l'heri-
tage ou le mariage
sa mere per brieve
d'entre, que son pere
aliena en temps sa
mere, dont nul fine est
levy en la court le

ALSO, it is spoken
in the end of the
said statute of Gloucester,
which speaketh of the
alienation with war-
rantie made by the te-
nant by the courtesie
in this forme. Also, in
the same manner, the
heire of the woman af-
ter the death of the fa-
ther and mother shall
not bee barred of ac-
tion, if hee demandeth
the heritage or the
marriage of his mo-
ther by writ of entry,
that his father aliened
in his mother's time,

DONT nul fine est
levy en le court le

roy, &c. Here are three (Ant. 115. a. 360. a. 365. b. 369. a.)
things worthy of observa-
tion concerning the construc-
tion of statutes. First, that
[a] it is the most naturall [a] Pl. Com. f. 75.
and genuine exposition of a 7. E. 3. 39.
statute to construe one part
of the statute by another (3. Rep. 31. 59.
part of the same statute, 4. Rep. 50. b. 58. 76.)
for that best expresth the
meaning of the makers. As
here the question upon the
generall words of the sta-
tute is, whether a fine levied
onely by a husband seised in
the right of his wife with
warranty shall bar the heire
without assents. And it is well
expounded by the former
part of the act, whereby it is
enacted, that alienation made
by tenant by the courtesie
with warrantie shall not bar
the heire, unlessse assents de-
scend,

Vide *Bracton* lib. 4. f. 321.
Fle a lib. 5. cap. 31.

(6. Rep. Gregory's case.
5. Rep. 60. 7. Rep. 37.
8. Rep. 20. 118. 138.
Plowd. 204, 205, 206. a. 465.
487. a. 11. Rep. 62. b.)

* This Section not in L. and M. nor Roh.

[Continuation of note to 379. b.]

The attempt mentioned in the Sections to which this note refers, is one of the many attempts which have been made at different times to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1. Burr. 84. He observes, that the power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which is not restrained by the statute *de donis*, and has been so considered ever since *Taltarum's case* [12. E. 4. 14. b. p. 16.]. And this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. That it cannot be restrained by condition, appears by *Co. Litt.* 223. b. 224. a. and *Sunday's case*, 9. Rep. 128.—That it cannot be restrained by limitation, appears by *Cro. Jac.* 696. *Foy v. Hinde*, and by *Sunday's case*, and other books.—That it cannot be ascertained by custom, appears by the case of *Taylor and Shaw*, in *Carter* 6. and 22.—That it cannot be restrained by recognizance, or by statute, appears by *Pool's case*, cited in *Moore* 810.—That it cannot be restrained by covenant, appears by the case of *Collins v. Plummer*, 1. Peere Wms. 104.—That an attempt to suffer a common recovery cannot be restrained, appears by *Cobbet's case*, in the 1. Rep. 83. *Mildmay's case*, in the 6. Rep. 40. and the case of *Pierce v. Wife*, in 1. Vent. 321. And that a conclusion to suffer a recovery cannot be restrained, appears by *Mary Portington's case*, in the 10. Rep. 55.—One of the last attempts to establish a perpetuity was made in the will of John duke of Marlborough, where a power was given to trustees, on the birth of the sons of the several persons therein mentioned, to revoke the uses limited to those sons in tail male; and in lieu thereof, to limit the estates to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally and successively in tail male. Lord Northington, in 1759, declared this clause, as it tended to a perpetuity, and was repugnant to the estate limited, was void and of no effect. There was an appeal from this decree to the lords. After hearing counsel upon it, the judges were ordered to attend, and their opinion was asked, "Whether by the rules of law an estate tail limited to the use of persons unborn by any deed or will, can, by virtue of any power given by such deed or will to trustees, be revoked upon the births of such persons, and a new estate limited to such persons for their lives respectively, with remainder to their issue successively in tail male." The lord chief-justice of the common pleas delivered the unanimous opinion of the judges in the negative. The utmost stretch towards a perpetuity which the courts have hitherto allowed, is through the medium of an exercise of a power of appointment limited in a deed or will. If the objects of the powers be not restrained to any particular description of persons, but designed generally to be such persons as the party to whom the power is given shall appoint, there is no question but he may appoint life estates, with remainders over, in the

descend. And therefore it should be inconvenient to intend the statute in such manner, as that he that hath nothing but in the right of his wife should by his fine levied with warrantie barre the heire without assets. And this exposition is *ex visceribus actus*.

Secondly, the words of an act of parliament must be taken in a lawfull and rightfull sense; as here the words being (whereof no fine is levied in the king's court) are to be understood, whereof no fine is lawfully or rightfully levied in the king's court. And

therefore [b] a fine levied by the husband alone, is not within the meaning of the statute, for that fine should worke a wrong to the wife; but a fine levied by the husband and wife is intended by the statute, for that fine is lawfull and worketh no wrong. [c] So the statute of *W. 2. cap. 5.* saith (*It. quod episcopus ecclesiam conferat*) is construed, *Ita quod episcopus ecclesiam legitime conferat*; and the like in a number of other cases in our bookes. And generally the rule is, *Quod non præstat impedimentum quod de jure non sortitur effectum*.

Thirdly, that construction must be made of a statute in suppression of the mischief, and in advancement of the remedie, as by this case it appeareth. For a fine levied by the husband only is within the letter of the law; but the mischief was, the heire was barred of the inheritance of his mother, by the warrantie of his father without assets: and this act intended to apply a remedie, viz. that it should not barre unlesse there were assets, and therefore the mischief is to be suppressed, and the remedie advanced. *Et qui hæret in literâ, hæret in cortice*, as often before hath beene said.

*roy: et issint per force de mesme l'estatute, si le baron del feme aliena l'heritage ou mariage sa feme en fee ove garrantie, &c. per son fait en pais, ceo est clere ley, que cest garrantie ne barrera my l'heire, sinon que il n'ad assets per discent.**

wherof no fine is levied in the king's court: and so by force of the same statute, if the husband of the wife alien the heritage or mariage of his wife in fee with warrantie, &c. by his deed in the countrey, it is cleere law, that this warranty shall not bar the heire, unlesse hee hath assets by discent.

(10. Rep. 43.)

[b] Pl. Com. 246. b. Seignior Barkley's case. Li. 9. fol. 26. in case del Abbot de Strata mercella.

[c] 11. H. 4. 80. 9. E. 4. 12.

21. H. 6. 28. 4. E. 4. 31.

12. H. 4. Formedon 15.

(6. Rep. 20.)

Sect. 729.

MES le doubt est, si le baron alienast l'heritage sa feme per fine levy en la court le roy ovesque garrantie, &c. si ceo barrera l'heire sans ascun discent en value. † Et quant a ceo, jeo voile icy dire certaine raisons, que jeo ay oye dit en cest matter. Jeo ay oye mon master sir Richard Newton, jades chiefe justice de common banke, dire un foits en mesme le banke, que tiel garrantie que le baron fait per fine levie en le court le roy barrera l'heire, coment que il ‡ ad riens per discent, pur ceo que l'estatute dit (dont nul fine est levy en le court le roy) ||; et issint per son

BUT the doubt is, if the husband alien the heritage of his wife by fine levied in the king's court with warrantie, &c. if this shall barre the heire without any discent in value. And as to this, I will here tell certaine reasons, which I have heard said in this matter. I have heard my master sir Richard Newton, late chiefe-justice of the common pleas, once say in the same court, that such warrantie as the husband maketh by fine levied in the king's court shall barre the heire, albeit hee hath nothing by discent, because the statute saith (whereof no fine is levied in the king's court); and so by his opinion

* &c. added L. and M. and Roh.
|| &c. added L. and M. and Roh.

† &c. added L. and M. and Roh.

‡ ad—n'ad, L. and M. and Roh.

same manner as he might do by a substantive original conveyance, notwithstanding the persons to whom the life estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained. But it seems to be otherwise, if the objects of the power are restrained to any particular description of persons, as to the children of the appointor. See *Alexander v. Alexander*, 2. Vez. 640. and *Robinson v. Hardcastle*, in Mr. Brown's Rep. of Cases determined in Chancery during the 26th Year of his present Majesty's Reign, p. 22.—In note 2, to page 216, it was contended, that the estates created by the exercise of powers of appointment preceded from the time of their coming into existence, all the uses limited to take effect in default of appointment, and all the rights and incidents annexed to them; and consequently, that in the cases where estates are limited to such uses as a person shall appoint, and for want of appointment, to the use of his right heirs, the appointment will be good against the wife's right of dower; but in the same note it is observed, that there are reasons why such appointments should not always be depended upon. The modes generally used to prevent the wife's dower seem open to objection. Sometimes the estate is limited to a purchaser and a trustee and their heirs, but as to the estate of the trustee and his heirs in trust for the purchaser and his heirs. This exposes the purchaser to the chance of the trustee's dying in his life; in which case the right of dower will attach upon the estate. Sometimes the estate is limited to the purchaser and a trustee, and the heirs of the trustee, but in trust for the purchaser. Sometimes it is limited immediately to the trustee and his heirs, in trust for the purchaser and his heirs; but all these modes are objectionable, as they keep the legal fee from the purchaser, and expose him to all the inconvenience of its escheating to the crown for want of heirs of the trustee, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the conveyances required to be made of it. Sometimes even it may be considered to pass in the general devise of the trustee's will, and by that means become settled at law to uses in strict settlement, and therefore not to be regained but by a fine or common recovery, and till the existence of a tenant in tail not to be regained without the aid of parliament. It cannot therefore be desirable that the legal fee should be outstanding in a trustee. To prevent this, the estates may be first limited to such uses as the purchaser shall by deed or will appoint, and for want of appointment, to the use of a trustee, his heirs and assigns, during the life of the purchaser, in trust for him, and subject thereto to the use of the purchaser, his heirs and assigns. If this method be adopted, no doubt will remain of the wife's right of dower being effectually prevented; the purchaser during his life will have the absolute command of the legal fee, and at his death it will descend upon his heir.

*opinion cel garrantie per fine * demurt uncore un collateral garrantie, come il fuit a le common ley, nient remedy per le dit estatute, pur ceo que le dit estatute except alienations per fine ove garrantie.*

opinion this warrantie by fine remaineth yet a collateral warrantie, as it was at the common law, not remedied by the said statute, because the said statute excepteth alienations by fine with warrantie.

Sect. 730.

ET ascuns auters ont dit, et uncore diont le contrarie, et ceo est lour prooffe, que come per mesme le chapitre de dit estatute il est ordeine, que le garrantie le tenant per le curtesie ne serra my barre al heire, sinon que il ad assets per discent, &c. coment que le tenant per le curtesie levie un fine de mesmes les tenements oveque garrantie, &c. auxy fortment come il poit faire, uncore cel garrantie ne barrea my l'heire, sinon que il ad assets per discent, &c. Et jeo croy que ceo est ley; et pur ceo ils diont, que serroit inconvenient d'entender l'estatute entiel forme, que un home que n'ad riens forsque en droit sa feme purroit per fine levie per luy † de mesmes ‡ les tenements queux il ad forsque en droit sa feme ove garrantie, &c. barre l'heire de mesmes les tenements sans ascun discent de fee simple, &c. lou le tenant per le curtesie ceo ne puit faire.

AND some others have said, and yet doe say the contrary, and this is their prooffe, that as by the same chapter of the said statute it is ordained, that the warrantie of the tenant by the courtesie shall be no barre to the heire, unlesse that he hath assets by discent, &c. although that the tenant by the courtesie levie a fine of the same tenements with warrantie, &c. as strongly as hee can, yet this warrantie shall not barre the heire, unlesse that hee hath assets by discent, &c. And I beleieve that this is law; and therefore they say, that it should be inconvenient to intend the statute in such maner, as a man that hath nothing but in right of his wife might by fine levied by him of the same tenements which he hath but in right of his wife with warrantie, &c. barre the heire of the same tenements without any discent of fee simple, &c. where the tenant by the courtesie cannot doe this.

Sect. 731.

MES ils ont dit, que le statute serra entend selonque cel forme, scilicet, lou le statute § dit, dont nul fine est levie en court le roy, ceo est a dire, dont nul loial

BUT they have said, that the statute shall bee intended after this manner, scilicet, where the statute saith, whereof no fine is levied in the king's court, that is to say, *fine*

(Plowd. 57. b. Ant. 115 a. 360. a. 369. a. 381. b.)

* &c. added L. and M. and Roh.
§ dit—parte, L. and M. and Roh.

† mesme added L. and M. and Roh.

‡ mesmes not in L. and M. nor Roh.

(10. Rep. 43. Ant. 381. b.)

*fine est droiturement levy en la court le roy. Et ceo est, dont nul fine de le baron et sa feme soit levie en le court le roy, car al temps de le fesans del dit estatute, chescun estate de terres ou tenements que ascun home ou feme avoit, que discenderoit a son beire, fuit fee simple sans condition, ou sur certaine conditions en fait ou en ley. Et pur ceo que adonques tiel fine poit droiturement estre levie per le baron et sa feme, et les beires le baron garronteront, &c. tiel garrantie barrera l'beire, * et issint ils dient que cest l'entendement de l'estatute, car si le baron et sa feme fieront un feoffement en fee per fait en pais, son beire apres le decease le baron et sa feme avera brieve d'entre sur cui in vitâ, &c. nient obstant le garrantie de le baron, donque si nul tiel exception fuit fait en l'estatute de le fine levie, &c. donque l'beire averoit le brieve d'entre, &c. nient obstant le fine levie per le baron et sa feme, pur ceo que les parolx de l'estatute devant l'exception de fine levie, &c. sont generals, &c. c'est a sçavoir, que l'beire la feme apres le mort le pere et la mere ne soit barre d'action, s'il demaund l'heritage ou le mariage sa mere per brieve d'entre, que son pere aliena en temps sa mere, et issint coment que le baron et la feme alienent per fine, uncore ceo est voier, que le baron aliena en temps la mere, et issint il serroit en case de l'estatute, sinon que tielx parolx fueront, scilicet, dont nul fine est levie en la court le roy; et issint ils dient, que ceo est a entendre, dont*

whereof no lawfull fine is rightfully levied in the king's court. And that is, whereof no fine of the husband and his wife is levied in the king's court, for at the time of the making of the said statute, every estate of lands or tenements that any man or woman had, which should descend to his heire, was fee simple without condition, or upon certain conditions in deed or in law. And because that then such fine might rightfully be levied by the husband and his wife, and the heires of the husband should warrant, &c. such warrantie shall barre the heire, and so they say that this is the meaning of the statute, for if the husband and his wife should make a feoffement in fee by deed in the countree, his heire after the decease of the husband and wife shall have a writ of entrie sur cui in vitâ, &c. notwithstanding the warrantie of the husband, then if no such exception were made in the statute of the fine levied, &c. then the heire should have the writ of entrie, &c. notwithstanding the fine levied by the husband and his wife, because the words of the statute before the exception of the fine levied, &c. are generall, viz. that the heire of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entrie, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should bee in that case of the statute, unlesse that such

nul

* &c. added L. and M. and Roh.

*nul fine per le baron et sa feme
est levie en la court le roy, lequel
est loialment levie en tiel case;
car si les justices ont conusans,
que home que n'ad riens forf-
que en droit sa feme, voile levier
un fine en son nosme solement,
ils ne voylont, ne * unque de-
voyent prender tiel fine d'estre le-
vie per le baron solement sans †
sa feme, &c. Ideo quare de cest
matter, &c. ‡*

words were, viz. whereof no fine is levied in the king's court; and so they say, that this is to be understood, (2. Inst. 394.) whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levie a fine in his name onely, they will not, neither ought they to take such fine to be levied by the husband alone without his wife, &c. Ideo quare of this matter, &c.

JEO ay oye mon maister sir R. Newton, &c. who was a gentleman of an ancient family; in Latine, *de nova villa*; in French, *de neuve ville*; and a reverend learned judge, and worthily advanced to be chiefe-justice of the court of common pleas, whom our authour remembers with great reverence, as by his words you may perceive, calling him his master, and citeth his opinion delivered once in the court of common pleas, which our authour heard and observed (whose example therein it is necessary for our student to follow); but the latter opinion (as hath beene before observed) being *Littleton's* owne, is against the opinion of the lord *Newton* [d], and the law is holden cleerely with our authour at this day; and our authour (as in all other cases) hath good authoritie in law to warrant his opinion: *Nullius hominis auctoritas tantum apud nos valere debet, ut meliora non sequeremur si quis attulerit.*

Car si les justices ont conusance, &c. Hereby it appeareth [e] that the judge, if hee knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third person.

Que serroit inconvenient. *Argumentum ab inconuenienti*, is very forcible in law, as often hath beene observed.

Of the rest of these three Sections sufficient hath beene said before.

Sect. 732.

ITEM, *est ascarvoir, que en ceux parolx, ou l'heire demande l'heritage, ou le mariage sa mere, cest parol (ou) est un disjunctive, et est autant a dire, si l'heire demande le heritage sa mere, scilicet, les tenements que sa mere avoit en fee simple per discent ou per purchase, ou si l'heire demaund le mariage sa mere, c'est ascarvoir, les tenements*

ALSO, it is to be understood, that in these words, where the heire demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is asmuch to say, if the heire demand the heritage of his mother, viz. the tenements that his mother had in fee simple by discent or by purchase, or if the heire demaund the marriage of his mother, that is que

* unque not in L. and M. nor Roh.

† nosme added L and M. and Roh.

‡ &c. not in L. and M. nor Roh.

[d] *Bracton* 341. *Fleta* lib. 5. cap. 34. 8. E. 2. *Gar.* 81. 18. E. 3. 51. 7. E. 3. 84. *Pl. Com.* 57. (3. Rep. 77.) *Sect.* 731. [e] 33. H. 6. 52. 5. E. 3. 56. 2. *Eliz.* Dier 178. 1. H. 7. 9. 1. Mar. 89. 4. E. 3. 41. 7. *Eliz.* Dier 246. *Vide Sect.* 87, &c.

que fueront dones a sa mere en frankmariage. to say, the tenements that were given to his mother in frankmariage.

(Ant. 16. 2.)
Vide Seēt. 9.

SOME doe expound heritage of the mother to be the lands which the mother hath by discent; and that construction is true, but the statute, by the authoritie of *Littleton*, extendeth also where the mother hath it by purchase in fee simple; for so saith *Littleton* himselfe, that this word (inheritance) is not only intended where a man hath lands by discent, but where a man hath a fee simple by purchase, because his heires may inherit him. And albeit it be true, that the statute extendeth to an estate in frankmariage acquired by purchase, yet doth it extend also to all estates in taile, aswell by discent as by purchase; for that frankmariage is put but for an example.

Seēt. 733.

EGO et hæredes mei warrantizabimus, et imperpetuum defendemus.

Wherein three things are to be observed. First, that *hæredes mei* are words of necessity, for otherwise the heires are not bound. [a] Secondly, though in the clause of the warrantie it bee not mentioned to whom, &c. yet shall it be intended to the feoffee. [b] Thirdly, that the feoffor may by expresse words warrant the land for the life of the feoffee, or of the feoffor, &c. but the recoverie in value shall bee in fee. [c] Of this *Bracton* writeth in this manner: *Et ego et hæredes mei warrantizabimus tali et hæredibus suis tantum vel tali et hæredibus et assignatis et hæredibus assignatorum, vel assignatis assignatorum, et eorum hæredibus, et acquietabimus et defendemus eos totam terram illam cum pertinentiis, contra omnes gentes, &c. Per hoc autem quod dicit (ego et hæredes mei) obligat se et hæredes ad warrantiam propinquos, et remotos, presentes et futuros, et succedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) suscipit in se obligationem ad defendendum suum tenementum in possessione rei data et assignatos suos et eorum hæredes et omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat se et hæredes suos ad acquietandum si quis*

*ITEM, come est move + en divers faits ceux parolx en Latyne, Ego et hæredes mei * warrantizabimus et imperpetuum defendemus; il est a veier quel effect ad cel parol, defendemus, en tiels faits; et il semble que il n'ad pas l'effect de garrantie, ne emprent en luy + la cause de garrantie; car s'il issint serroit, que il prent effect ou cause de garrantie, donques il serroit + mettre en ascuns fines levies en la court le roy: et home ne veiet || ceo unque que cest parol defendemus fuit en ascun fine, mes tantsolement cest parol warrantizabimus; per que semble, que cest parol § et verbe warrantizo, ¶ fait la garrantie, et est la cause de*

ALSO, where it is contained in divers deedes these words in Latine, Ego et hæredes mei warrantizabimus et imperpetuum defendemus; it is to be seene what effect this word (defendemus) hath in such deedes; and it seemeth that it hath not the effect of warrantie, nor comprehendeth in it the cause of warranty; for if it should be so, that it tooke the effect or cause of warrantie, then it should bee put into some fines levied in the king's court: and a man never saw that this word (defendemus) was in any fine, but only this word (warrantizabimus); by which it seemeth, that this word and verbe (warrantizo) maketh the warrantie, and is the cause of warrantie, and

gar-

+ move—mote, L. and M. and Roh.
mote, L. and M. and Roh.
ded L. and M. &c. only added in Roh.

* &c. added L. and M. and Roh.
|| ceo not in L. and M. nor Roh.

+ la not in L. and M. nor Roh.
§ et verbe not in L. and M. nor Roh.

† mitte—
¶ as, &c. ad-

[a] 6. E. 2. Vouch. 238.
12. E. 2. ib. 262. 14. H. 4. 15.

[b] 38. E. 3. 14.

[c] *Bract.* fol. 37. 238. & *Lib.* 5. 380, 381. *Brit.* fol. 106. b. *Flet.* lib. 5. cap. 15. & *Lib.* 6. cap. 23. 35. H. 8. 8. *Gar.* 90. *F. N. B.* 134. b.

Brit. ubi sup. *Flet.* ubi sup.
11. H. 6. 48. 6. E. 2. *Gar.* 262.

garrantie, et nul au- no other word in our
ter verbe en nostre law.
ley.

*plus petierit servitii vel aliud
servitium quam in carta dona-
tionis continetur. Per hoc au-
tem quod dicit (defendimus)
obligat se et heredes suos ad*

defendendum si quis velit servitutem ponere rei datæ contra formam suæ donationis. [d] Hereby it appeareth, that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as *Ego et heredes mei warrantizabimus, &c.* in Latine doe create a warrantie; so, I and my heires shall warrant, &c. in English, doth create a warrantie also.

[e] If a man be bound to A. in an obligation to defend such lands to A. whereof the obligor had infeoffed him for twelve yeares, &c. in this case if he be ousted by a stranger without being impleaded, the obligation is forfeit: but if he be bound to warrant the land, &c. the bond is not forfeited, unlesse the obligee be impleaded, and then the obligor must be readie to warrant, &c.

Donques il serra mit en ascuns fines, &c. Here Littleton draweth an argument from the forme and words of a fine; and his reason is this: that seeing that a fine is the highest and surest kinde of assurance in law, if *defendimus* had the force of a warrantie, it would have beene contained in fines: and on the other side, seeing this word *warrantizo* is contained in fines to create a warrantie, that therefore that word doth imply a warrantie, and not the other.

Et nul auter verbe en nostre ley. Here it appeareth, that no other verbe in our law doth make a warrantie, but *warrantizo* only, which is only appropriated to create a warrantie.

But, *Qui bene distinguit bene docet*; and here of necessitie you must distinguish, [*] first, betweene a warrantie annexed to a freehold or inheritance, (whereof Littleton here speaketh) and a warrantie annexed to a ward, which is a chattell reall; for there, grant, demise, and the like, doe make a warrantie. And of warranties annexed to freeholds and inheritances, some be warranties in deed, and some be warranties in law. A warrantie in deed, or an expresse warrantie, (whereof Littleton here speaketh) is created only by this word *warrantizo*; but warranties in law are created by many other words; they be therefore called warranties in law, because in judgement of law they amount to a warrantie without this verbe *warrantizo*. [f] As *dedi* is a warrantie in law to the feoffee and his heires during the life of the feoffor, but *concessi* in a feoffment or fine implyeth no warrantie. (1) But before the statute of *quia emptores terrarum*, if a man had given lands by the word *dedi*, to have and to hold to him and to his heires, of the donor and his heires, by certain services, then not only the donor but his heires also had beene bound to warrantie: but if before that statute a man had given lands by this word *dedi*, to a man and to his heires for ever, to hold of the chiefe lord, there the feoffor had not beene bound to warrantie but during his life, as at this day he is.

And albeit the words of the statute of *bigamis* be, *in cartis autem ubi continentur (dedi et concessi, &c.)* yet if *dedi* be contained alone, it doth import a warrantie; for the statute doth conclude, *ipse tamen feoffatur in vita sua ratione proprii doni sui tenetur warrantizare*; so as *dedi* is the word that implyeth warrantie, and not *concessi*. Also where the words of the statute bee further, *sine clausula quæ continet warrantiam*, the meaning of the statute is, that *dedi* doth import a warrantie in law, albeit there bee an expresse warrantie in the deed.

For if a man make a feoffment by *dedi*, and in the deed doth warrant the land against I. S. and his heires, yet *dedi* is a generall warrantie during the life of the feoffor; and so was the statute expounded in both points, [g] *Hil. 14. El.* in the court of common pleas, which I myselfe heard and observed. [h] And if a man make a lease for life reserving a rent, and adde an expresse warrantie, here the expresse warrantie doth not take away the warrantie in law, for he hath election to vouch by force of either of them. And in *Nokes'* case note a diversitie betweene a warrantie that is a covenant reall, and a warrantie concerning a chattell. [i] Also this word *excambium* doth imply a warrantie.

Also a partition implyeth a warrantie in law, as in the Chapter of *Parceners* appeareth. And homage auncestrell doth draw to itselfe warrantie, as hath beene said in the Chapter of *Homage Auncestrell*.

And it is to be observed, that the warrantie wrought by this word *dedi*, is a speciall warrantie, and extendeth to the heires of the feoffee during the life of the donor only. But upon the exchange and homage auncestrell the warrantie extendeth reciprocally to the heires, and against the heires of both parties: and in none of the cases the assignee shall vouch by force

[d] 46. E. 3. 28. 11. H. 4. 41.
6. E. 2. Vouch. 262.
2. E. 4. 15. 2.
(Moor. 175.)

[e] 2. E. 4. 15. tit. Det. 71.
(2. Roll. Abr. 396. Cro. Car. 5.
Dyer 255. a. Ant. 201. b.
4. Rep. 80. 9. Rep. 61.)

46. E. 3. 28. Vide Sect. 1.

Sect. 697.

[*] 31. E. 3. Vouch. 24.
12. Rich. 2. tit. Cont. de
Vouch. 35. 29. E. 3. 48.
30. E. 3. 6. b. Symken Symons'
case. 8. E. 3. 61. 12. E. 3.
Vouch. 27. Temps E. 1.
Vouch. 302. 3. H. 6. 17.

[f] *Lestat. de Bigamis*, c. 6.
2. H. 7. 7. 6. H. 7. 2.
48. E. 3. 2. 31. E. 1. tit.
Vouch. 200. Fitz. N. B. 134. b.
6. E. 2. Vouch. 258.
(Vaugh. 118.)

(F. N. B. 134. b.)

[g] *Hil. 14. El.* in Com. Banc.
[h] *Lib. 4. fol. 80.* in *Nokes'* case.
8. E. 3. 69. 9. E. 3. 15. 10. E. 3. 11.
20. E. 3. Cont. de Gar. 7.
31. E. 3. Vouch. 280.
32. E. 3. ib. 102. 43. E. 3. 3.
2. E. 3. tit. Cui in vita 17.
3. E. 3. Formedon 44.
[i] 4. E. 2. Vouch. 245.
22. E. 3. 3. 14. H. 6. 2.
20. H. 6. 14. *Lib. 4. fol. 122.*
in *Bustard's* case. 15. E. 3.
Bar. 255. 43. E. 3. 3.
Lib. 1. f. 96. *Lib. 5. fol. 17.*
Spencer's case. *Lib. 8. fol. 75.*
Sr. Stafford's case.

(1) What is said by sir Edward Coke in this place, and the determination of the judges in *Nokes'* case, 4. Rep. 80, and lord chief justice Vaughan's argument in *Hayes v. Bickerstaff*, in his Reports, page 126, should remove the scruples too often entertained on the part of trustees, respecting the propriety of their conveying by the word *grant*. From the passages here referred to, it most clearly appears, that the word *grant*, when used in the conveyance of an estate of inheritance, does not imply a warranty; and that if it did, the insertion of any expresse covenant on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by expresse words how far the parties designed the warranty should extend, will not carry it farther by construction. There is therefore no reasonable ground for trustees objecting to convey by the word *grant*; but serious objections may be raised in some cases to purchasers taking a conveyance from them without it. These are stated in the following passage from *Bridgman's Complete Conveyancer*, vol. 1. 323.—“Sir Jeffrey Palmer's resolution concerning the words *give and grant* in a conveyance. “Sir, I conceive that care ought to be taken in a conveyance, of what nature soever it be, that there be not therein *give and grant*; for they imply a general warranty, and shall not be qualified by the special warranty following; as hath of late been thrice adjudged. H. 1.”—Sir Jeffrey Palmer's answer. “*Give* implies a personal warranty, and so is not always used. The word *grant*, in a lease for years, is a covenant in law; or (as you may call it) a general warranty, if it be not qualified by a covenant or warranty in fact: but if there be a covenant or warranty in fact, then it is restrained to the words of the covenant subsequent. But in an estate of inheritance where the fee passeth, there the word *grant* is neither a covenant in law, nor warranty. For if it should be a covenant in law, or warranty in itself, it would be there restrained and qualified by the warranty and covenants in fact. And a deed to pass an inheritance where common is, cannot be without it; for if it be common in gross, it cannot pass by the livery, but must pass by the word *grant*. And I never yet saw a feoffment without it. Jeffrey Palmer.”—How a covenant shall be expounded with regard to the context, or to synonymous or other words, see *Com. Dig. Cov. (D.) Vin. Abr. Covenant (L. 4.)*

[*k*] 28. Aff. 33. 14. H. 4. 5.
 18. E. 3. 18. 4. E. 2. Avowr.
 2. 1. & 202. 19. E. 3.
 Avowr. 201, 202. 11. E. 3.
 Avowr. 100. 30. H. 6. 7.
 33. H. 8. Dyer 51.
 10. H. 7. 11. b. F. N. B. 163. a.
 [l] 6. E. 2. Cont. de Vouch. 105.
 5. E. 3. 67. 4. E. 2. ibid. 102.
 6. E. 3. 11. 50. 7. E. 3. 6.
 18. E. 3. 8. 22. E. 3. 3.
 3. H. 7. 13. 6. H. 7. 2. 14. E. 3.
 Garr. 32. F. N. B. 134. g.
 5. E. 3. 87. 20. E. 3.
 tit. Counterplea de Gar. 7.
 [m] 4. E. 3. 36. 31. E. 3.
 tit. Cont. de Vouch. 122.
 43. Aff. 32. 50. E. 3. 7.
 F. N. B. 149. m.
 [n] 14. H. 6. 2. 15. E. 3.
 Bar. 255.
 [o] 38. E. 3. 22, 23, 24.
 13. E. 3. Gar. 35.

[p] 16. E. 3. Age 45.
 18. E. 3. 8. 31. E. 3. Gar. 29.

(1. Rep. 10.)

Vide lib. 4. fol. 121. Buftard's
 cafe.

[q] 45. E. 3. 20. b.

[r] 14. E. 3. Gar. 33.
 13. E. 1. Gar. 83.

Lib. 5. fol. 17. b. in Spenfer's
 cafe. 38. E. 3. 21.

[s] 12. E. 2. Vouch. 263.
 19. E. 2. Gar. 85. 13. E. 1.
 ib. 93. Lib. 5. fol. 17. Spenfer's
 cafe. 7. E. 3. 34. 10. E. 3. 9.
 14. E. 3. Garr. 33.
 Bract. ubi sup. 9. E. 2.
 Garr. de Chart. 30. 36. E. 3.
 Gar. 1. 4. H. 8. Dy. 1.
 F. N. B. 135.
 [t] 43. E. 3. 23. 26. E. 3. 68.
 (Ante 174. a. b. Post. 390. a.)
 40. E. 3. 14. 24. E. 3. 36.
 11. H. 4. 94. 30. E. 3. 17.
 5. E. 3. Age 19. Pl. Com. 418.

[u] 42. E. 3. b. per Finchden.

force of any of these warranties, but in the case of the exchange and *dedi*, the assignee shall rebutt, but not in the case of homage ancestrell.

[*k*] And so no man shall have a writ of *contra formam collationis*, but only the feoffee and his heires which be privie to the deed; but an assignee may rebutt by force of the deed.

[*l*] If a man make a gift in taile, or a lease for life of land, by deed or without deed, reserving a rent, or of a rent service by deed, this is a warrantie in law, and the donee or lessee being impleaded, shall vouch and recover in value. And this warrantie in law extendeth not only against the donor or lessor, and his heires, but also against his assignees of the reversion; and so likewise the assignee of lessee for life shall take benefit of this warrantie in law.

[*m*] When dower is assigned there is a warrantie in law included, that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable. (1)

And it is to be understood, that a warrantie in law and affets is in some cases a good bar.

[*n*] In a formedon in the descender the tenant may plead, that the ancestor of the demandant exchanged the land with the tenant for other lands taken in exchange, which descended to the demandant, whereunto he hath entred and agreed; or if he hath not entred and agreed unto the lands taken in exchange, then the tenant may plead the warrantie in law, and other affets descended.

[*o*] If tenant in taile of lands make a gift in taile, or a lease for life, rendring a rent, and dieth, and the issue bringeth a formedon in the descender, the reversion and rent shall not barre the demandant; because by his formedon he is to defeat the reversion and rent, *Et non potest adduci exceptio ejusdem rei, cujus petitur dissolutio*.

[*p*] But if other affets in fee simple doe descend, then this warrantie in law and affets is a good barre in the formedon.

Here foure things are to be observed: first, that no warrantie in law doth barre any collateral title, but is in nature of a lineall warrantie: wherein the equitie of the law is to be observed.

Secondly, that an expresse warrantie shall never binde the heires of him that maketh the warrantie, unlesse (as hath beene said) they be named: as for example, *Littleton* here saith (*Ego et heredes mei*); but in case of warranties in law, in many cases the heires shall bee bound to warrantie, albeit they be not named.

Thirdly, that in some cases warranties in law doe extend to execution in value, of speciall lands, and not generally of lands descended in fee simple, as you may see at large in my Reports.

[*q*] Fourthly, that warranties in law may be in some cases created without deed, as upon gifts in taile, leases for life, exchanges, and the like

And seeing somewhat hath beene said out of *Bracton* and other antient authors, concerning assignees, it is necessarie to shew who shall take advantage of a warrantie, as assignee by way of voucher, to have recompence in value.

[*r*] If a man infeoffe *A.* and *B.* to have and to hold to them and to their heires, with a clause of warrantie, *prædictis A. et B. et eorum heredibus et assignatis*: in this case if *A.* dieth, and *B.* surviveth and dieth, and the heire of *B.* infeoffeth *C.* he shall vouch as assignee, and yet he is but the assignee of the heire of one of them; for in judgement of law the assignee of the heire is the assignee of the ancestor, and so the assignee of the assignee shall vouch *in infinitum*, within these words, (his assignes.)

[*s*] If a man infeoffeth *A.* to have and to hold to him, his heires and assignes; *A.* infeoffeth *B.* and his heires, *B.* dieth, the heire of *B.* shall vouch as assignee to *A.*: so as heires of assignees, and assignees of assignes, and assignees of heires are within this word (assignes); which seemed to be a question in *Bracton's* time. And the assignee shall not only vouch, but also have a *warrantia cartæ*.

If a man doth warrant land to another without this word (heires), his heires shall not vouch: and regularly if he warrant land to a man and his heires, without naming assignes, his assignee shall not vouch. [*t*] But if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his eldest son with warrantie and dieth, the law giveth to the sonne advantage of the warrantie made to his father, because by act in law the warrantie betweene the father and the sonne is extinct.

But note, there is a diversitie betweene a warrantie that is a covenant reall, which bindeth the partie to yeeld lands or tenements in recompence, and a covenant annexed to the land, which is to yeeld but dammages, for that a covenant is in many cases extended further than the warrantie. As for example:

[*u*] It hath beene adjudged, that where two coparceners made partition of land, and the one made a covenant with the other, to acquite her and her heires of a suit that issued out

(1) Tenant by the curtesy shall not vouch, because he shall not recover in value, 10. H. 7. 10. b. but he may pray in aid of him in the reversion. Hob. Rep. 21.

out of the land the covenantee aliened. In that case the assignee shall have an action of (5. Rep. 18. a. in Spencer's case.) covenant; and yet he was a stranger to the covenant, because the acquittal did runne with the land.

[x] A. seised of the mannor of D. whereof a chappell was parcell. a prior with the assent of his covent covenanteth by deed indented with A. and his heires to celebrate divine service in his said chappell weekly, for the lord of the said mannor, and his servants, &c. In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedie by covenant doth runne with the land, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor. [y] But if the covenant had beene wth a stranger to celebrate divine service in the chappell of A. and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the mannor, because the covenantee was not seised of the mannor. See in *Spencer's case* before remembred, divers other diversities betweene warranties and covenants which yeeld but dammages.

And here it is to be observed, that an assignee of part of the land shall vouch as assignee. [*] As if a man make a feoffment in fee of two acres to one, with warrantie to him, his heires and assignes, if he make a feoffment of one acre, that feoffee shall vouch as assignee; for there is a diversitie betweene the whole estate in part, and part of the estate in the whole, or of any part. As if a man hath a warrantie to him, his heires, and assignes, and he make a lease for life, or a gift in taile, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee simple whereunto the warranty was annexed; but the lessee for life may pray in aide, or the lessee or donee may vouch the lessor or donor, and by this meanes hee shall take advantage of the warranty. But if a lease for life, or a gift in taile be made, the remainder over in fee, such a lessee or donee shall vouch as assignee, because the whole estate is out of the lessor, and the particular estate and the remainder doe in judgement of law to this purpose make but one estate.

[a] If a man infeoffe three with warrantie to them and their heires, and one of them release to the other two, they shall vouch; but if he had released to one of the other, the warrantie had beene extinct for that part, for he is an assignee.

[b] If a man doth warrant land to two men and their heires, and the one make a feoffment in fee, yet the other shall vouch for his moitie. If a man at this day be infeoffed with warrantie to him, his heires, and assignes, and he make a gift in taile, the remainder in fee, the donee make a feoffment in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee, but he that commeth in, in privitie of estate; but he must vouch his feoffor, and he to vouch as assignee, but such an assignee may rebutte. If the warrantie be made to a man and his heires without this word (assignes), yet the assignee, or any tenant of the land may rebutte. And albeit no man shall vouch or have a *warrantia carte*, either as partie, heire, or assignee, but in privitie of estate, yet any that is in of another estate, be it by disseisin, abatement, intrusion, usurpation, or otherwise, shall rebutte by force of the warrantie, as a thing annexed to the land, which sometime was doubted [c] in our bookes. But herein is a diversitie to be observed, when in the cases aforesaid he that rebutteth claimeth under the warrantie; and when he that would rebutte claimeth above the warranty, for there he shall not rebutte. And therefore if lands be given to two brethren in fee simple, with a warranty to the eldest and his heires, the eldest dieth without issue, the survivor albeit he be heire to him, yet shall he neither vouch nor rebutte, nor have a *warrantia carte*, because his title to the land is by relation above the fall of the warrantie, and he commeth not under the estate of him to whom the warrantie is made, as the disseisor, &c. doth.

[d] If a man make a gift in taile at this day, and warrant the land to him, his heires and assignes, and after the donee make a feoffment and dieth without issue, the warrantie is expired as to any voucher or rebutter, for that the estate in taile whereunto it was knit is spent: otherwise it is, if the gift and feoffment had beene made before the statute of *donis conditionalibus*; for then both the donee and feoffee had a fee simple; and so are our bookes to be intended in this and the like cases.

[e] If A. be seised of lands in fee, and B. releaseth unto him or confirmeth his estate in fee with warrantie to him, his heires and assignes; all men agree this warrantie to be good: but some have holden, that no warrantie can be raised upon a bare release or confirmation without passing some estate or transmutation of possession. [f] But the law, as it appeareth by *Littleton* himselfe, is to the contrary, and that both the party, and (as some doe hold) his assignee shall vouch; but he that is vouched in that case must be present in court, and ready to enter into the warranty and to answer, and the tenant must shew forth the deed of release or confirmation with warrantie, to the intent the demandant may have an answer thereunto, and either deny the deed, or avoid it; for that at the time of the confirmation made, he to whom it was made, had nothing in the land, &c. for otherwise the demandant may counterplead the voucher by the statute of *W. 1.* viz. that neither vouchee nor any of his ancestors had any seisin

[x] 42. F. 3. 3. a. Laur. Pakenham's case. a. H. 4. 6. 6. H. 4. 1 & 2. Ralfie Brabson's case. Lib. 5. fol. 17, 18. Spencer's case.

[y] a. H. 4. 6. Hen. Horne's case. 6. H. 4. 1. Lib. 5. fol. 17, 18. Spencer's case.

[*] 18. E. 3. 52. 10. E. 3. 58. 5. E. 3. 40. 12. E. 3. Counterplea de Vouch. 42. 14. E. 3. Voucher 108. 5. E. 3. ibid. 178. 13. E. 3. ibid. 119. 20. E. 3. 22. 41. E. 3. Vouch. 69. & 100. 32. E. 3. ibid. 96. (Hob. 25.)

And this diversitie was agreed Hill. 14. Eliz. in Commun Banco, which I heard and observed.

[a] 40. E. 3. 14. 40. Aff. 5. 33. H. 6. 4. 37. H. 8. Alienation sans licence 32. 8. H. 4. 8.

[b] 11. R. 2. Detin. 46. 7. E. 3. 35. 46. E. 3. 4.

(See Vaugh. 388.)

[c] 38. E. 3. 21. 26. E. 3. 56. Lib. 10. fo. 96. b. Seymour's case. 7. E. 3. 34. 35. 8. E. 3. 10. 46. E. 3. 4. 10. E. 3. 42. 45. E. 3. 18. 10. Aff. 5. 35. Aff. 9. 22. Aff. 39. 88. 31. Aff. 13.

[d] Lib. 3. fol. 62, 63. Lincoln College case.

[e] 14. E. 3. Garr. 108. 12. H. 7. 1.

[f] 11. H. 4. 22. 10. E. 3. 52. 21. E. 3. 27. Vid. Sect. 706. 728. & 745.

W. 1. cap. 40.

Vide 20. E. 1. Statute de vocat. ad warrant.

[g] 22. H. 6. 15. 19. H. 6. 73.
20. H. 6. 73. 2. H. 4. 13.
41. E. 3. Garr. 15. 43. E. 3. 17.
43. Aff. 42. 12. Aff. 17.
12. E. 3. taile 3. 22. E. 4. 16. b.
44. E. 3. 40. 44. Aff. Basing-
born's. Aff. lib. 10. fol. 97.
Seymour's case.

[h] Lib. 3. fo. 63. Lincolne
College case.

[i] 29. E. 3. 70. 17. E. 2.
Joinder in action 1. 11. E. 4. 8.

[4] 14. H. 4. 3.

(Ant. 20. b.)

feisin whereof he might make a feoffement. And this is ground upon the said statute of W. 1. the words whereof be, *S'il neit son garrantor en present, (1) que luy voile garranter de son gree, et maintenant enter en respons*, otherwise the tenant must be driven to his *warrantia cartæ*.

[g] But a warrantie of it selfe cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heires, yet doth not this enlarge his estate.

[b] If a man make a feoffement in fee with warrantie to him, his heires and assignes by deed (as it must be), and the feoffee enfeoffeth another by paroll, the second feoffee shall vouch, or have a *warrantia cartæ* (as hath beene said) as assignee, albeit he hath no deed of the assignment, because the deed comprehending the warrantie, doth extend to the assignees of the land; and he is a sufficient assignee, albeit he hath no deed.

[i] If a man infeoffe two, their heires and assignes, and one of them make a feoffement in fee, that feoffee shall not vouch as assignee. (2)

If a man make a feoffement in fee to A. his heires and assignes, A. infeoffeth B. in fee, who re-infeoffeth A. he or his assignes shall never vouch, for A. cannot be his own assignee. But if B. had infeoffed the heire of A. he may vouch as assignee; for the heire of A. may be assignee to A. inasmuch as he claimeth not as heire.

[k] If a man make a feoffement by deed of lands to A. to have and to hold to him and his heires, and bind him and his heires to warrant the land *in formâ prædictâ*; this warrantie shall extend to the feoffee and his heires: but if he had warranted the land to the feoffee, the warrantie had not extended to his heires, except the words had beene to him and his heires.

If a man letteth lands for life, the remainder in taile, the remainder *eâdem formâ*, this is a good estate taile, *quia idem semper refertur proximo præcedenti*. (3)

Sect. 734.

*ITEM, si tenant en taile soit
seisie des * terres devisables
per testament solongue le custome,
Ec. et le tenant en taile alien
† mesmes les tenements a son
frere en fee, et ad issue, et de-
vie, et puis son frere devisa per
son testament mesmes les tene-
ments a un auter en fee, et oblige
luy et ses beires a garrantie, Ec.
et morust sans issue; il semble que
cest garrantie ne barrera my
l'issue en taile, s'il voit sues son
brieve de formedon, pur ceo que
cest garrantie ne discendera my
al issue en le taile, entant que le
uncle del issue ne fuit my oblige a le
garrantie en sa vie: ne ‡ que il
ne puisse garranter les tenements
en sa vie, entant que le devise ne
puisse prendre ascun execution
ou effect, forsque apres son de-
cease. Et entant que le uncle en
son vie ne fuit tenu de garran-
ter, tiel garrantie ne poit discen-*

*ALSO, if tenant in taile be seised
of lands devisable by testament
after the custome, &c. and the
tenant in the taile alieneth the
same tenements to his brother in
fee, and hath issue, and dieth, and
after his brother deviseth by his
testament the same tenements to
another in fee, and bindeth him
and his heires to warrantie, &c.
and dieth without issue; it seem-
eth that this warrantie shall not
barre the issue in the taile, if
hee will sue his writ of forme-
don, because that this warrantie
shall not descend to the issue
in taile, in so much as the uncle
of the issue was not bound to
the same warrantie in his life-
time: neither could hee warrant
the tenements in his life, inso-
much as the devise could not take
any execution or effect until after
his decease. (4) And insomuch as
the uncle in his life was not
der*

* terres—tenements, L. and M. and Roh.

† mesmes not in L. and M. nor Roh.

‡ que il ne not in L. and M. nor Roh.

(1) i. e. if he have not his *warrantor* present.

(2) The other may vouch for his moiety, as is observed in the preceeding page: but if they make partition, both have lost it. Hob. 25.

(3) A man enfeoffeth three by deed, and warranteth the land to them, *et cuilibet eorum*, this is a joint warranty, because the estate or interest was joint; but if the estates were several, the warranty would be several. 5. Rep. 19.

(4) Upon a similar principle it was held, that a person could not devise land in frankmarriage, because the donee could not hold of the donor. Ant. 21. b.

*der de luy al issue en le tayle, held to warrantie, such warrantie
 &c. car nul chose poit discen- may not descend from him to the
 der del auncester a son heire, issue in the tayle, &c. for nothing
 sinon que mesme ceo fuit en l'aun- can descend from the ancestour to
 cester. his heire, unlesse the same were
 in the ancestour. (1)*

HERE our author declareth one of the maxims of the common law, that the heire shall never be bound to any expresse warrantie, but where the ancestor was bound by the same warranty; for if the ancestor were not bound, it cannot descend upon the heire, which is the reason here yeelded by *Littleton*. [1] If a man make a feoffment in fee, and binde his heires to warrantie, this is void by the warrant of this maxime, as to the heire, because the ancestor himselfe was not bound. Also, if a man binde his heires to pay a summe of money, this is void. And of the other side, if a man binde himselfe to warranty, and binde not his heires, they be not bound; for he must say, as it appeareth before, *Ego et heredes mei warrantizabimus, &c.* [m] And *Fleta* saith, *Nota quod heres non tenetur in Angliâ ad debita antecessoris reddenda, nisi per antecessorem ad hoc fuerit obligatus, præterquam debita regis tantum: A fortiori* in case of warrantie, which is in the realtie.

But a warrantie in law may binde the heire, although it never bound the ancestour, and may be created by a last will and testament. [n] As if a man devise lands to a man for life or in taile reserving a rent, the devisee for life or in taile shall take advantage of this warrantie in law, albeit the ancestor was not bounden, and shall binde his heires also to warrantie, although they be not named. Also an expresse warrantie cannot be created without deed, and a will in writing is no deed, and therefore an expresse warrantie cannot be created by will.

(6. Rep. 33. 2. Cro. 579.
10. Rep. 95.)

[1] 31. E. 1. Grant. 85.
(Hob. 130. Ant. 213. b.)

Bracton li. 2. fo. 37. 238.
Britton, fol. 106. b.

[m] *Fleta*, lib. 2. cap. 55.
Britton, fol. 65. b. 11. H. 6. 48.
(4. Rep. 80. Ante 209. a.)

[n] 18. E. 3. 8.

Sect. 735.

AUXY, un garrantie ne poit
 aler * selonque la nature
 des tenements per le custome,
 &c. mes tantselement selonque le
 forme del common ley. Car si
 le tenant en taile soit seisie des
 tenements en burgh English,
 lou le custome est, que tous les
 tenements deins mesme le bo-
 rough devoyent discender a le
 fits puisne, et il discontinua le
 tayle ove garrantie, &c. et ad
 issue deux fits, et morust seisie des
 auters terres ou tenements en
 mesme le burgh en fee simple a
 le value ou plus de les tene-
 ments tailed, &c. uncore le puisne
 fits avera un formedon de les
 † terres tailed, et ne serra my barre
 per le garrantie son pere, coment
 que assets a luy descendist en fee
 simple de mesme le pere, selonque

ALSO, a warranty cannot goe
 according to the nature of
 the tenements by the custome,
 &c. but onely according to the
 forme of the common law. For
 if the tenant in taile be seised of
 tenements in borough English,
 where the custome is, that all the
 tenements within the same bo-
 rough ought to descend to the
 youngest sonne, and hee disconti-
 nueth the taile with warranty, &c.
 and hath issue two sonnes, and dy-
 eth seised of other lands or tene-
 ments in the same borough in fee
 simple to the value or more of the
 lands entailed, &c. yet the young-
 est sonne shall have a *formedon* of
 the lands tailed, and shall not bee
 barred by the warrantie of his fa-
 ther, albeit assets descended to him
 in fee simple from his said father
 le

* selonque—sans, L. and M. and Roh.

† terres—tenements, L. and M. and Roh.

(1) It is a general rule, that the heir cannot take any thing by descent when the ancestor is secluded from taking. Ant. 99. b.—
 If a father and his heir apparent join in a warranty, the heir is doubly bound, by his own warranty, and as heir to his father.
 Moor. 20,

*le custome, &c. pur ceo que le garrantie descendist a son eigne frere que est en pleine vie *, et nemy sur le puisne. † Et en mesme le maner est de collaterall garrantie fait de tiels tenements, lou le garrantie descendist sur l'eigne fits, &c. ceo ne barrera my le puisne fits, &c.*

according to the custome, &c. because the warranty descendeth upon his elder brother who is in full life, and not upon the youngest. And in the same manner is it of collaterall warranty made of such tenements, where the warranty descendeth upon the eldest sonne, &c. this shall not barre the younger son, &c.

Sect. 736.

EN mesme le maner est de tenements en le countie de Kent, queux sont appellees gavelkind, les queux tenements sont departibles enter les freres, &c. solonque la custome ‡; si ascun tiel garrantie soit fait per son auncester, tiel garrantie descendra tantsolement al heire que est beire al common ley, § c'estascavoir, al eigne frere, solonque la consufans del common ley, et nemy a tous les heires queux sont heires de tiels tenements solonque le custome ||.

IN the same manner is it of lands in the county of Kent, that are called gavelkinde, which lands are dividable betweene the brothers, &c. according to the custome; if any such warrantie be made by his ancestor, such warrantie shall descend onely to the heire which is heire at the common law, that is to say, to the elder brother, according to the consufance of the common law, and not to all the heires that are heires of such tenements according to the custome.

(8. Rep. 86.)

Vid. Sect. 603. 718. & 737.

(2. Rep. 25.)

[a] 11. E. 3. Det. 7.

11. H. 7. 12.

[c] 17. E. 3. Joint. 41.

16. H. 7. 13. 29. E. 3. 46.

12. H. 7. 3. 22. E. 3. 1.

17. E. 3. 8. 30. E. 3. 40.

19. H. 6. 55. Lib. 3. fol. 14.

Matthew Herbert's case.

(1. Leon. 322. March. 125.

Allen 41. Savil. 692. Clay. 3.)

HEREUPON a diversite is to be observed betweene the lien reall, and the lien personall; for the lien reall, as the warrantie, doth ever descend to the heire at the common law; [a] but the lien personall doth binde the speciall heires, as all the heires in gavelkind, and the heire on the part of the mother. as hath beene said.

[c] If two men make a feoffment in fee with a warranty, and the one die, the feoffee cannot vouch the survivor only, but the heire of him that is dead also; (1) but otherwise, if two joyntly binde themselves in an obligation, and the one die, the survivor only shall be charged.

Sect. 737.

ITEM, si tenant en le taile ad issue deux files per divers venters, et morust, et les files entrent, et un estrange eux disseist de mesmes les tenements, et l'un de ¶ eux releffa per son fait a le disseisor tout son droit, et oblige luy et ses heires a garrantie, et morust sans issue: en cest cas la

ALSO, if tenant in taile hath issue two daughters by divers venters, and dieth, and the daughters enter, and a stranger disseiseth them of the same tenements, and one of them releaseth by her deed to the disseisor all her right, and binde her and her heires to warrantie, and die without issue: in this case the

joer

* &c. added L. and M. and Roh. † Et not in L. and M. nor Roh. ‡ &c. added L. and M. and Roh. § c'estascavoir al eigne frere, solonque la consufans del common ley, not in L. and M. nor Roh. || &c. added L. and M. and Roh. ¶ eux—les filles, L. and M. and Roh.

(1) This seems to be contradicted in Moore 20, where it is said, that if two are vouched, and one of them makes default, the grand cape ad valentiam shall issue against him who made the default; and if one of them dies, the heir and the survivor of them may be vouched, or the survivor of them only, at the election of him who hath the warranty.

foer que survesquist poit bien enter et ouster le disseisor de tous les tenements, pur ceo que tiel garrantie n'est pas discontinuance ne collateral garrantie a la foer que survesquist, pur ceo que ils sont de demy sanke, et l'un ne poit estre beire a l'auter, solonque le cours del common ley. Mes auterment est, lou y sont files del tenant en taile per un mesme venter.

sister which surviveth may well enter, and oust the disseisor of all the tenements, because such warrantie is no discontinuance nor collateral warrantie to the sister that surviveth, for that they are of halfe blood, and the one cannot be heire to the other, according to the course of the common law. But otherwise it is, where there bee daughters of tenant in taile by one venter.

THE reason of this is in respect of the halfe blood, whereof sufficient hath beene said in the first booke, in the Chapter of Fee Simple.

Two brothers be by demy venters; the eldest releaseth with warrantie to the disseisor of the uncle, and dieth without issue, the uncle dieth, the warrantie is removed, and the younger brother may enter into the land. (Ante 12. a. 14. 2.)

Sect. 738.

ITEM, si tenant en taile lessa les tenements a un * home pur terme de vie, le remainder a un auter en fee, et un collateral auncester confirma le state del tenant a terme de vie, et oblige luy et ses beires a garrantie pur terme de vie del tenant a terme de vie, et morust, et le tenant en taile ad issue et devie; ore l'issue est barre a demander les tenements per briefe de formedon durant le vie le tenant a terme de vie, per cause del collateral garrantie descendu sur le issue en le taile. Mes apres le decease de le te-

ALSO, if tenant in taile letteth the lands to a man for terme of life, the remainder to another in fee, and a collateral ancestor confirmeth the state of the tenant for life, and bindeth him and his heires to warrantie for terme of the life of the tenant for life, and dieth, and the tenant in taile hath issue and dies; now the issue is barred to demand the tenements by writ of formedon during the life of tenant for life, because of the collateral warrantie descended upon the issue in taile. But after the decease of the tenant for life,

HERE it appeareth, that a warrantie may be raised by a confirmation which transferreth neither estate nor right, whereof sufficient hath beene said before. (Ant. 385.)

A garrantie pur terme de vie, &c. [p] [p] 38. E. 3. 14. 16. E. 3. Vouch. 87. This proveth that a warrantie may be limited, and that a man may warrant lands aswell for terme of life or in taile, as in fee. (1)

If tenant in fee simple that hath a warrantie for life, either by an expresse warrantie or by *dedi*, be impleaded and vouch, hee shall recover a fee simple in value, albeit his warrantie were but for terme of life, because the warrantie extended in that case to the whole estate of the feoffee in fee simple; (2) but in the case that *Littleton* here putteth, the tenant for life shall recover in value but an estate for life, because the warrantie doth extend to that estate only. (4. Rep. 80. Ant. 383. Hob. 156.) (2. Cro. 453.)

Un briefe de formedon, &c. (F. N. B. 211. b. 217. b. 219. c.) Here is implied, that a collateral warrantie giveth no right, but

* home not in L. and M. nor Roh.

(1) From this it appears, that the warranty ceases on the expiration of the estate to which it is annexed. In *Smith v. Tyndal*, Salk. 685, 686, it was resolved, that no warranty extinguishes a right, but only binds or bars it so long as the warranty continues in force; for if the warranty be released, the ancient right revives.

(2) Though the warrant be temporary, yet the thing warranted and to be recovered is perpetual; for it is a warranty of a fee, tho' not a warranty in fee. Hob. 126.

but shall barre only for life, and after the partie is restored to his action.

It is also to bee observed, that a warrantie may descend to the heires of him that made it during the life of another.

tenant a terme de vie, the issue shall have *l'issue avera un * brieve* a writ of *formedon*, *de formedon*, &c. &c.

Sect. 739.

(9 Rep. 120.)

ET sur ceo jeo aye oye un reason, que cel case provera un autre case, scilicet, si un home lessa ses terres a un autre, a aver et tener a luy et a ses heires pur terme d'auter vie, et le lessée morust vivant celui a que vie, &c. et un estrange enter en la terre que le heire le lessée luy poit ouster, † &c. pur ceo que en le case procheine avantdit, entant que home poit obliger luy et ses heires a garrantie al tenant a terme de vie tantseulement, durant la vie le tenant a ‡ terme de vie, et cel garrantie descendist al heire celui que fist le garrantie, lequel garrantie n'est pas garrantie d'enheritance, mes tantseulement pur terme d'auter vie: per mesme le reason lou tene-ments sont lessés a un home, a aver et tener a luy et a ses heires pur terme d'auter vie, si le || lessée morust vivant celui a que vie, son heire avera les tene-ments, vivant celui a que vie, &c. Car ont dit, que si home grant un annuitie a un autre, a aver et perceiver a luy et a ses heires pur terme d'auter vie, si le grantee morust, &c. que apres § son mort son heire avera l'annuitie durant la vie celui a que vie, &c. Quare de ista materiâ.

AND upon this I have heard a reason, that this case will prove another case, viz. if a man letteth his lands to another, to have and to hold to him and to his heires for terme of another's life, and the lessée dieth living *celuy a que vie*, &c. and a stranger enteth into the land that the heire of the lessée may put him out, &c. because in the case next aforesaid, inasmuch as a man may binde him and his heires to warrantie to tenant for life only, during the life of the tenant for life, and this warrantie descendeth to the heire of him which made the warrantie, the which warrantie is no warrantie of inheritance, but only for terme of another's life: by the same reason where lands are let to a man, to have and to hold to him and his heires for terme of another's life, if the lessée die living *celuy a que vie*, his heires shall have the lands, living *celuy a que vie*, &c. For they have said, that if a man grant an annuitie to another, to have and to take to him and his heires for terme of another's life, if the grantee die, &c. that after his death his heire shall have the annuitie during the life of *celuy a que vie*, &c. *Quare de ista materiâ.*

Jeo

* *brieve* de not in L. and M. nor Roh.

|| *lessée-pier*, L. and M. and Roh.

† &c. not in L. and M. nor Roh.

§ *son mort* not in L. and M. nor Roh.

‡ *terme* not in L. and M. nor Roh.

FEO ay eye un reason. Here our student is taught after the example of our author, to observe everie thing that is worth the noting.

Si un home lessa terres a un auter, &c. This case is without question, [q] that the heire of the lessee shall have the land to prevent an occupant. And so it is (as *Littleton* here saith) in case of an annuitie, or of any other thing that lieth in grant, whereof there can be no occupant. And of this somewhat hath beene said in the Chapter of Descents. (1)

[q] 17. E. 3. 48. 18. E. 3. 12.
11. H. 4. 42. 7. H. 4. 46.
8. H. 4. 15. Dy. 8. El. 253.
18. H. 8. 3. 27. H. 8. 21. H. 8.
tit. Estat. Br. 50. 19. E. 3.
tit. Account. 56. 33. Aff. p. 17.
22. H. 6. 33. 39. E. 3. 37.
Vide Sect. 387.
(Ant. 41. L.)

Sect. 740.

MES lou tiel lease
ou grant est fait
a un home et a
ses beires pur terme
d'ans, en cest case
l'beire le lessee ou
le grantee n'avera
unques apres la mort
le lessee ou le gran-
tee ceo que est issint
lessee ou grant, pur
ceo que est chattel
real, et* chateuxrealx
per le common ley
viendra al execu-
tors del grantee, ou
del lessee, et nemy al
beire. †

BUT where such
lease or grant is
made to a man and to
his heires for terme of
yeares, in this case the
heire of the lessee or
the grantee shall not
after the death of the
lessee or the grantee
have that which is so
let or granted, because
it is a chattell reall,
and chattels realls by
the common law shall
come to the execu-
tors of the grantee,
or of the lessee, and
not to the heire.

HERE is a generall rule,
that chattels reals af-
well as chattels personals
shall goe to the executors
or administrators of the les-
see, and not to his heires.
For as estates of inheri-
tance or freehold descendi-
ble shall goe to the heire,
so chattels, aswell reall as
personall, shall goe to the
executors or administrators.

[r] But if the king's ten-
ant by knight's service *in*
capite be seised of a man-
nor, whereunto an advow-
son is appendant, and the
church become void, the ten-
ant dieth, his heire within
age, the king shall present
to the church, and not the
executor or administrator:
but if the land be holden
of a common person, in
that case the executor shall
present, and not the gardeine.

11. E. 3. tit. Aff. 88.
11. Aff. 21. 10. El. Dy. 276.

(9. Rep. 86. 5. Rep. 25. 33.)

[r] 24. E. 3. 26. F. N. B. 33. b.
F. N. B. 34. a.
(Ant. 90. Sect. 125.)

[f] 40. E. 3. 14.

[r] 9. H. 6. 58. 11. H. 4. 7.

[f] If a bishop hath a ward fallen and dieth, the king shall not have the ward nor the successor, but the executor and the ward shall be assets in his hands. So it is of heriot, releefe, and the like. [r] But if a church become void in the life of a bishop, and so remaine untill after his decease, the king shall present thereunto, and not the executor or administrator; for nothing can be taken for a presentment, and therefore it is no assets.

Sect. 741.

ITEM, en ascuns
cases il poit estre,
que coment que un
collaterall garrantie
soit fait en fee,
&c. uncore tiel gar-
rantie poit estre de-
feat et anient. Si-
come tenant en taile

ALSO, in some cases
it may bee, that
albeit a collaterall war-
rantie be made in fee,
&c. yet such a war-
rantie may be defeat-
ed and taken away.
As if tenant in taile
discontinue the taile

ET morust sans is-
sue, &c. Here (as

before in this Chapter hath
been noted) the collaterall
warrantie doth descend upon
the issue in taile, before any
right doth descend unto
him, wherein this diver-
sitie is to bee observed.
Where the right is in *esse* in
any of the ancestors of the
heire, at the time of the dis-
cent

Vide Sect. 707.

* tous added L. and M. and Roh.

† &c. added L. and M. and Roh.

(1) But several alterations have been made in the law of occupancy, by statutes passed since sir Edward Coke's time. See ant. 41.
b. note 5.

(10. Rep. 95.)

[u] 7. E. 3. 48. 30. H. 8. 42.

(10. Rep. 95.)

[w] Lib. 1. fol. 67. Archer's case.

[y] Temps E. 1. Voucher 296.
 31. Aff. 13. 22. Aff. 36.
 41. Aff. 6. 23. E. 3. 101. G. 17.
 74. Lib. 10. fol. 97. E. Seymour's case.
 (9. Rep. 106.)

[z] 45. E. 3. 31. 21. H. 7. 11.

Vide Sect. 698.

[a] 21. E. 4. 26. 21. H. 7. 9.
 3. H. 7. 4. 7. H. 4. 17.
 30. H. 8. Dier 42.
 30. E. 3. 30. 9. E. 3. 78.
 45. E. 3. Voucher 72.
 1. N. B. 125. 14. H. 8. 6.
 (Ant. 366. b. Moor. 56.)

cent of the collateral warrantie, there albeit the warrantie descend first, and after the right doth descend, the collateral warrantie shall binde, as here in this case of our author expressly appeareth. But where the right is not in esse in the heire, or any of his ancestors, at the time of the fall of the warrantie, there it shall not binde.

[u] As if lord and tenant be, and the tenant make a feoffment in fee with warrantie, and after the feoffor purchase the feignorie, and after the tenant esse, the lord shall have a cessavit; for a warrantie doth extend to rights precedent, and never to any right that commenceth after the warrantie; whereof more shall be said in this Section. Also a warrantie shall never barre any estate that is in possession, reversion or remainder, that is not devested, displaced, or turned to a right before, or at the time of the fall of the warrantie.

[w] If a lease for life be made to the father, the remainder to his next heire, the father is disseised and releaseth with warrantie and dieth; this shall barre the heire, although the warrantie doth fall, and the remainder commeth in esse at one time.

[y] If there be father and sonne, and the sonne hath a rent service, suit to a mill, rent charge, rent secke, common of pasture, or other profit appender out of the land of the father, and the father maketh a feoffment in fee with warrantie, and dieth, this shall not barre the sonne of the rent, common, or other profit appender, *quomvis clausula specialis warrantie vel acquietancie in cartis tenentium inferatur, quia in tali casu transit terra cum onere*: and he that is in seisin or possession need not to make any entrie or claime: and albeit the sonne after the feoffment with warrantie, and before the death of the father, had bene disseised, and so being out of possession, the warrantie descended upon him, yet the warrantie should not binde him, because at the time of the warrantie made, the sonne was in possession. [*] So if my collateral ancestor release to my tenant for life, this shall not binde my reversion or remainder, because that the reversion or remainder continued in me. But if he that hath a rent, common, or any profit out of the land in taile, disseise the tenant of the land, and maketh a feoffment of the land, and warrant the land to the feoffee and his heires; [a] regularly the warrantie doth extend to all things issuing out of the land, that is to say, to warrant the land in such plight and manner, as it was at in the hand of the feoffor, at the time of the feoffment with warrantie; and the feoffee shall vouch, as of lands discharged of the rent, &c. at the time of the feoffment made.

A woman that hath a rent charge in fee entermarrieth with the tenant of the land, an estranger releaseth to the tenant of the land with warrantie; he shall not take advantage of this warrantie either by voucher or *warrantia cartae*; for the wife, if her husband die, or the heire of the wife living the husband, cannot have an action for the rent upon a title before the

discontinue le taile en fee, et le discontinuee est disseisee, et le frere del tenant en le taile releffa per son fait a le disseisor tout son droit, &c. ove garranty en fee, et mourust sans issue, et le tenant en le taile ad issue et devie; ore l'issue est barre de son action per force del collateral garranty descendue sur luy. Mes si apres ceo le discontinuee enter sur le disseisor, donques poit l'heire en le taile aver bien son action de formedon, &c. pur ceo que le garranty est aniente et defeate, car quant garranty est fait a un home sur estate que adonques il avoit, si l'estate soit defeat le garranty est defeat.

in fee, and the discontinuee is disseised, and the brother of the tenant in taile releaseth by his deed to the disseisor all his right, &c. with warrantie in fee, and dieth without issue, and the tenant in taile hath issue and die; now the issue is barred of his action by force of the collateral warrantie descended upon him. But if afterwards the discontinuee entreth upon the disseisor, then may the heire in taile have well his action of *formedon*, &c. because the warrantie is taken away and defeated, for when a warrantie is made to a man upon an estate which hee then had, if the estate be defeated, the warrantie is defeated. (1)

(1) In the former cases put by Littleton, the warranty determined, upon the natural expiration of the estate to which it was annexed: here it determines by the estate being defeated. But if an estate be bound by a warranty, and afterwards the estate to which the warranty is annexed be defeated as to a particular estate only, the warranty shall not be defeated. As if tenant for life, remainder to A. be disseised, and an ancestor of A. releases to the disseisor with warranty and dies, and afterwards tenant for life enters or recovers, yet the remainder will be bound by the warranty. See 2. Roll. Abr. 740. l. 40. 741. l. 5. And see Com. Dig. vol. 3. 434, 435.

the warrantie made; for if the heire of the wife bring an affise of *mordancester*, this action is grounded after the warrantie, whereunto, as hath beene said, the warrantie shall not extend.

So it is if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffement of the land with warrantie, this warrantie cannot extend to the rent, altho it the feoffement was made of the land discharged of the rent; for if the condition be broken, and the grantor be intituled to an action, this must of necessity be grounded after the warrantie made. (Ant. 366. b.)

But in the case aforesaid, when the woman grantee of the rent marrieth with the tenant, and the tenant maketh a feoffement in fee with warrantie, and dieth, in a *cui in vita* brought by the wife (as by law she may), [b] the feoffee shall vouch as of lands discharged at the time of the warranty made, for that her title is paramount: so if tenant in taile of a rent charge purchase the land, and make a feoffement with warrantie, if the issue bring a *formedon* of the rent, the tenant shall vouch *causa qua supra*. (Ant. 202.)

[*] But some doe hold, that a man shall not vouch, &c. as of land discharged of a rent service. [*] 10. E. 4. 9. b. 18. E. 3. 55. 44. E. 3. 19.

[c] Also, no warrantie doth extend unto meere and naked titles, as by force of a condition with clause of re-entry, exchange, mortmain, consent to the ravisher and the like, because that for these no action doth lye; and if no action can be brought, there can be neither voucher, writ of *warrantia cartæ*, nor rebutter, and they continue in such plight and essence as they were by their originall creation, and by no act can be displaced or devested out of their originall essence, and therefore cannot be bound by any warrantie. [c] Lib. 10. fol. 97. E. Sty more's case. 22. Aff. pl. 38. 31. Aff. p. 13. 41. Aff. p. 6. 33. E. 3. Gar. 74. (2. Cro. 593. Dyer 224. a. 3. Inst. 216. 10. Rep. 98. b. Ant. 205. a. Plowd. 363. b.)

[d] And albeit a woman may have a writ of dower to recover her dower, yet because her title of dower cannot be devested out of the originall essence, a collateral warrantie of the ancestor of the woman shall not barre her. So it is of a feoffement *causa matrimonii* (4. Rep. Vernon's case.)

[e] A warrantie doth not extend to any lease, though it be for many thousand yeares, or to estates of tenant by statute staple, or merchant, or *eleger*, or any other chattle, but only to freehold or inheritances, as it appeareth in all *Littleton's* cases which he putteth in this Chapter. And this is the reason, that in all actions which lessee for yeares may have, a warrantie cannot be pleaded in barre, as in an action of trespass, or upon the statute of 5. R. 2. and the like. But in those actions when the freehold or inheritances doe come in question, there the warrantie may be pleaded: but in such actions which none but a tenant of the freehold can have, as upon the statute of 8. H. 6. affise, or the like, there a warrantie may be pleaded in barre. (1) [e] 21. E. 4. 18. 82. 1. H. 7. 12. 22. 11. H. 7. 15. 16. 20. H. 7. 2. b. 14. H. 7. 22. 43. E. 3. 25. per Finch. in quar. Imp. 15. H. 7. 9. Lib. 10. fol. 97. (Ant. 101. 366. Hob. 14. 28. 2. Saund. 180.)

Quant garrantie est fait a un home sur estate, que adonques il avoit, si l'estate soit defeat, le garrantie est defeat. Here it appeareth, that although a collateral warrantie be descended, [f] yet if the state whereunto the warrantie was annexed be defeated, albeit it be by a meere stranger (as in this case that *Littleton* here puts by the discontinuance), the warrantie is defeated; and although the discontinuance remaine, and no remitter wrought to the heire, yet the warrantie is defeated, and barre removed, so as the issue in taile may have his *formedon*, and recover the land. *Sublato principali tollitur adjunctum.* (2) [f] 3. H. 7. 9. b. 16. E. 3. tit. Continual Claim 10. 9. H. 4. 8. Pl. Com. 158. (10. Rep. 95)

Sect. 742.

EN mesme le manner est, si le discontinuance fait feoffement en fee, reservant a luy un certaine rent, et pur default de payment un re-entry, &c. et un collateral * garrantie de ancestor est fait a celuy feoffee que ad estate sur condition, &c. et morust sans issue, coment que cel garrantie descenderoit sur l'issue en taile, uncore si apres le rent soit aderere, et le

IN the same manner it is, if the discontinuance make a feoffement in fee, reserving to him a certain rent, and for default of payment a re-entry, &c. and a collateral warrantie of the ancestor is made to the feoffee that hath the estate upon condition, &c. and dieth without issue, albeit that this warranty shall descend upon the issue in taile, yet if after the rent be behind, and the dis-

* garrantie de ancestor est fait—ancestor releffu, in L. and M. and Roh.

(1) The feoffee with warranty cannot take any advantage of the warranty, unless he be tenant of the land. 26. II. 6. 3. b.

(2) If a man makes a feoffment with warranty, non feoffment is a good plea; for if the feoffment be avoided, the warranty also is avoided, for that depends upon the feoffment. But if the man makes a lease for yeares, and covenants that he will warrant and defend the land to the lessee; if the lessee be ousted, whether it be by one that hath or that hath not title, he shall have a writ of covenant. Brownlow Rep. part 2. fol. 165.

*discontinuee entra en la terre **, *adonques averal'issue en taile son recovery per brieve de formedon, pur ceo que le collateral garranty est defeat. Et issint si ascun tiel collateral garranty soit pleder envers l'issue en le taile, en son action de formedon, il poit montrer le matter come est avantdit, coment le garranty est defeat, &c. et issint il poit bien maintenir son action, † &c.* *discontinuee enter into the land, then shall the issue in taile have his recovery by writ of formedon, because the collateral warranty is defeated. And so if any such collateral warranty be pleaded against the issue in taile, in his action of formedon, he may shew the matter as is aforesaid, how the warrantie is defeated, &c. and so hee may well maintaine his action, &c.*

(10. Rep. 95.)

HERE Littleton putteth another case upon the same ground and reason, viz. where the state whereunto the warrantie is annexed is defeated, there the warrantie it selfe is defeated also, which is one of the maximes of the common law.

Sect. 743.

ITEM, si tenant en taile fait un feoffement a son uncle, et puis l'uncle fait un feoffement en fee ovesque garrantie, &c. a un auter, et puis le feoffee del uncle enseoffa areremaine l'uncle en fee, et puis l'uncle enseoffa un estrange en fee sans garrantie, et morust sauns issue, et le tenant en taile morust, si issue en le taile voyle porte son breve de formedon envers l'estrange que fuit le darrein feoffee, ‡ et ceo per l'uncle, l'issue ne serra unque barre per le garrantie que fuit fait per le uncle al dit primer feoffee de son uncle, pur ceo que le dit garrantie fuit defeat et anient, pur ceo que l'uncle a luy || reprist cy grand estate de son § primer feoffee a que le garrantie fuit fait, sicome mesme le feoffee avoit de luy. Et la cause pur que le garrantie est anient en ceo cas est ceo, scilicet, que si le garrantie estoieroit en sa force, donque l'uncle garrantera a luy mesme, que ne poit estre.

ALSO, if tenant in taile make a feoffement to his uncle, and after the uncle make a feoffement in fee with warranty, &c. to another, and after the feoffee of the uncle doth re-enseoffe againe the uncle in fee, and after the uncle enseoffeth a stranger in fee without warrantie, and dieth without issue, and the tenant in taile dieth, if the issue in taile will bring his writ of *formedon* against the stranger that was the last feoffee, and that by the uncle, the issue shall not be barred by the warranty that was made by the uncle to the first feoffee of his uncle, for that the said warrantie was defeated and taken away, because the uncle tooke backe to him as great an estate from his first feoffee to whom the warrantie was made, as the same feoffee had from him. And the cause why the warranty is defeated is this, viz. that if the warrantie should stand in his force, then the uncle should warrant to himselfe, which cannot be.

Here

* &c. added L. and M. and Rob.
|| *reprist—prist*, L. and M. and Rob.

† &c. not in L. and M. nor Rob.
§ *dit*: added in L. and M. and Rob.

‡ &c. added L. and M. and Rob.

HERE *Littleton* putteth another case where a warrantie may be defeated, as when the uncle taketh backe as large an estate as he had made, the warrantie is defeated, because he cannot warrant land to himselfe. [g] And so it is if the uncle had made the warrantie to the feoffee, his heires and assignes, and taken backe an estate in fee, and after infeoffed another, yet the warrantie is defeated, for that he cannot be assignee to himselfe, and a man shall not regularly vouch himselfe as assignee of a fee simple, and the law will not suffer things inutile and unprofitable. [h] And yet if the father be infeoffed with warrantie to him and his heires, the father infeoffeth his heire apparant in fee and dieth, he (as it hath beene said) shall vouch himselfe, and the heire in borow English, by reason the act in law determined the warrantie betweene the father and the sonne.

[i] But if a man maketh a feoffment in fee with warrantie to the feoffee, his heires and assignes, and the feoffee re-enfeoffeth the feoffor and his wife, or the feoffor and any other stranger, the warrantie remaineth still; or if two doe make a feoffment with warrantie to one and his heires and assignes, and the feoffee re-enfeoffe one of the feoffors, the warrantie doth also remaine.

(Vaugh. 389.)

[g] Temps E. 1. Voucher 265.

40. E. 3. 14. 44. E. 3. 38.

25. E. 3. 41. b. 26. E. 3. 68.

14. E. 3. Vouch. 106.

16. E. 3. Voucher 87.

19. E. 3. Vouch. 122.

17. E. 3. 73. 74. 20. H. 6. 29.

(2. Roll. Abr. 739.)

[h] 40. E. 3. 41. 2. 41. E. 3. 25. 2.

(Ant. 384. Roll. Abr. 98. a.)

[i] 11. H. 4. 20. 42.

17. E. 3. 47. 59. 18. E. 3. 56.

29. E. 3. 46. 39. E. 3. 9.

(Vaugh. 389.)

Sect. 744.

MES si le feoffee fesoit estate al uncle pur terme de vie, ou en taile, savant le reversion, &c. ou que il fait done en taile al uncle, ou un leas pur terme de vie, le remainder ouster, &c. en cest cas le garrantie n'est pas tout ousterment anient, mes est mis en suspence durant l'estate que l'uncle ad. Car apres ceo que l'uncle est mort sans issue, &c. donques celui en le reversion, ou celui en le remainder, barreroit l'issue en taile en son brieve de formedon per le collateral garranty en tiel cas, &c. Mes autrement est lou l'uncle avoit auxy graund estate en la terre de le feoffee, a que le gar-

BUT if the feoffee had made an estate to his uncle for terme of life, or in taile, saving the reversion, &c. or a gift in taile to the uncle, or a lease for terme of life, the remainder over, &c. in this case the warrantie is not altogether taken away, but is put in suspence during the estate that the uncle hath. For after that that the uncle is dead without issue, &c. then he in the reversion, or he in the remainder, shall barre the issue in taile in his writ of *formedon* by the collateral warranty in such case, &c. But otherwise it is where the uncle hath as great estate in the land of the feoffee to whom the warrantie was made, as the feoffee

PUR terme de vie, ou en taile. Here

it appeareth [k] that by taking a [l] lease for life, or a gift in taile, the warrantie is suspended.

A man infeoffeth a woman with warrantie, they intermarry and are impleaded, upon the default of the husband, the wife is received, she shall vouch her husband, &c. notwithstanding the warranty was put in suspence. [m] And so on the other side, if a woman infeoffe a man with warrantie, and they intermarry and are impleaded, the husband shall vouch himselfe and his wife by force of the said warrantie.

[n] An infant *en ventre sa mere* may be vouched if God give him a birth, and if not, such a one heire to the warrantie; but he cannot be vouched alone without the heire at the common law, for proces shall be presently awarded against him.

Mes est mise en suspence. [o] Tenant in taile maketh a feoffment in fee with warrantie, and discontinue the discontinuee, and dyeth seised, leaving assets to his issue. Some hold that in respect of this suspended warrantie and assets, the

[k] 16. E. 3. Vouch. 87.

44. E. 3. 38. 26. E. 3. 56.

17. E. 3. 47. 10. E. 3. 39.

12. E. 3. Counterplea de vouch.

41. 14. E. 3. ib. 12.

(4. Rep. 52.)

[l] 6. E. 2. Vouch. 257.

3. E. 3. ib. 201. 5. E. 3. ib. 172.

18. E. 3. 52. 14. E. 3. Vouch. 109.

31. E. 3. ibid. 25.

43. E. 3. 7. 44. E. 3. 38.

32. E. 3. Voucher 102.

[m] 4. E. 2. Voucher 243. 246.

(Ant. 348. a.)

[n] Temps E. 1. Gard. 153. 31. E. 1.

Buete 873. 8. E. 2. Vouch. 237.

11. E. 3. ibid. 13.

11. E. 3. quer. imp. 158.

38. E. 3. 7. & 29. 41. E. 3. in

Dower. 9. H. 6. 24. Pl. Com.

Stowel's case per. Saunders & Browne.

[o] 21. E. 3. 36. 2. & b.

38. E. 3. 21. 41. E. 3. 26.

45. E. 3. Taile 32. 44. E. 3. ib. 31.

33. E. 3. ib. 4.

(3. Leon. 20. Cro. Car. 145.)

* pas not in L. and M. nor Rob.

+ &c. added L. and M. and Rob.

issue in taile shall not be remitted, but that the discontinuee shall recover against the issue in taile and he take advantage of his warrantie, if any hee hath, and after in a *formedon* brought by the issue, the discontinuee shall barre him in respect of the warrantie and assents; and so every man's right saved. (1)

rantie fuit fait, come hath himselfe. *Causa le feoffee avoit de luy. patet.*
Causa patet.

Sect. 745.

Sect. 733. 706.

OU release fait per luy ove garrantie.

Note a warrantie grounded upon a release. Hereof you shall reade before in this Chapter.

Soit attain de felony, ou utlage, &c.

8. E. 2. Voucher 237. (Plowd. 397. a.)

Note, according to *Littleton* here, there be two manner of attainders: the one is after appearance, and that in three manners; by confession, by battell, or by verdict: the other upon proces to bee outlawed, which is an attainder in law. But (as hath beene said) there is a great diversitie, as to the forfeiture

(5. Rep. 109. Ant. 13. a. b.)

[e] 33. E. 3. Forfeiture 30. 38. E. 3. 31. 3. E. 4. 25. 19. E. 4. 2. Pl. Com. 488. b.

[p] 8. E. 2. Voucher 237. Vid. 38. E. 3. 29. b. Simile.

of land, betweene an attainder of felony by outlawry upon an appeale, and upon an inditement: for in the case of an appeale the defendant shall forfeit no lands, but such as he had at the time of the outlawrie pronounced; but in case of inditement, such as hee had at the time of the felony committed. And the reason of this diversitie is evident; for that in the case of appeale there is no time alleaged in the writ when the felony was done, and therefore of necessitie it must relate in that case only to the judgement of the outlawry: but in the case of inditement there is a certain time alleaged, and therefore in that case it shall relate to the time alleaged in the inditement when the felony was committed. But in the case of the inditement there is also a diversitie to be observed; [e] for, as hath beene said, it shall relate to the time alleaged in the inditement for avoyding of estates, charges, and incumbrances, made by the felon after the felony committed; but for the meane profits of the land it shall relate only to the judgement, aswell in this case of outlawrie as in other cases. And where *Littleton* saith, (*attain de felony*) if a man be convicted of felony by verdict, and delivered to the ordinary to make purgation, [p] hee cannot be vouched, for that the time of his purgation (if any should be) is uncertaine, and the demandant cannot be delayed upon such an uncertaintie; but the tenant is not without remedie, for hee may have his *warrantia cartæ*.

Attaint. Of this word hath beene spoken in the second Booke in the Chapter of Villenage.

[*] Dame Hale's case in Pl. Com. fol. 262.

Upon severall attainders of felonies, there lye three severall writs of escheate, viz. [*] first, when he hath judgement to be hanged: secondly, when he is outlawed: thirdly, when he abjureth the realme.

[q] 8. E. 3. Judgement 225.

[q] The defendant in an appeale of death did wage battell, and was slaine in the field, yet judgement was given that he should be hanged; and the justices said, that it is altogether necessarie that such a judgement be given, for otherwise the lord could not have a writ of escheate. [r] And in cire it hath been seene, that a man hath beene attainted after his death by presentment, &c. (2) The difference betweene a man attainted and convicted is, that a man is said convict before hee hath judgement; as if a man bee convict by confession, verdict, or recreancie. And when he hath his judgement upon the verdict, confession, or recreancy,

(1) But clearly, if the warranty were never executed, as in the case of *fine* sur render with warranty and assents, there shall be a remitter. Lord Hale's MSS.

(2) In *Lambarde's Justice of Peace*, ch. 10. it is said, that if a man be attainted of murder or felony, it is needles to arraign him of new of any other felony, because it is needles to condemn him who already is attainted, except in special cases, either for the advantage of the king, or the commodity of the subject. The author then proceeds to state several examples of both the exceptions. In 4. Rep. fol. 57, sir Edward Coke observes, that though a man be killed in rebellion, he shall not forfeit his lands nor goods; but if the chief-justice (sovereign coroner of England) upon the view of the body, make record thereof, and return it into the king's bench, he shall forfeit lands and goods, as *Fineux*, chief-justice, did temp. H. 7.

recreancie; or upon the outlawrie, or abjuration, then is he said to be attaint. And thus is the law taken at this day, notwithstanding [f] some diversitie of opinions in our bookes.

If a felon be convicted by verdict, confession, or recreancie, he doth forfeit his goods and chattels, &c. presently. [r] For where a reason hath beene yeilded in our bookes, that the praying of his clergie was a refusall of the judgement of the law, and a flight in law, and for that cause he forfeited his goods and chattels, that doth not hold; for if a man be convicted of petite treason, or murder, or any other crime, for which he cannot have his clergie, yet by the verie conviction he forfeiteth his goods and chattels before attainer. And [u] Stanford (speaking of a felon convicted by verdict) saith, that he shall forfeit his goods which he had at the time of the verdict given, which is the conviction in that case; and by the statute of 1 R. 3. cap. 3. no sheriffe, bailiffe, &c. shall seise the goods of a felon before hee bee convicted of the felony; whereby it appeareth, that the goods may be seised as forfeit after conviction. And the [x] old statute is worthy of noting: *Provisum est in curia nostrâ coram iusticiariis nostris, quod de cetero nullus homo captus pro morte hominis vel aliâ felonâ pro quâ debet imprisonari, disseisetur de terris et tenementis vel catallis suis quousque convictus fuerit.* Soas by a conviction of a felon, his goods and chattels are forfeited; but by attainer, that is by judgement given, his lands and tenements are forfeited, and his blood corrupted, and not before.

[y] If the partie upon his arraignment refuse to answer according to law, or say nothing, he shall not be adjudged to be hanged, but for his contempt, to *peine fort et dure*, which worketh no attainer for the felony, nor forfeiture of his lands, or corruption of blood. But in case of high-treason, if the partie refuse to answer according to law, or say nothing, hee shall have such judgement by attainer, as if he had beene convicted by verdict or confession. (1)

Felony. (*) *Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum,* in which sense murder is said to be done *per feloniam*, and is so appropriated by law, as felonice cannot be expressed by any other word. [a] And in antient times this word (*felonice*) was of so large an extent as it included high-treason; and therefore in our antient bookes, by the pardon of all felonies, high-treason, or counterfeiting of the great seal, and of the king's coine, &c. was pardoned. [b] But afterwards it was resolved, that in the king's pardon or charter, this word (*felonie*) should only extend to common felonies, and that high-treason should not be comprehended under the same, and therefore ought to be specially named. And yet that a pardon of all felonies should extend to petite treason; wherefore by the law at this day under the word (*felony*) in commissions, &c. is included petite treason, murder, homicide, burning of houses, burglary, robbery, rape, &c. chance-medly, *se defendendo*, and petite larceny. [c] For such of these crimes for the which any shall have this judgement, to be hanged by the necke till he be dead, he shall forfeit all his lands in fee simple, and his goods and chattels: for felony by chance-medly, or *se defendendo*, or petite larceny, he shall forfeit his goods and chattels, and no lands of any estate of freehold or inheritance. And all felonies punishable according to the course of the common law, are either by the common law, or by statute. There is also a felony punishable by the civill law, because it is done upon the high sea, as pyracie, robbery, or murder, whereof the common law did take no notice, because it could not be tried by twelve men. If this pyracie be tried before the lord admirall in the court of the admiraltie, according to the civill law, and the delinquent there attainted, yet shall it worke no corruption of blood, nor forfeiture of his lands; otherwise it is if he be attainted before commissioners by force of the statute of [d] 28. H. 8. By the expresse purview of that statute, about the end of the reigne of queene Elizabeth, certaine English pyrats, that had robbed on the sea merchants of Venice, in amitie with the queene, being not knownen, obtained a coronation pardon, whereby, amongst other things, the king pardoned them all felonies. It was [e] resolved by all the judges of England upon conference and advisement, that this did not pardon the pyracie; for seeing it was no felonie whereof the common law tooke consance, and the statute of 28. H. 8. did not alter the offence, but ordaine a triall and inflict punishment, therefore it ought to be pardoned specially, or by words which tant amount, and not by the generall name of felony; and according to this resolution the delinquents were attainted and executed.

Pyrata cometh of the word *πυράτης*, which signifieth a rover at sea. Attainer of heresie or *præmunire* worketh no corruption of blood, nor heresie, forfeiture of lands; but in case of *præmunire*, forfeiture of lands in fee simple, but not of lands in taile, as formerly hath been said. [f] By some statutes it is said, *sur forfeiture de corps et de avoir*, or *sub forisfactura omnium quæ in potestate suâ obtinet*, or to be at the king's will, body, lands, and goods, and the like, these are not extended to the losse of life or member, but to imprisonment, lands and goods. [g] But if an act of parliament saith, *Ecce judgement de vie et member*, or *subeat iudicium vitæ vel membrorum*, in that case judgement of death shall be given, as in case of felonie, viz. that he be hanged

[f] 40. E. 3. 12. 3. E. 3. Corone 365. 8. E. 2. ibid. 293.

21. H. 7.

[r] Dame Hale's case, ubi sup.

8. H. 4. 2.

(12. Rep. 121. 9. Rep. 129)

[u] Stanf. Pl. cor. fol. 192.

Lib. 3. fol. 110. Foxley's case.

Vide 7. H. 4. 11. 1. R. 3. cap. 3.

(3. Infl. 228.)

[x] Statute de catallis felonum

vet. Magna Carta, fol 66. 2. part.

[y] Stanf. Pl. Cor. 139. 185.

(3. Rep. 10. b.)

[a] Glanvil. lib. 14. ca. 15.

Marlbr. ca. 25. W. 1. c. 15.

[b] 3. E. 4. 14. 18. E. 4. 10.

23. Aff. 49. 1. E. 3. 13.

Stanf. Pl. Cor. 102. E. 8. H. 4. 2.

[c] 23. Aff. 49.

(3. Infl. 47. 4. Rep. 40, 41, 42.

44.)

[d] Stanf. præ. 45. 16. E. 7.

Coron. 116. & 3. E. 3. Coron. 302.

(5. Rep. 120. 9. Rep. 65.)

(Vide Ant. 74. 3. Infl. 112.

1. H. P. C. 354, 355. Vol. 2. 12.

368. Salk. 85. contra.)

[e] 28. H. 8. cap. 15.

(3. Infl. 112.)

[f] Hill. 2. Jac. Regis.

Vide Mich. 7. & 8. Eliz. Dier 241.

14. Eliz. Dier 308.

(4. Rep. 43.)

[g] Statute de Magna moneta

tempore E. 1. 35. E. 1. de Car-

liffe. 20. E. 3. cap. 4.

(Doc. & Stud. 115.)

[h] W. 2. cap. 34. Rot. Parl.

25. E. 1. 1. E. 2. de frang. pri-

sonam. 14. E. 3. cap. 10. Stanf.

Pl. Coron. 30, 31. 3. E. 3. Co-

ron. 153. Brooke tit. Coron. 203.

9. E. 4. 26.

(11. Rep. 2. 23. H. 8. 25. H. 8.

48. H. 6. by 18. Eliz. 25. Ed. 3.)

(1) On the *peine forte et dure*, see Mr. justice Blackstone's Commentaries, vol. 4. c. 25.

(11. Rep. 291. 4. Infl. 123.
4. Mod. 128. Show. 353.)
[4] Bract. lib. 4. fol. 248.
4. E. 3. 3. 13. R. 2. cap. 2.
Rot. Parl. 21. R. 2. nu. 19.
1. H. 4. c. 1. 13. H. 4. 4. & 5.
37. H. 6. 21. Rot. Parl. 8. R. 2.
nu. 31. Fortesc. cap. 32. Rot.
Parl. 2. H. 4. 74. 11. H. 4. 24.
20. H. 6. 6. Stanf. Pl. Cor. 65.
Stat. de Assiznat. 4. E. 1. Br.
Cor. 196. Rot. Parl. 2. H. 6.
nu. 9. Rot. Parl. 5. H. 4. nu. 39.
Rot. Vase. 9. H. 4. nu. 14.
8. H. 6. nu. 38. 21. E. 4. 17. b.
Catesby. 10. H. 7. per Vavalor.
18. E. 2. Quar. Imp. 175.
6. E. 3. 41. Pafe. 14. E. 3. in
Scac. le Count. de Kent's case,
p. 39. E. 3. cor. Reg. Rot. 49.
le Count. de Lanc. case. Rot. Parl.
28. E. 2. nu. 8. Mortimer's case.
Rot. Parl. 28. E. 3. nu. 13. le
Countee de Arundel's case.
[*] Stanf. lib. 3. Pl. Cor. 195. b.
27. E. 3. 77. 13. H. 4. 8. Vid.
Lit. lib. 1. in the Chap. of
Dover.
(3. Infl. 240.)

hanged by the necke till he be dead. and consequently his blood is corrupted (as our author here saith) and shall forfeit as in case of felonie.

[6] There is also a court of the constable and marshall, who have conuance of contracts of deeds of arme, and of warre out of the realme and also of things touching warre within the realme, which may not be determined or discuted by the common law, and also all appeales of offences done out of the realme. and they proceed according to the civill law: but these things more properly pertaine to another kind of treatise, and therefore I shall speake no more thereof in this place, but only for the satisfaction of the studious reader, to quote some authorities of law touching the jurisdiction of that court, that hee may have some taste thereof.

In the same manner it is, if a man be attainted of high-treason, the warrantie is also defeated.

Le sanke est corrupt enter eux, &c. [*] Aptly is a man said to be attainted, *attinens*, for that by his attainder of treason or felonie his blood is so stained and corrupted, as, first, his children cannot be heires to him, nor to any other ancestor, and therefore the warrantie cannot binde; for thereby heires only, are to be bound.

Secondly, if he were noble or gentle before, he and all his children and posteritie are by this attainder made base and ignoble in respect of any nobilitie or gentrie which they had by their birth.

Thirdly, this corruption of blood is so high, that regularly it cannot be absolutely salved but by authoritie of parliament: all which is implied in the same (&c.). (1)

Sect. 746.

LE issue en taile poit enter. And the rea-

son is, for that by the attainder of the father, it is now in judgement of law but a release without warrantie; for albeit the warrantie at the time of the release was effectually, yet it worketh no discontinuance unless it descendeth upon the issue in taile; so as if it be defeated, extinct, or determined in the life of the tenant in taile, then no discontinuance is wrought; and so it is if tenant in taile hath issue, and releaseth to the disseisor with warrantie, and after is attainted of felonie, and after obtaineth his pardon and dieth, the issue in taile may enter; [*] for the pardon doth not restore the blood as to the warrantie, nor maketh the issue in that case inheritable to the warrantie. But if the issue in taile in that case had been attainted of felonie in the life of his father, and obtained his charter of pardon, and then his father had died, the issue cannot enter into the

*ITEM, si tenant en taile soit disseise, et puis fait release al disseisor ove garrantie en fee, et puis le tenant en taile est attaint, ou utlage de felony, et ad issue et morust; en cest case l'issue en taile poit enter sur le disseisor. Et la cause est pur ceo, que * rien fait discontinuance en cest case forsque le garrantie, et garrantie ne poit descendre al issue en taile, pur ceo, que le sanke est corrupt perenter celuy que fist le garrantie et issue en taile.*

ALSO, if tenant in taile bee disseised, and after make a release to the disseisor with warrantie in fee, and after the tenant in taile is attaint, or outlawed of felony, and hath issue and dieth; in this case the issue in taile may enter upon the disseisor. And the cause is for this, that nothing maketh discontinuance in this case but the warrantie, and warrantie may not descend to the issue in taile, for this, that the blood is corrupted between him that made the warrantie and the issue in taile.

(Plowd. 252. a. 3. Infl. 241.)

[*] 27. E. 3. 77. 1. E. 3. 4.
6. E. 3. 55. 9. H. 5. 9. 31. E. 1.
Discent. 17. 46. E. 3. Petit. 20.
26. Aff. 2. 49. Aff. 4. 29. Aff. 11.
13. H. 4. 8. 13. H. 7. 17. Pl.
Com. in Walsingham's case.
3. E. 2. Discent. Br. 64. Stanf.
Pl. Cor. 195, 196. See in the
Chapter of Tenant by the Cur-
tesie, touching this matter.

(Plowd. 557. b. Ante 8. a.)

Sect.

* null added L. and M. and Roh.

(1) The policy and justice of our laws of forfeiture in this respect are most ably discussed in Mr. Yorke's celebrated Considerations on the Law of Forfeiture.

Sect. 747.

*CAR le garranty tous foits demurt a le common ley, et la common ley est, * ove quant home est attaint ou utlage de felonie, quel utlagarie est un attainder en ley, que le sanke perenter luy et son firs, et tous autres queux ferra dits ses heires, est corrupt, issint que † riens per discent poit disceder a ascun que poit estre dit son heire per le common ley. Et la feme de tiel home que issint est attaint de felonie, ne ferra jammes endow de les tenements sa baron issint attaint. Et la cause est, pur ceo que homes plus eschuerent de faire ascuns felonies. ‡ Mes l'issue en tayle quant a les tenements tailed n'est pas en tiel cas § barre, pur ceo que || est enberite per force de le statute, et nemy per le course de common ley: et pur ceo tiel attainder de son pier ou de son ancestor en le tayle ¶, ne luy ouster de son droit per force de le taile, &c.*

FOR the warrantie alwayes abideth at the common law, and the common law is such, that when a man is attaint or outlawed of felony, which outlawrie is an attainder in law, that the blood betweene him and his sonne, and all others which shall bee said his heires, is corrupt, so that nothing by discent may descend to any that may bee said his heire by the common law. And the wife of such a man that is so attaint, shal never be endowed of the tenements of her husband so attainted. And the cause is, for that men should more eschew to commit felonies. But the issue in taile as to the tenements tailed is not in such case barred, because hee is inheritable by force of the statute, and not by the course of the common law: and therefore such attainder of his father or of his ancestour in the taile, shall not put him out of his right by force of the taile, &c.

land in respect of the corruption of blood upon the attainder of himselfe. [b] And it is a generall rule, that having respect to all those whose blood was corrupted at the time of the attainder, the pardon doth not remove the corruption of blood neither upward nor downward. As if there be grandfather, father, and sonne, and the grandfather and father have divers other sonnes, if the father bee attainted of felonie and pardoned, yet doth the blood remaine corrupted not onely above him and about him, but also to all his children borne at the time of his attainder. But in the case of *Littleton*, if tenant in taile at the time of his attainder had no issue, and after the obtaining of his pardon had issue, that issue should have beene bound by the warrantie; for by the pardon he was as a new creature, *tangquam filius terræ*, whose blood upwards remaine corrupted; but for the issue had after the pardon, hee is inheritable to his father; and if his father had issue before the pardon, and had issue also after and dieth, nothing can descend to the youngest, for that the eldest is living and disabled. But if the eldest sonne had died in the life of the father without issue, then the youngest should inherit.

Le garrantie demurt al common ley.

The collateral warrantie is not restrained by the statute of *donis conditionalibus*, but a lineall warrantie is restrained by the statute, unless there be assets; as formerly at large hath beene said.

Et la feme de tiel home que issint est attaint, &c. ne ferra jammes endow, &c.

It is to be observed, that the judgement against a man for felonie is, that he be hanged by the neck untill he be dead; but *implicative*, (as hath beene said) he is punished

[b] *Bract. lib. 3. fol. 132, 133. 276. & lib. 5. 374. Britt. fol. 215. b. Flet. lib. 1. cap. 28.*

(1. Cro. 435. Ant. 8. 2.)

Vid. Sect. 711, 712.

(8. Rep. 171. Ante 31. 2. 37. 2. 41. 2.)

(Lamb. 275, 276.)

* *tiel* added L. and M. and Roh.
§ *barre* not in L. and M. nor Roh.

† *null* added L. and M. and Roh.
|| *il* added L. and M. and Roh.

‡ *&c.* added L. and M. and Roh.
¶ *&c.* added L. and M. and Roh.

(3. Inst. 17. 47. Ant. 41. a.)

[i] 5. E. 3. 14. 9. E. 3. 22.

[4] 7. H. 4. 32. 19. H. 6. 71.
See Lit. lib. 1. cap. Dow. Sect. 55.

(7. Rep. 11.)

[f] 26. H. 8. cap. 13.

33. H. 8. cap. 20. 5. E. 6. ca. 11.

[m] Stanf. Pl. Cor. 195.

[n] 1. E. 6. ca. 13. 5. E. 6. c. 11.

5. El. ca. 1. & 11. 18. El. cap. 1.

12. H. 4. 3. Vide Sect. 55.

(3. Rep. 171.)

[o] 6. H. 4. 1. 45 E. 3. Vouch. 72.

Pl. Com. 292. 16. E. 3. Age 46.

18. H. 3. Vouch. 281. 23. E. 3.

Garr. 77. See in the Chapter of

Villanage, Sect. 200.

first in his wife, that she shall lose her dower. Secondly, in his children, that they shall become base and ignoble; as hath been said. Thirdly, that he shall lose his posterity, for his blood is stained and corrupted, that they cannot inherit unto him or any other ancestor. Fourthly, that he shall forfeit all his lands and tenements which he hath in fee, and which he hath in tail, for terme of his life. And fifthly, all his goods and chattels. And thus severe it was at the common law; and the reason hereof was, that men should feare to commit felonie: *Ut pœna ad paucos, metus ad omnes perveniat*. And it is truly said, *Esse meliores sunt quos ducit amor, tamen plures sunt quos corrigit timor*. And so it is *a fortiori* in case of high-treason. But some acts of parliament have altered the common law in some of these points: first, by the statute of *donis conditionalibus*, lands intailed were not forfeited neither for felonie nor for treason, but for the life of tenant in tail. This act was made by king Edward the first, who (as our bookes [i] speake) was the most sage king that ever was: [4] and the cause wherefore this statute was made, was to preserve the inheritance in the blood of them to whom the gift was made, notwithstanding any attainder of felonie or treason. And this act in historie is called *gentilitium municipale*; for that by this act the families of many noblemen and gentlemen were continued and preserved to their posterities. And this law continued in force from the thirteenth yeare of king Edward the first, untill the [f] twentieth yeare of king Henry the eighth, when by act of parliament estates in tail are forfeited by attainder of high-treason. But as to felonies (whereof our author here speaketh) the statute of *donis conditionalibus* doth yet remaine in force, so as for attainder of felonie, lands or tenements entailed are not forfeited, but only (as hath been said) during the life of tenant in tail, but the inheritance is preserved to the issues.

[m] The wife of a man attainted of high treason or petit treason shall not be received to demand dower, unlesse it be in certaine cases specially provided for. But the wife of a person attainted of misprision of treason, murder, or felonie, is dowable since our author wrote, [n] by the statute in that case made and provided, which is more favourable to the woman than the common law was.

[o] If a feignorie be granted with warrantie, and the tenancie escheat, the feignorie whereunto the warrantie was annexed is extinct, and consequently the warrantie defeated, and it shall not extend to the land; *et sic in similibus*.

If a collateral ancestor release with warrantie, and enter into religion, now the warrantie doth binde; but if after he be deraigned, now it is defeated.

Sect. 748.

(1. Rep. 112. b.)

(5. Rep. 71. a.)

Vide Lib. 8. fol. 153, 154. Al-

tham's case. 46. E. 3. 2.

45. E. 3. 23. Vid. before in the

Chapter of Releases. Sect. 508.

(Ant. 291. b.)

[7] 14. Aff. pl. 2.

3. Eliz. Dyer. 188. 9. E. 4. 52. b.

(Plowd. 2. b. Manxel's case)

Ant. 319. b. 20. a. 6. Rep. 7.)

LITTLETON having spoken in what cases warranties may be defeated and extinguished by matter in law, now he sheweth how a warrantie may be discharged or defeated by matter in deed: and hereupon he putteth an example of a release in three severall manners:

First, by a release of all warranties.

Secondly, by a release of all covenants reall.

And thirdly, by a release of all demands.

[7] If a man make a gift in tail with warrantie, this warrantie is also intailed, and therefore a release made by tenant in tail of the warrantie, shall not bar the issue, no more than his release shall bar the issue to bring an attainder upon a false verdict, or a writ of error upon an erroneous

ITEM, *si tenant en le taile enseoffa son uncle, le quel enseoffa un auter en fee ove garrantie, &c. si apres le feoffee per son fait releffa a son uncle tous manners des garranties, ou tous manners de covenants reals, ou tous manners de demandes, per tiel release le garrantie est extinct. Et si le garrantie en cel case soit pleade envers le heire en taile, que porta son brieve*

ALSO, if tenant in taile infeoffe his uncle, which infeoffes another in fee with warrantie, if after the feoffee by his deed release to his uncle all manner of warranties, or all manner of covenants realls, or all manner of demands, by such release the warrantie is extinct. And if the warrantie in this case be pleaded against the heire in taile that bringeth his writ of *formede*

*de formedon, pur bar-
rer le heire de son ac-
tion, si l'heire avoit * le
dit releas et ceo pledast,
il defetere le plee en
barre, &c. Et mults
autres casés et matters
y sont, per queux home
poet defeater garrantie,
&c.*

don, to barre the heire
of his action, if the
heire have and plead
the said release, &c. he
shall defeat the plee in
barre, &c. And many
other casés and mat-
ters there be, whereby
a man may defeat a
warrantie, &c.

judgement given against the
father, nor his gift can barre
the issue of the deed that
create the estate taile, nor of
any other deed necessary for
defence of the title.

*Après le feoffee re-
lessa.*

Littleton here put-
teth his case where one is
bound to warrant: put the
case [r] then that two make
a feoffment in fee, and war-
rant the land to the feoffee
and his heires, and the feof-
(5. Rep. 70.)
[r] 45. E. 3. 23.
(3. Rep. 14.)

fee release to one of the feoffors the warrantie, yet he shall vouch the other for the moytie.
And so it is if one infeoffe two with warrantie, and the one release the warrantie, yet the
other shall vouch for his moytie.

Si le heire avoit le dit releas, &c. Here it appeareth, that the release being
made to the uncle being his ancestor, the deed doth after the decease of the uncle belong to
him, and therefore he cannot plead it, unlesse he sheweth it forth.

Et mults autres casés et matters y sont, per queux home poet defeater (Vaugh. 387.)
garrantie, &c.

As namely by a defeasance, as other things executorie may. Also a
warrantie may lose his force by taking benefit of the same. In a *præcipe* the tenant voucheth,
and at the *sequatur sub suo periculo*, the tenant and the vouchee make default, whereupon the
demandant hath judgement against the tenant. And afterwards the demandant brings a
scire facias against the tenant to have execution; in this case the tenant may have a *warrantia
cartæ*. And if in that case a stranger had brought a *præcipe* against the tenant, hee might have
vouched againe, for by the judgement given against the tenant, the warranty lost not his
force; but if the tenant had judgement to recover in value against the vouchee, hee
should never vouch againe by reason of that warrantie, because hee had taken advantage of
the warrantie. And it is to be observed, that upon the proces of *summonas ad warrantizan-
dum*, if the sherife returne the vouchee summoned, and he make default, the tenant shall
have a *capias ad valentiam*; but if he returne that the vouchee had nothing, then after the
scire facias and *plures a sequatur sub suo periculo* shall issue; and there if the vouchee make default,
the tenant shall not have judgement to recover in value, for he was never summoned; and
it appeareth of record that he hath nothing, but in the *capias ad valentiam* it appeareth that
he had assets, and he had beene summoned before: but in some speciall casés there shall be two
recoveries in value upon one warrantie. As if a disseisor give lands to the husband and wife,
and to the heires of the husband, the husband alieneth in fee with warrantie and dieth, the
wife bringeth a *cui in vita*, the tenant vouches and recovereth in value, if after the death of
the wife the disseisor bring a *præcipe* against the alienee, he shall vouch and recover in value
againe.

[f] So it is where the wife bringeth a writ of dower against the alienee, he shall recover in [f] 45. E. 3. Voucher 72.
value, and after her death he shall recover in value againe, upon the same warrantie.

In the same manner it is if a man be seised of a rent by a defeasible title, and releaseth to
the tenant of the land all his right in the land, and warranteth the land to him and his
heires, if he be impleaded for the rent, he shall vouch and recover in value for the rent; and
if after he be impleaded for the land, he shall vouch and recover in value againe for the
land: but in these and the like casés, the reason is in respect of the severall estates recovered,
but for one and the same estate he shall never recover but once in value; and though the
land recovered in value be evicted, yet shall he never take benefit of that warrantie after.
And as warranties may be defeated in the whole, so they may be defeated as to part of the
benefit that may be taken of the same. [r] As he that hath a warrantie may make a defea-
sance not to take any benefit by way of voucher; in the like manner that he shall take no ad-
vantage by way of *warrantia cartæ*, or by way of rebutter.

(Ant. 367. b.)

[r] 7. H. 6. 43. 13. Aff. 8.
13. E. 3. Garr. 24, 25, 37.
22. H. 6. 51. 8. H. 7. 6.

* *le dit releas et ceo pledast—et pledast le dit releas, &c.* in L. and M.

Seēt. 749.

HERE *Littleton* sheweth, that in the same manner that a collateral warrantie may be defeated by matter in deed, or by matter in law, so may to all intents and purposes a lineall warrantie, whereof hee putteth an example of a lineall warrantie and assents.

Et un lineal garrantie, &c. ovesque ceo que assents a luy discendist, &c. Here it appeareth

by *Littleton*, that a lineall warrantie and assents is a good plea in a *formedon* in the discender; wherein it is to be knowen, that if tenant in taile alieneth with warrantie, and leave assents to descend; if the issue in taile doth alien the assents, and die, the issue of that issue shall recover the land, because the lineall warrantie descendeth only to him without assents; for neither the pleading of the warrantie without the assents, nor the assents without the warrantie is any barre in the *formedon* in the discender. But if the issue to whom the warrantie and assents descended had brought a *formedon*, and by judgement had beene barred by reason of the warrantie and assents; in that case, albeit he alieneth the assents, yet the estate taile is barred for ever; for a barre in a *formedon* in the discender, which is a writ of the highest nature that an issue in taile can have, is a good barre in any other *formedon* in the discender, brought afterwards upon the same gift.

ET est ascavoir, que en mesme le manner come garrantie collateral poit estre defeat per matter en fait ou en ley; en mesme le manner poit lineal garrantie estre defeat, &c. Car si l'heire en taile porta brieve de formedon, et un lineal garrantie de son ancestor enheritable per force de le taile, soit plede envers luy, ove ceo, que assents a luy discendist de fee simple, † que il ad per mesme l'auncestor que fist le garrantie; si l'heire que est demandant poit adnuller et defeater le garrantie, ceo suffist a luy: car le discent des auters tenements de fee simple ne fait riens pur barrer l'heire sans le garrantie, &c.*

AND it is to be understood, that in the same manner as the collateral warrantie may be defeated by matter in deed or in law; in the same manner may a lineall warrantie be defeated, &c. For if the heire in taile bringeth a writ of *formedon*, and a lineall warrantie of his ancestor inheritable by force of the taile, be pleaded against him, with this, that assents descended to him of fee simple, which hee hath by the same ancestor that made the warrantie; if the heire that is demandant may adnull and defeat the warrantie, that sufficeth him: for the discent of other tenements of fee simple maketh nothing to barre the heire without the warrantie, &c.

Temps E. 1. Car. 89. 34. E. 1. ibid. 88. 11. E. 2. ibid. 83. 4. E. 3. 24. 5. E. 3. 14. 40. E. 3. 9. 14. H. 4. 39. 24. H. 8. taile Br. 33. 4. Mar. Dier 139. Lib. 10. fol. 37, 38. in Mary Portington's case.

(8. Rep. 51.)

(Ant. 374. a. b.)

(10. Rep. 38. Plowd. 440. a. b. Hob. 40. Moor. 55.)

A TOY, mon fitz, &c. Here our author calleth (as many times in these bookes he hath done)

not only his sonne *Richard*, but everie student of the law to be accounted his son, and worthily; for that seeing our author had the honour to be in his time the father of the law, and all good students in the law justly account themselves the sonnes of the law (for otherwise they are not worthy of the profession), our author, as a carefull and provident father, as it hath manifestly appeared, gave excellent instructions in these his bookes, both to his owne sonne, and to his adopted sonnes, to make them from age to age the more apt and able to understand the arguments and reasons of the law.

ORE jeo ay fait a toy, mon fits, trois livres.

NOW I have made to thee, my sonne, three bookes.

Le

* &c. not in L. and M. nor Roh.

† que il ad not in L. and M. nor Roh.

Le primer Livre est de Eſtates
que homes ont en terres * ou te-
nements : c'eſtaſcavoir,

The firſt Book is of Eſtates
which men have in lands and te-
nements : that is to ſay,

De Tenant en fee ſimple	†† Cap. 1
De Tenant en fee taile	2
De Tenant en † fee taile apres poſſibilitie d'iſſue extinct	3
De Tenant per le curteſie d'Engleterre	4
De Tenant en dower	5
De Tenant a terme de vie	6
De Tenant pur terme des ans	7
De Tenant a volunt per le common ley	8
De Tenant a volunt per cuſtome del mannor	9
‡ De Tenant per le verge	10

Le Second Livre. §

De Homage	Cap. 1
De Fealtie	2
De Eſcuage	3
De Service de Chivaler	4
De Socage	5
De Frankalmoigne	6
De Homage Aunceſtre	7
De Grand Serjeantie	8
De Petit Serjeantie	9
De Tenure en Burgage	10
De Tenure en Villenage	11
De Rents	12

Et ceux deux petits Livres jeo
ay fait a toy pur le melior enten-
der de certaine Chapters de les an-
tient Livre de Tenures.

And theſe two little Books I
have made to thee for the better un-
derſtanding of certaine Chapters
of the antient Booke of Tenures.

Meliour entendre, &c. And theſe Inſtitutes have I collected and publiſhed to the
end that theſe three Bookes of our author may be the better underſtood of the ſtudious
reader.

Antient Livre des Tenures. This booke may well be accounted antient, for it
was compoſed in the raigne of king Edward the third, (as juſtice Fitzherbert ſaith) by a Fitz. in his Preface to his N. B.
grave and diſcreet man.

Le Tierce Livre. ¶

De Parceners ** ſolouque le courſe del common ley	Cap. 1
	De

* ou—r, L. and M. and Roh. † fee—le, L. and M. and Roh. ‡ De tenant per le verge not in L. and M. nor Roh.
§ eſt added L. and M. and Roh. || Rents—iii. maners de rentes, ſcilicet, rent ſervice, rent charge, et rent ſekke, L. and M.
and Roh. ¶ eſt added L. and M. and Roh. ** ſolouque le courſe del common ley added L. and M. and Roh.
†† The numbers of the Chapters as above are not enumerated either in L. and M. or Roh.

Epilogus.

* De Parceners solongue le custome	Cap. 2
De Jointenants	3
De † Tenants en common	4
De Estates de terres et tenements sur condition	5
De Discent que tollent entries	6
De Continual Claime	7
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¶ Epilogus.

JE O ne voile enprender ne presumer,

Ec. Here observe the great modestie and mildnesse of our author, which is worthy of imitation; for *Nulla virtus, nulla scientia locum suum et dignitatem conservare potest sine modestia*. And herein our author followed the example of *Mosis*, who was a judge, and the first writer of law; for he was *mitissimus omnium hominum qui fuit in terris*, as the holy historie testifieth of him.

Les arguments et les raisons del ley, Ec.

Ratio est anima legis; for then are we said to know the law, when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason, that wee perfectly understand it as our owne; and then, and never before, we have such an excellent and inseparable propertie and ownership therein, as wee can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other cases. But if by your studie and industrie you make not the reason of the law your owne, it is not possible for you

ET saches, mon fits, que jeo ne voile

que tu croies, que tout ceo que jeo ay dit en les dits livres soit ley, car jeo ne ceo voile enprender ne presumer sur moy. Mes de tiels choses que ne sont pas ley, enquires et apprendres de mes sages masters apprises en la ley.

Nient meins coment que certaines choses queux sont motes et specifies en les dits livres, ne sont pas ley, uncore tielx choses ferra toy plus apt et able de entendre et apprendre les arguments et les raisons del ley, *Ec.* Car per les arguments et les raisons en la ley, home plus tost aviendra a le

AND know, my son, that I would not have thee beleieve, that all which I have said in these bookes is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learne of my wise masters learned in the law. Notwithstanding albeit that certaine things which are moved and specified in the sayd bookes, are not altogether law, yet such things shall make thee more apt, and able to understand and apprehend the arguments and the reasons of the law, &c. For by the arguments and reasons in the law, a man more sooner shall come to the certain-

cer-

* De parceners solongue le custome not in L. and M. nor Roh. garrantie lyncall, garrantie collaterall, et garrantie que comence per disseisin, added L. and M. and Roh. M. nor Roh.

† Tenants—tenements, L. and M. and Roh.

‡ scilicet,

¶ Not in L. and

certaintie et a la co- tie and knowledge of
nusans de la ley. the law.

Lex plus laudatur quando ratione probatur.

argumentari et ratiocinari are many times taken for one. And that our author may not speake anything without authority, (which in these Institutes we have as we take it manifested) his opinion herein also agreeth with that of the learned and reverend chiefe justice of the court of common pleas, sir Richard Hankford, [y] *Home ne scavera de quel mettal un campane est, si ne soit bien bate, ne le ley bien conus sans disputation.* And another saith, [*] *Jeo aye dispute cest matter pur la apprender la ley.* So as our author hath made a most excellent epilogue or conclusion with a grave advice and counsell, together with the reason thereof, which all good students are to know and follow; and with *scire* and *sequi* I will conclude our author's epilogue.

long to retaine it in your memorie. And wel doth our author couple arguments and reasons together, *Quia argumenta ignota et obscura ad lucem rationis proferunt et reddunt splendida*: and therefore

[y] 11. H. 4. 37.
[*] 41. E. 3. 22. Kitor.
Vid. Sect. 377.

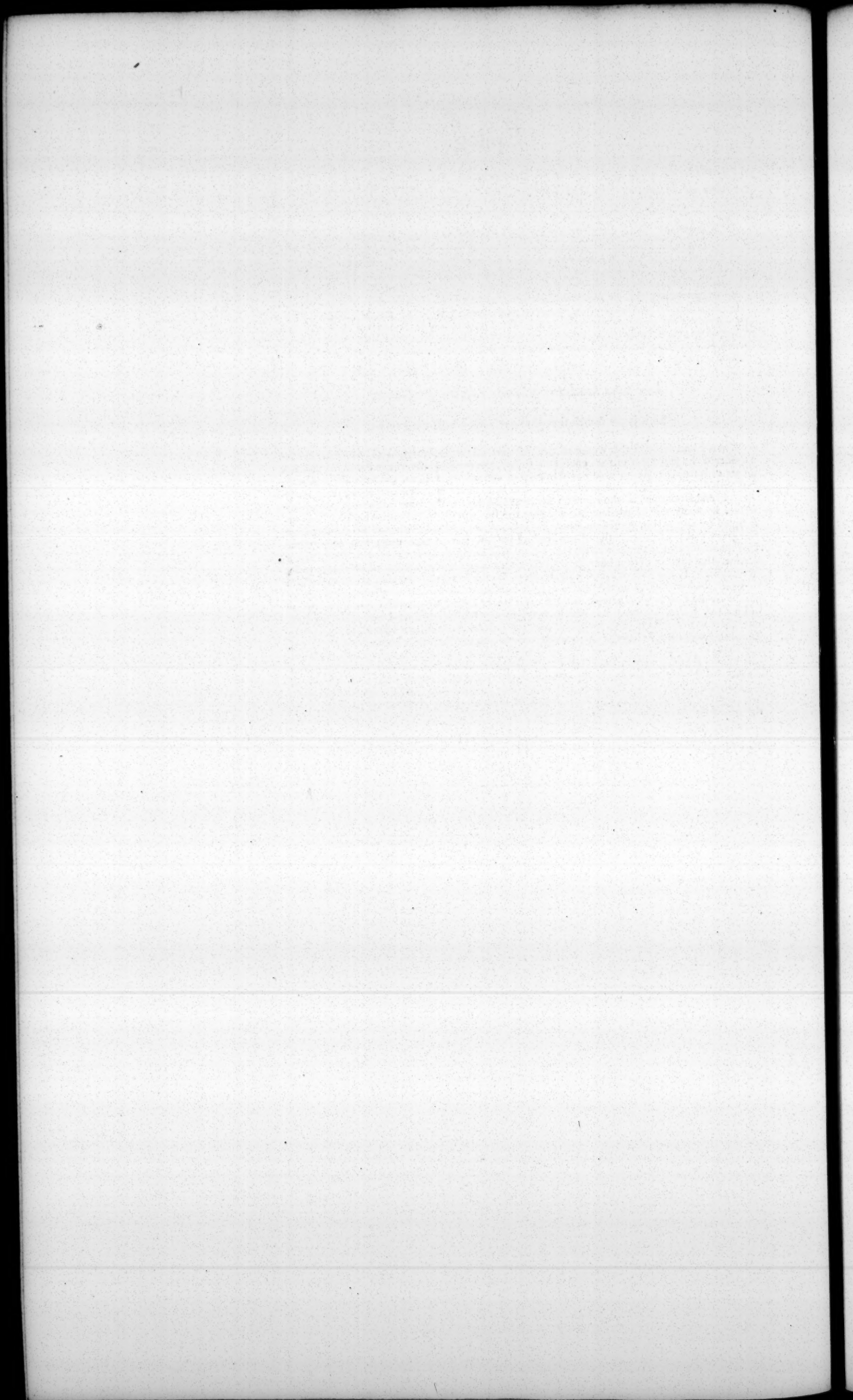
Lex plus laudatur quando ratione probatur.

This is the fourth time that our author hath cited verses.

Vid. Sect. 384. 443. 550.

When I had finished this worke of the first part of the Institutes, and looked backe and considered the multitude of the conclusions in law, the manifold diversities between cases and points of learning; the varietie almost infinite of authorities, antient, constant and moderne, and withall their amiable and admirable consent in so many successions of ages; the many changes and alterations of the common law, and additions to the same, even since our author wrote, by many acts of parliament, and that the like worke of Institutes had not been attempted by any of our profession whom I might imitate, I thought it safe for me to follow the grave and prudent example of our worthy author, not to take upon me, or presume that the reader should thinke that all that I have said herein to be law: yet this I may safely affirme, that there is nothing herein but may either open some windowes of the law, to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withall to inable him to inquire and learne of the sages, what the law, together with the true reason thereof, in these cases is: or lastly, upon consideration had of our old bookes, lawes, and records, (which are full of venerable dignitie and antiquitie) to finde out where any alteration hath beene, upon what ground the law hath beene since changed; knowing for certaine, that the law is unknownen to him that knoweth not the reason thereof, and that the knowne certaintie of the law is the safetie of all. I had once intended, for the ease of our student, to have made a Table to these Institutes; but when I considered that Tables and Abridgements are most profitable to them that make them, I have left that worke to everie studious reader. And for a farewell to our jurisprudent, I wish unto him the glad-some light of jurisprudence, the loveliness of temperance, the stabilitie of fortitude, and the soliditie of justice.

F I N I S.



P R F F A C E
TO THE
T A B L E*.

To the R E A D E R.

COURTEOUS READER,

ALTHOUGH I have ever observed true, what our Honourable and grave Author intimates in the conclusion of this worke, That Tables and Abridgements are most profitable to the makers, which indeed first gave life to my endeavours in this task, yet the confidence that they are not altogether unserviceable to others, together with the undeniable importunitie of some especiall friends, hath now wrested that to the publike view, what only was intended for private use. I hope the largeness of the Volume will apologize for the length of the Table, and its language speake somewhat in excuse of its prolixitie. And because of the smalnesse of the print, together with the much matter couched in every line, I have observed some notes or figures for your more speedie direction to what you
are

* The Table to which this Preface was originally prefixed appears to have been first printed in 1629. It is here printed from the improved edition of it annexed to the 11th and 12th editions of this work.

P R E F A C E T O T H E T A B L E.

are inquisitive. Divide each page with your eye into three parts, and where you meet with this note (+) it directeth to the upper part, this note () to the middle part, and this (¶) inviteth you to the lower part of the page, so that you may easily at the first view finde what you desire, without the tedious reading over the whole page : and if you chance to misse what you seeke for in the comment, the text will supply it unto you, or else the Printer shall be much to blame. Thus requesting you to weigh these my labours in the even balance of your indifferent judgement, I submit them to your censure, and take my leave.*

From the Inner Temple.

Prodesse non obesse.

Illud ex animo fiet, hoc præter voluntatem accidet.

A Table

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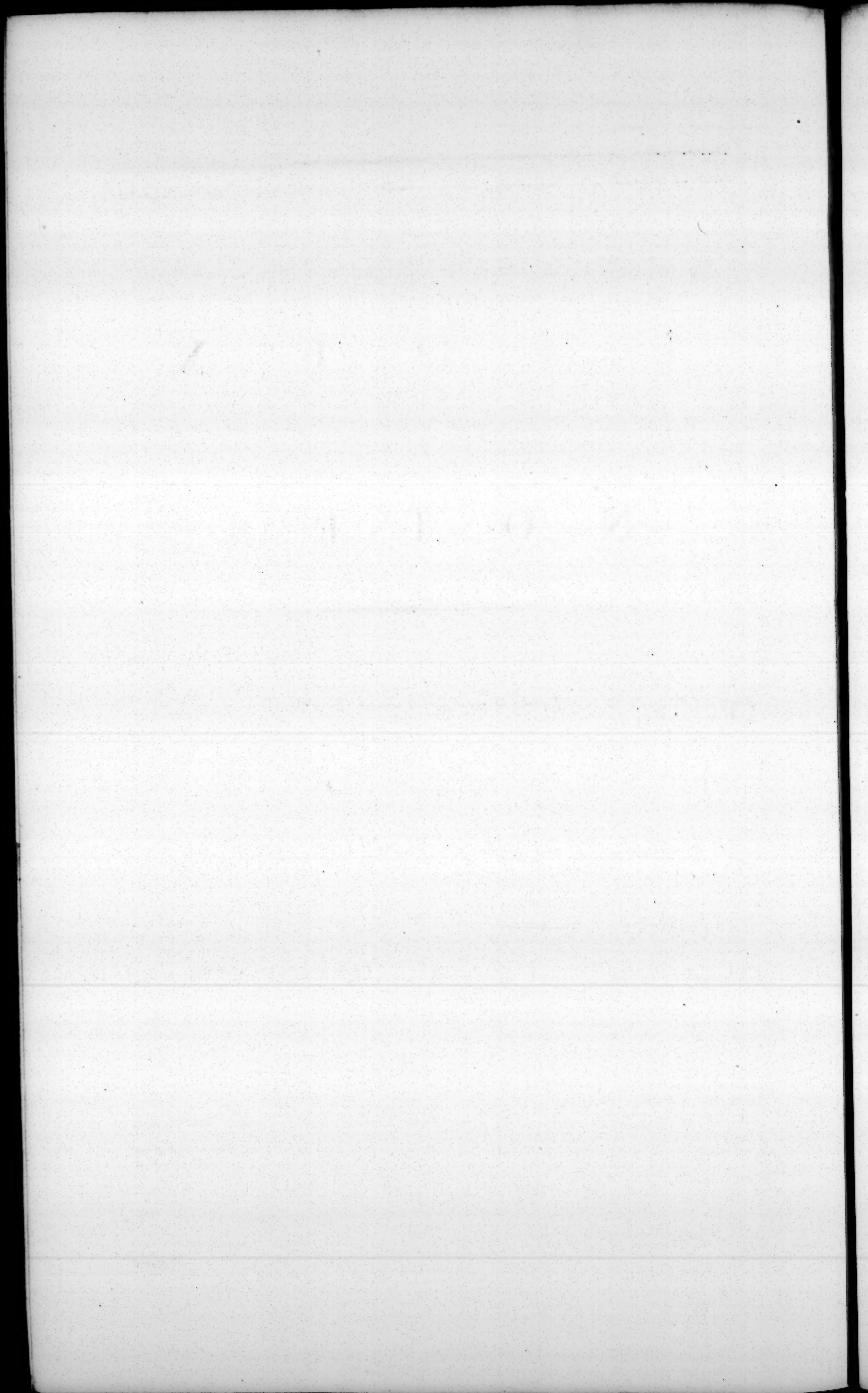
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In this note it is suggested, as a mode to prevent dower, that the estate should be limited to such uses as the purchaser shall appoint, and for want of appointment, to a trustee, his heirs and assigns, during the life of the purchaser, &c. To keep the estate of the trustee from vesting in an infant heir, feme covert, &c. it may be limited to the trustee, his executors, administrators, and assigns, during the life of the purchaser. This will not prevent its being an estate of freehold in the hands of the executor or administrator. See note 1, page 41 b, Cartwright 376. It is worthy of consideration, whether in marriage settlements, the powers of selling and exchanging, and the other powers given to the releasees, and the survivor of them, and the heirs of the survivor, should not be given to them and the survivor of them, and the executors and administrators of such survivor. This will prevent the mischief of either becoming vested in an infant heir, &c. It is observable, that even in the most approved precedents of settlements, the powers both of the cestuys que use and the releasees, are so far inaccurately penned, that they appear to be framed on a notion, that the persons exercising them act as grantors, or lessors, or otherwise as owners of the fee; when, in fact, they only design the person in whom, or the event upon which, the use is to vest or arise; or, to use a more technical expression, their acts appear to be executions of a power derived from an interest, not the executions of a power specially reserved. See n. 1, p. 112 a

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E R A T A



E R R A T A.

In Mr. HARGRAVE'S ADDRESS, for *Mecklinia*, read *Macblinia*.

In the COKE upon LITTLETON, and the NOTES.

- Fol. 2. b. at the end of note 6, for 3. *Ro. Rep.* read 2. *Ro. Rep.*
 3. a. first line of note 1, for 1. *Vern. an. Atk.* read 2. *Vern. and 3. Atk.*
 b. line 18, after *deformed*, dele *not.*
 6. b. line 22, for *banished*, read *vanished*.
 36, after *ibat*, for *by*, read *up*.
 7. a. in the notes, line 5, for *Menochius*, read *Menochius*.
 9. b. line 27, after (*beirs*) add 3.
 10. a. in the notes, line 7, for *Dy. 178 b.* read *Dy. 179. b.*
 13. a. in the side references, line 5, for *Ro. Abr.* read 2 *Ro. Abr.*
 line 43, for *nisi*, read *cui*; and in line 44, for *quæ de rege tenent*, read *qui de rege tenent*. Both of these are also errors in the second edition.
 line 19 of the notes, for *Pym's*, read *Pimb's*.
 14. a. line 11 of lord Coke's commentary, for *genitum*, read *nitum*
 line 18, for *hereafter*, read *hereafter in*.
 line 1 of note 2, after *see*, add *in*.
 18. a. line 8, dele *of writ*.
 19. a. line 5 of the notes, for *and Trafford*, read *Trafford and Trafford*.
 20. a. line 22 of the notes, for *Accordingly*, read *According*.
 21. a. line 11 of the notes, for *were held adjudged*, read *were adjudged*.
 26. a. line 20 of lord Coke's commentary, after *wife* insert (3).
 line 2 of the notes, for *must*, by a *special heir*, read, *must be a special heir*.
 b. line 5 of the notes, for *be* read *she should have taken*.
 28. a. in the first side references to Sect. 33, for *Bowie's case* 13, read *case 11*.
 b. line 10 of the notes, for *was* read *seems to have been agreed*.
 29. b. line 14 *ibid.* read *of the former claim*, at the beginning of the line.
 line 18 *ibid.* for *leaves undecided*, read *leave undecided*.
 31. a. line 7 *ibid.* for 30. *b. n. 3.* read 30. *b. n. 2.*
 line 7 *ibid.* from the bottom, for *covenantor's son for life*, read *covenantor for life*.
 33. a. line 9 of the notes, for *residus*, read *residue*.
 b. line 17 from the bottom, for 1641. read 1741.
 34. a. line 10 of lord Coke's commentary, for *lecto mortali*, query, if it should not be *lecto mortali*.
 line 2 in the side references, for *cap. 318.* read *cap. 39.*
 line 8 of the notes, from the bottom, for *to as take heir*, read *to take as heir*.
 36. b. line 11 of the notes, for *Vifett*, read *Vifett*; and line 15, for *B. 6.* read *B. 5.*
 37. a. line 13 *ibid.* for *Lays*, read *Seys*.
 53. a. line 8 *ibid.* after *wainscot*, add, *if put up by himself*.
 54. a. line 15 *ibid.* for *Sizer*, read *Si-c.*
 60. b. line 9 *ibid.* from the bottom, for *contrary, because*; read *contrary; because*
 65. a. line 2 *ibid.* for *adscripti*, read *adscripti*.
 line 3 *ibid.* from the bottom, for *services, after*, read *services, and after*.
 b. line 20 *ibid.* for *Hominum*, read *Hominium*.
 66. a. line 7 *ibid.* for *perfection of which*, read *perfection which*.
 67. b. line 8 *ibid.* insert a comma between *sue* and *antequam*.
 68. a. line 2 *ibid.* from the bottom, for *adapt*, read *adopt*.
 75. b. line 8 *ibid.* for *Rushw. vol. 3.* read *Rushw. vol. 2.*
 line 4 from bottom, after the word following, insert *addition*.
 78. a. line 28, for *seifon*, read *seifin*.
 84. a. line 16 of lord Coke's commentary, from the bottom, for *heredum*, read *heredem*.
 85. a. line 5 of the notes, from the bottom, after *subject to a rent*, insert, *unless by special custom, or express reservation*.
 86. a. line 7 of lord Coke's commentary, for *terra regis*, read *tempore regis*: though in the second edition it is printed *terra regis*.
 91. b. line 2 of the notes, for *on reversion*, read *or reversion*.
 line 5 *ibid.* from the bottom, for *Inde?* read *Pandect*.
 94. a. line 6 *ibid.* between *socage*. In, insert 3.
 100. a. line 10 of lord Coke's commentary, for *about the mesne*, read *above the mesne*.
 101. a. line 9 of the notes, after *Elizabeth*, insert *c. 4. f. 1.*
 105. a. line 1 *ibid.* for *so far it relates*, read *so far as it relates*.
 106. a. line 11 *ibid.* for *seems to point*, read *seem to point*.
 line the last *ibid.* for *statutory*, read *statutory*.
 108. a. line 17 *ibid.* after the word *found*, dele the words after the note.
 109. b. line 1 *ibid.* for *Deucalidian*, read *Deucalidian*.
 110. b. line 14 of Lord Coke's commentary, from the bottom, for *puisna*, read *puisne*.
 line 5 of the notes, from the bottom, after (1), add (2).
 111. b. line 4, *ibid.* for *dividing land*, read *devising land*.
 112. a. line 3 of lord Coke's commentary, from the bottom, after *mente*, insert (7); and in the line immediately above it, for (7), read (6).
 114. a. line 21 of the notes, for *Mar. of Eq.* read *Max. of Eq.*
 26 *ibid.* after *see 114 b.* dele the rest of the line.
 b. line 4, *ibid.* after *indiscriminately*, insert, *For the remainder of the note to 113 a, see 116 b.*
 118. a. line 6 *ibid.* for *statute against cutting*, read *statutes against cutting*.
 119. b. line the last *ibid.* for *constitution*, read *construction of this statute*.
 120. a. line 11 *ibid.* for 2. *H. 7. 11. a.* read 2 *H. 7. 6 b.*
 121. a. line the last *ibid.* for 1. *P. Wms.* read 2. *P. Wms.*
 b. line 3 and 5 in the notes, for 24. *Ed. 3.* read 34 *Ed. 3.*
 122. b. line 1 *ibid.* dele *a.* after *fol. 122.*
 123. a. line 29 and 30 *ibid.* for *good in the first instance, and bad in the second*, read, *bad in the first instance, and good in the second*; and in the last line, for *from*, read *before*.
 124. a. line 2 *ibid.* from the bottom, after *guardian of his child*, add, *and there is no mother*.
 126. b. line 8 *ibid.* from the bottom, for 2. *Leon.* read 2. *Lev.*
 and also in the same line, 2. *Saund.* 324.
 127. b. line 9 *ibid.* for *ex in*, read *ex vi*.
 128. b. line 6 *ibid.* from the bottom, after the word *wanting*? dele the remainder of this and the next line, as far as 198 a.
 187. b. last line but one of the text, for 32. *H. 8. c. 1.* read 32. *H. 8. c. 28 n. 6.*
 188. a. in the side references, for 32. *H. 8. 2.* read 32. *H. 8. 28.*
 191. b. line 4 in the notes, for *en*, read *or*.
 202. b. line 7 note 2, dele *case*.
 203. a. line 10 note 3, for *estate to B.* read *estate to G.*
 line 14 note 3, for *conusor*, read *conusee*.
 b. line 12 note 1, for *be*, read *B.*
 204. b. line 8 note, dele *and*.
 209. b. line 1 note, between *Price* and *in*, insert *Price*.
 232. a. line 10 note 1, for *Croke*, read *Coke*.
 239. b. line 4 note 2, for *no*, read *a.*
 241. a. line 8 note 4, for *grantor*, read *grantee*.
 244. b. line 27 note 2, for *en*, read *in*.
 246. b. line 3 note 1, for *anonus*, read *animus*.
 250. a. the reference (1) should be removed from the place where it is, to after the words *continual claim*.
 257. a. line 1 note 1, for *now*, read *not*.
 266. b. line 22 note 1, between *of* and *feudatory*, insert *the*.
 270. a. line 2 note 2, for 71, read 271.
 271. a. line 26 of lord Coke's commentary, at the end, add (2).
 293. a. line 9 note, for *mortgagor*, read *mortgagee*.
 295. a. dele (2) at the beginning of the third line of the note.
 302. b. line 59 of lord Coke's commentary, after *himself*, insert (1).
 309. b. note, for *conusor*, read *conusee*.
 325. a. line 4 note 1, after *title* read, *It was the same originally if the disseisor aliened; the alienee came*
 326. b. line 21 note, for 296, read 29, b.
 327. a. line 22 note 1, for 196, read 19, b.
 329. a. line 6 note, between *be* and *or*, insert *party*.
 line 18 note, dele *or any of her daughters*.
 line 23 note, after *issue*, insert *inheritable under such entail*.
 line 28 note, between *purjuance* and *herein after*, insert *of the power*.
 336. a. line 12, for *omnia*, read *omnino*.
 b. line 9, for *E.* read *D.*
 339. b. line 7, for *seoffee*, read *seoffor*.
 368. b. line 46 of lord Coke's commentary, after *like*, insert (3).
 373. b. line 11, dele *intail*.
 379. b. line 17 of the note commencing 376 b, dele from *language*, to *This*, line 18.
 381. a. line 8 note, for *ascertained*, read *restrained*.

*. The former part of this work having been reprinted since the original publication, the greater part of the errata above pointed out, have been corrected in such reprinted copies.

DIRECTIONS to the BINDER.

Cancel the Title-Page, M, DCC, LXXV.

The remaining half-sheet, containing the Editor's Address, to follow the Dedication,

Next follow signature [A] [B]

Then place *Prooemium*, signature [a] [b]

Next place Sheets *, containing the Analysis, immediately preceding the body of the work.

Table of Titles contained in the Table, to follow the last sheet of the body of the work.

Next place the Table to the First Part of the Institutes, &c. signature a, &c.

And at the end place, Index to the Notes.

In some copies the signatures T t t, U u u, X x x, Y y y, are wrong printed; but in these instances the paging will be a proper direction.

THROUGH the obliging interference of JOHN HOLLIDAY, Esq; of Lincoln's Inn, with the Executors of the Will of the late Sir THOMAS PARKER, the Continuator of Mr. HARGRAVE's Edition of COKE UPON LITTLETON has been favoured with a Copy of the Notes of Lord Chancellor NOTTINGHAM and Lord HALE, upon that Work. The following Account is given of them in a Note in Sir THOMAS PARKER's own Hand-writing.

" The Notes to this Book, in my Hand-writing, (except one Note in fo. 26. b. and some modern Cases), were transcribed from a Copy of the Lord Chancellor NOTTINGHAM's Manuscript Notes, in the Margin of his Lord COKE's COMMENTARY UPON LITTLETON, which Copy was made for the use of his Son HENEAGE FINCH, Esq; Solicitor-general, afterwards Earl of AYLESFORD, and is now in the Possession of the Honourable Mr. Baron LEGGE, to whose Favour I am indebted for these Notes.

" The Notes in a different Hand-writing were transcribed from a Copy of Lord-chief Justice HALE's MSS. Notes, in the Margin of COKE UPON LITTLETON, presented by Lord HALE to the Father of PHILLIP GYBBON, Esq; which Copy was made for the Use of the Honourable CHARLES YORKE, Esq; His Majesty's Solicitor-general. The Book, in which the Notes are in the Hand-writing of Lord HALE, is now in the Possession of Mr. GYBBON; and the Book from which those Notes were transcribed, by the Favour of Mr. YORKE, is now in his Possession.

" T. PARKER. 1758."

ALL Lord HALE's Annotations, and all Lord NOTTINGHAM's, with a very few Exceptions, will be inserted in the Places to which they refer.

It may be proper to acquaint the Reader, that the following Work is continued on the PLAN adopted by Mr. HARGRAVE, and will be completed in Four other Parts, one of which, till the Work is finished, will be given in every ensuing Term.

TRINITY TERM, 1785.

Erratum. In 195, b. 1a st Line, *dele* under the title Conditions.

